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## Countervailing Duty Law

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## NOTES

### THE EXPRESS DEFENSES OF THE N.Y. CONVENTION ON FOREIGN ARBITRAL AWARDS

The legal system intervenes in the arbitral process on two occasions.<sup>1</sup> The first arises when a party to an arbitration agreement is antagonistic to arbitral dispute resolution. The second arises when the arbitration has culminated in an award against a party who is adverse to compliance with it. This second situation is the focus of this note, with exclusive treatment given to awards subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>2</sup> (N.Y. Convention).

Under the N.Y. Convention, transnational arbitral awards<sup>3</sup> need not be reduced to judgment in the state in which they are rendered before enforcement is attempted in the United States.<sup>4</sup> When a judgment is obtained, however, a party may seek to enforce the judgment or the award.<sup>5</sup> Therefore, a brief review of the law governing the enforcement of foreign judgments is in order. Thereafter, this note will deal with the defenses to enforcement of a foreign arbitral award not sought to be enforced as a judgment.<sup>6</sup>

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1. See 2 G. DELAUME, *TRANSNATIONAL CONTRACTS* § 13.01, at 1 (rev. ed. 1982).

2. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 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 December 29, 1970) [hereinafter cited as N.Y. Convention]. The legislation implementing the N.Y. Convention in the United States is codified at 9 U.S.C. §§ 201-208 (1982).

3. Respected commentators in the field distinguish among domestic, foreign, international and delocalized awards. Representative discussions are found in Park & Paulsson, *The Binding Force of International Arbitral Awards*, 23 VA. J. INT'L L. 253 (1983), and 2 G. DELAUME, *supra* note 1, § 13.02, at 7-11.

4. Discussion with Carolyn Penna, Associate General Counsel, American Arbitration Association, November 8, 1984. One of the primary objectives of the N.Y. Convention is to eliminate the necessity of reducing a foreign arbitral award to a foreign judgment in the rendering state. See G.W. HAIGHT, *CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS* 39-44 (1958).

5. Cf. *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313 (2d Cir. 1973) (holding that the N.Y. Convention does not preempt New York law on the enforcement of foreign judgments).

6. For a concise review of the law governing the recognition and enforcement of foreign judgments, see Bishop & Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 INT'L LAW. 425 (1982).

## I. FOREIGN JUDGMENTS

Nothing in the United States Constitution requires individual states or the United States to recognize foreign judgments. The full faith and credit clause of the Constitution<sup>7</sup> accords judgments rendered in state A, for example, the same status in any other state, for recognition and enforcement purposes, as it would receive in state A.<sup>8</sup> The full faith and credit clause, however, does not apply to judgments rendered in foreign nations.<sup>9</sup>

In spite of this, courts have accorded a great deal of conclusiveness to foreign judgments in proceedings for recognition and enforcement.<sup>10</sup> The basis of this treatment is comity. The most authoritative definition of comity, still cited today,<sup>11</sup> is the one found in the 1894 Supreme Court decision in *Hilton v. Guyot*.<sup>12</sup> Under the *Hilton* formulation, the

7. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

8. See, e.g., *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943).

9. *Aetna Life Ins. Co. v. Tremblay*, 225 U.S. 185, 190 (1912). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98, comment b (1971); but see *Scott v. Scott*, 331 P.2d 641, 643 (Cal. 1958).

10. For commentary distinguishing between recognition and enforcement, see von Mehren & Patterson, *Recognition and Enforcement of Foreign Country Money Judgments in the United States*, 6 L. POL'Y INT'L BUS. 37 (1974) and Zaphiriou, *Transnational Recognition and Enforcement of Civil Judgments*, 53 NOTRE DAME LAW. 734 (1978).

11. See, e.g., *Her Majesty, Queen in Right of British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979); *John Sanderson & Co. v. Ludlow Jute Co.*, 569 F.2d 696 (1st Cir. 1978).

12. 159 U.S. 113 (1895). The definition referred to in the text follows:

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

*Id.* at 205-06.

At least one commentator has stated that the *Hilton* case replaced the principle of comity with that of reciprocity. See Wei Ja Ju, *The "Enforcement Clause": A New Definition in the Recognition and Enforcement of Foreign Judgments*, 31 AM. J. COMP. L. 520 (1983). The analysis is built on that part of the holding which denies conclusive effect, but allows *prima facie* evidentiary effect, to a judgment of a French court where

following characteristics of a foreign judgment must be shown to establish a *prima facie* case for its recognition and enforcement:<sup>13</sup> a formal judgment; subject matter jurisdiction; personal jurisdiction; timely and proper notice; opportunity to defend; and proceedings that are held "according to the course of a civilized jurisprudence."<sup>14</sup> Defenses explicitly set out by the *Hilton* Court include prejudice and fraud,<sup>15</sup> and "that, by the principles of international law, and by the comity of our own country, it [the foreign judgment] should not be given effect."<sup>16</sup>

The specifically applicable law regarding the recognition of foreign judgments, however, can only be determined by reference to state rules on point. This is because the Supreme Court has not yet required the law in this area to be governed by a federal common law.<sup>17</sup> As such, *Erie Railroad v. Tompkins*<sup>18</sup> interdicts the power of the federal judiciary to formulate standards for the recognition of foreign judgments.<sup>19</sup>

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that country's courts do not give conclusive effect to United States judgments. The distinction, for present purposes, does not alter the discussion herein.

13. Bishop & Burnette, *supra* note 6, at 431-32.

14. 159 U.S. at 205.

15. It must be noted that the type of fraud cognizable as sufficient grounds for non-enforcement must be extrinsic to the transaction and proceedings. Only "fraud that deprives a party of an opportunity to present adequately his claim or defense will suffice." Bishop & Burnette, *supra* note 6, at 434 (citing *Harrison v. Triplex Gold Mines*, 33 F.2d 667, 671 (1st Cir. 1929)). Allegations that the foreign decree was procured by false statements have been held not to be of that kind. *See, e.g., McKay v. Alexander*, 268 F.2d 35 (9th Cir. 1959).

16. 159 U.S. at 206.

17. It could do so by reasoning that foreign judgments are acts of a foreign sovereign which should, as a matter of federal law, not be questioned in United States courts, i.e., under the rubric of the Act of State doctrine. *Cf. Banco Nacional de Cuba v. Sabbatino*, 316 U.S. 398 (1964) (finding that acts of Cuba could not be questioned in United States courts as a matter of federal law because of the Act of State's "constitutional underpinnings"); *cf. also Zschernig v. Miller*, 389 U.S. 429 (1968) (broadly construing federal pre-eminence in the area of foreign affairs). It should be noted, however, that the Ninth Circuit has held that acts of a foreign judiciary do not fall under the Act of State doctrine. *See Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 608 (9th Cir. 1976).

The executive has attempted to make the area a matter of federal law by the conclusion of a treaty on the reciprocal recognition and enforcement of foreign civil judgments with the United Kingdom. *See Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters*, October 26, 1976, *reprinted in* 16 I.L.M. 71 (1977). If ratified, interpretation of the treaty would, of course, be a matter of federal law. The document has not, however, been ratified. *See Bishop & Burnette, supra* note 6, at 427.

18. 304 U.S. 64 (1938).

19. Soon after *Erie*, the late Professor Philip C. Jessup commented on the dangers of allowing that decision to affect areas of international law. *See Jessup, The Doctrine of Erie R.R. v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939). These dangers have not abated; it is always possible that the Supreme Court will not continue to extend *Erie* so as to circumscribe the power of the federal courts to fashion

The Uniform Foreign Money-Judgments Recognition Act of 1962 (Recognition Act)<sup>20</sup> is fairly representative of state law.<sup>21</sup> Under the Recognition Act, a *prima facie* case for enforcement is made out when a party demonstrates that it has been awarded a judgment, "final and conclusive and enforceable where rendered, even though an appeal therefrom is pending, or it is subject to an appeal."<sup>22</sup> A judgment is not conclusive, however, if the foreign court lacked personal<sup>23</sup> or subject matter jurisdiction,<sup>24</sup> or 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."<sup>25</sup>

The defenses explicitly provided for in the Recognition Act include lack of timely notice, fraud, the repugnancy of the underlying cause of action to the public policy of the state, a conflict with another judgment, an agreement by the parties to resolve the dispute otherwise than by adjudication, or that the forum was "seriously inconvenient."<sup>26</sup>

## II. ARBITRAL AWARDS

In stark contrast to the many elements of a *prima facie* case for recognition and enforcement of foreign judgments, and the many defenses available to one opposing such recognition and enforcement,<sup>27</sup> are the relatively few elements of a *prima facie* case for enforcement of a foreign arbitral award and the few grounds for refusal to enforce them. Most of the latter are concerned with due process inquiries, and where procedural fairness is shown courts are reluctant, with few exceptions, to look into the merits of a dispute.

It is perhaps ironic that a court will accord more deference to

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federal common law governing the enforcement of foreign judgments.

20. 13 U.L.A. 269 (1975). Another act, THE UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT OF 1964 (Enforcement Act), 13 U.L.A. 171 (1975), adopted by 26 states as of 1984, see 1984 U.L.A. Directory and Tables, applies only to "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in (the adopting) state." Enforcement Act § 1(a). Thus, transnational awards are excluded. Enforcement of a foreign judgment domestically, however, is a mere matter of mechanics, once the judgment is judicially recognized.

21. The Recognition Act has been ratified by 12 states. See 1984 U.L.A. Directory and Tables.

22. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT OF 1962 § 2, 13 U.L.A. 269 (1975).

23. *Id.* § 4(a)(2). Section 5 codifies six bases for personal jurisdiction, but allows for states to recognize others. *Id.* § 5.

24. *Id.* § 4(a)(3).

25. *Id.* § 4(a)(1).

26. *Id.* § 4(b).

27. See *supra* notes 13-16, 22-26.

awards rendered by arbitrators than to decisions rendered by trial judges, especially with regard to errors of law, when the former are almost certainly less well versed in the law than the latter. Sense can be made of this when it is observed that there is a great public interest in maintaining confidence that the judiciary will correctly apply the law as it is known. When parties forego the opportunity to utilize this institution, however, the public interest in ensuring dispute resolution according to reliable rules gives way to the public and private interests in expeditious resolution of commercial disputes, and in having trade practices, known intimately to the decisionmakers, take precedence over formal rules of law.<sup>28</sup>

### III. THE N.Y. CONVENTION

#### A. *Scope of the N.Y. Convention*

The N.Y. Convention applies to "arbitral awards made in the territory of a state other than the state where recognition and enforcement of such awards are sought,"<sup>29</sup> and for those countries which do not elect a reservation excluding them,<sup>30</sup> to those awards "not considered as domestic awards in the State where the recognition and enforcement are sought."<sup>31</sup> The latter category may include an award rendered in the enforcing state, but involving foreign parties, if such an award is not considered domestic (because of the nationality of the parties) in the enforcing state.<sup>32</sup> The United States has opted for the

28. It has been noted, however, that current international commercial arbitration practice often fails to avail itself of the potential advantage of using the most qualified arbitrators in a particular field. See Smit, *The Future of International Commercial Arbitration*, WEST'S INT'L L. BULL., Fall 1984, at 5.

29. See N.Y. Convention, *supra* note 2, art. I(1).

30. See *id.* art. I(3).

31. See *id.* art. I(1).

32. There are several situations in which an award may be made in the territory of a state in which recognition is being sought, yet still not be "domestic." Some nations characterize the award as international, *vel non*, on the basis of materially connecting factors including the situs of the arbitration and the nationality of the parties. Other legal systems, seen as "progressive" by at least one respected commentator, see 2 G. DELAUME, *supra* note 1, § 13.02 at 7, supplement the geographical tests with "qualitative tests, intended to take into account party autonomy and the needs of international commerce." *Id.* Some, e.g., Germany, France and Greece, look to the procedural rules applied in the arbitration to determine its international character. *Id.* at 8. In Germany, therefore, a domestic award may be international if the arbitration was conducted pursuant to United States procedural rules. In France, however, an additional factor has recently been included, *viz.*, whether the award "implicates international commercial interests." Code de procédure civile, art. 1492, reprinted in 3 G. DELAUME, *supra* note 1, app. 2, bk. A, at 130 (rev. ed. 1984). Thus, in France, much discretion is left to the courts.

aforementioned reservation,<sup>35</sup> and for another reservation which limits the applicability of the N.Y. Convention to those awards or arbitrations arising out of legal relationships commercial in nature.<sup>34</sup>

### B. Recognition of the Agreement

Article II of the N.Y. Convention, which provides for the recognition of the arbitral agreement, was inserted into the Treaty almost as an afterthought.<sup>35</sup> Its presence was demanded by the British delegation to the Convention, who were concerned that a pact which provided for the enforcement of arbitral awards but did not ensure the binding nature of agreements to arbitrate would be easily circumvented.<sup>36</sup> The requirements of a valid arbitration agreement are that it be in writing and that the subject matter be "capable of settlement by arbitration."<sup>37</sup> A court, when faced with such an agreement, must "refer the

The fact that only 29 of the 50 N.Y. Convention parties have made the same reservation on this issue as the United States, *see* 9 U.S.C.A. § 201 (West Supp. 1983) (reservations following the Convention), and treat as international only those awards rendered on foreign soil, reveals that, at present, the issue of the international character of the awards is no longer of uniquely academic interest. Commentators in the field are calling for states to look at the advantages of the "delocalized" or "floating" award. Such an award would not be governed by the law of any nation, but only by the rules the parties stipulate to. *See* Park & Paulsson, *supra* note 3, at 254-66. Coverage for delocalized awards was discussed as a possibility for the N.Y. Convention, but was ultimately rejected as "too revolutionary a concept." *See* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1066-67 (1961).

33. *See* 9 U.S.C. § 202 (1982) (excluding all awards resulting from arbitrations entirely between citizens of the United States). Chapter 2 of title 9, 9 U.S.C. §§ 201 *et seq.* (1982), is a codification of the N.Y. Convention. Because the treaty is not self-executing, codification was seen as necessary to fulfill the reciprocity obligation of the Convention, which states: "A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention." N.Y. Convention, *supra* note 2, art. XIV. For a discussion of the reciprocity provision as applied, *see infra* notes 170-81 and accompanying text.

34. *See* 9 U.S.C. § 202 (1982). The arbitral awards to which the N.Y. Convention applies are not only those which are rendered by arbitrators appointed by the parties, but include "those made by permanent arbitral bodies to which the parties have submitted." N.Y. Convention, *supra* note 2, art. I(2). These include the American Arbitration Association, the Court of Arbitration of the International Chamber of Commerce, the International Arbitration Association, the International Center for the Settlement of Investment Disputes, the London Court of Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce. These most prominent of the international arbitration organizations are comparatively analyzed in 2 J.G. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS—PUBLIC AND PRIVATE* 234-46 (1979).

35. *See* Quigley, *supra* note 32, at 1062-64.

36. *Id.* at 1063.

37. N.Y. Convention, *supra* note 2, art. II(1).

parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."<sup>38</sup>

### C. Enforcement of Awards

The operative provision of the N.Y. Convention is article III. It 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, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.<sup>39</sup>

Article IV adds that the authenticated original award, or a certified copy thereof, and the original agreement to arbitrate or a certified copy thereof (and certified translations of these documents, if needed), must be supplied to obtain enforcement.<sup>40</sup> It is significant that no other document need be supplied.<sup>41</sup>

### D. Defenses

The remainder of this note addresses the article V defenses to enforcement available to a party against whom an award has been rendered. There are seven defenses, five of which the defendant must raise,<sup>42</sup> and two the court may raise *sua sponte*.<sup>43</sup> Although there have been intimations that there are other defenses not specifically mentioned in the N.Y. Convention,<sup>44</sup> this note does not extensively address them.

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38. *Id.* art. II(3).

39. *Id.* art. III.

40. *Id.* art. IV.

41. When these documents are supplied, the burden of proof shifts, and a *prima facie* case is established. See *Parsons & Whittemore Overseas Co. v. Société Générale De L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974); Quigley, *supra* note 32, at 1066. The shifting of the burden of proof on those issues now characterized as defenses under the N.Y. Convention was perhaps the preeminent improvement of the Convention over prior law. See 2 G. DELAUME, *supra* note 1, § 13.20, at 126.

42. N.Y. Convention, *supra* note 2, art. V(1).

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

44. In *Fotochrome v. Copal*, 517 F.2d 512 (2d Cir. 1975), it was decided that nonretroactivity of the N.Y. Convention was not a defense where suit was brought after the Convention entered into force, despite the fact that the contract underlying the dispute was formed prior to the effective date of the Convention.

## 1. Incapacity of the Parties or Invalidity of the Agreement

Ironically, no arbitral award has been vacated in a reported United States judicial decision because of either lack of capacity of one or both of the contracting parties or invalidity of the agreement to arbitrate under the applicable law.<sup>45</sup> This may be explained, at least in part, by the fact that the potential for use (and abuse) of the validity defense in cases involving domestic agreements to arbitrate under the Federal Arbitration Act<sup>46</sup> has been drastically cut back by the Supreme Court decision in *Prima Paint Co. v. Flood & Conklin Mfg.*<sup>47</sup> In that case, the Court held that the validity of the contract was itself a matter for the arbitrator to decide.<sup>48</sup> The judiciary's decision regarding arbitrability should be reached by examination of the arbitration clause only, and not the entire contract.<sup>49</sup> It is hard to imagine a case, however, in which one would have proof of the invalidity of the clause itself without proof of the invalidity of the entire contract.<sup>50</sup> Moreover, since in-

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A defense of "manifest disregard of the law" under the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), was implied in *Wilko v. Swan*, 346 U.S. 427, 436 (1953). This, taken together with the fact that the residual application provision of 9 U.S.C. § 208 (1982) incorporates into the N.Y. Convention's implementing statute the Federal Arbitration Act, insofar as the two are not inconsistent, can lead to an argument that the Convention's defenses contain one for "manifest disregard of the law."

The Second Circuit, however, while declining to decide the question, did state that "[b]oth the legislative history of Article V . . . and the statute enacted to implement the United States' accession to the Convention are strong authority for treating as exclusive the bases set forth in the Convention for vacating an award." *Parsons & Whittemore Overseas Co. v. Société Générale De L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974) (citations omitted).

45. The N.Y. Convention provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made . . . .

N.Y. Convention, *supra* note 2, art. V(1)(a).

46. 9 U.S.C. §§ 1-14 (1982).

47. 388 U.S. 395 (1967).

48. *Id.* at 403-04.

49. *Id.*

50. In the wake of *Prima Paint*, the courts have consistently upheld the validity of arbitration agreements. The courts have rejected the following arguments favoring the invalidity of arbitration agreements: the cause of action arose prior to the agreement to arbitrate and therefore could not have been covered by it, *Coenen v. R.W. Presspich &*

capacity of the parties would seem to bring into question the validity of the entire contract, pursuit of this defense was impliedly discouraged in *Prima Paint*.

The article V(1)(a) defense distinguishes between the law under which a court should examine the capacity of the parties ("the law applicable to them") and the law under which a court should examine the validity of the agreement ("the law to which the parties have subjected

Co., 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972); non-compliance with conditions precedent in the contract precludes utilizing an arbitration agreement, *see Carey v. General Elec. Co.*, 315 F.2d 499 (2d Cir.), *cert. denied*, 377 U.S. 908 (1963); the contract expressly provides for various types of judicial relief, *see Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972); the claims being pressed to arbitration are frivolous, *see National R.R. Passenger Corp. v. Missouri Pacific R.R.*, 501 F.2d 423 (8th Cir. 1974), *see also Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240 (E.D.N.Y. 1973); arbitration is not a viable alternative if the statute of limitations has run on the claim, *see Condill, Rowlett, Scott v. Bd. of Educ.*, 47 A.D.2d 610, 364 N.Y.S.2d 7 (1975); a contrary stipulation prior to the invocation of the arbitration clause negates the arbitration clause, *see Boston & Maine Corp. v. Illinois R.R.*, 396 F.2d 425 (2d Cir. 1968); there exists an implied waiver regarding arbitration, *see Germany v. River Terminal Ry.*, 477 F.2d 546 (6th Cir. 1973) (no waiver by defending on the merits), *but see Lounge-A-Round v. G.C.M. Mills, Inc.*, 109 Cal. App. 2d 190, 166 Cal. Rptr. 920 (1980) (litigation for nine months without raising arbitration defense constitutes waiver); the party seeking arbitration has already defaulted in the arbitration, *see Mason v. Stevensville Golf & Country Club, Inc.*, 292 F. Supp. 348 (S.D.N.Y. 1968) (stay of litigation will be granted even where party seeking it is in default in arbitration); arbitration of certain statutory claims violates the law from which the claim arose, *see, e.g., Hart v. Orion Ins. Co.*, 453 F.2d 1358 (10th Cir. 1971) (where none of the three involved states had provisions for settlement of an insurance dispute, resolution via the United States Arbitration Act (Arbitration Act) is not a violation of the McCarran Act).

The defenses that the courts will acknowledge, *post Prima Paint*, include claims that the contract did not involve interstate commerce, *see Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956) (but note this defense is only good under the Arbitration Act, and not under state law, which may be more favorable to arbitration); the specific agreement for arbitration was procured by fraud, *see Main v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 136 Cal. Rptr. 378 (1978); there was never an arbitration agreement embodied in a written contract, *see C. Itoh & Co. v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. 1977) (contract created under U.C.C. § 2-207(3) by performance); arbitration of certain disputes would be violative of public policy, *see Wilko v. Swan*, 346 U.S. 427 (1958) (violation of section 12(2) of the Securities Act of 1933 not arbitrable); *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874 (2d Cir. 1976) (patent validity challenges not arbitrable); *American Safety Equip. Corp. v. J.P. McGuire & Co.*, 391 F.2d 821 (2d Cir. 1968) (antitrust claim not arbitrable). In addition, it appears that mutual mistake is still accepted as a valid ground for negating an arbitration clause. *See County of Middlesex v. Geyvn Constr. Corp.*, 450 F.2d 53 (1st Cir.), *cert. denied*, 405 U.S. 955 (1971) (*dicta*). It is questionable, however, whether *Prima Paint* reverses prior decisions which held that frustration nullifies an arbitration clause. *See Eastern Marine Corp. v. Fukaya Trading Co. S.A.*, 364 F.2d 80 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966). *Cf. N.Y. Convention, supra note 2, art. II(3)*, (to be enforceable, an agreement must be capable of being performed).

[the agreement] or, failing any indication . . . , under the law of the country where the award was made").<sup>51</sup> In the former situation, a court may apply its conflict of laws rules to determine the applicable law.<sup>52</sup> In the latter case, the parties are bound by the law they have selected (either expressly, or "by default").<sup>53</sup> Why the N.Y. Convention makes this distinction is not readily apparent. It may be surmised that the capacity of the parties was viewed as a matter more closely related to fundamental fairness of enforcement, and thus, not a matter to be regulated by rules chosen by the parties.

## 2. Lack of Notice or Inability to Present a Case

Article V(1)(b) provides that if a party is not given notice of either the appointment of the arbitrator or the proceeding, or if he is otherwise unable to present his case, he will not be held answerable for an arbitral award rendered against him.<sup>54</sup> Although the clause contains no criteria upon which to gauge the adequacy of the notice, at least one court has implied that the forum state should apply its own law of adequate notice.<sup>55</sup> It should be noted, however, that there is a remote chance that a court may analogize to the previous clause of the N.Y. Convention which states that the question of validity of the agreement is to be determined under the law the parties have selected, or, failing any selection, under the law of the situs of the arbitration.<sup>56</sup>

51. N.Y. Convention, *supra* note 2, art. V(1)(a).

52. *Cf.* *Matter of Ferrara*, 441 F. Supp. 778 (S.D.N.Y. 1977) (United States law rather than Italian law governed the court's construction of underlying contract containing arbitration clause).

53. For a case in which the failure to select a specific law may have worked to the prejudice of the party which prevailed at the arbitration, see *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (S.D. Oh. 1981).

54. The N.Y. Convention, art. V(1)(b) provides that enforcement may be denied if: "(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case . . ." N.Y. Convention, *supra* note 2, art. V(1)(b).

It is probable that this defense would be read into the N.Y. Convention, even if it were not expressly stated, as it embodies notions of due process which are, in the words of *Hilton v. Guyot*, 159 U.S. 113 (1895), fundamental to the jurisprudence of civilized nations. *Cf. id.* at 205-06.

55. *See Parsons & Whittemore Overseas Co. v. Société Générale De L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974).

56. N.Y. Convention, *supra* note 2, art. V(1)(a). The paucity of cases in which the notice defense has been argued is a tribute to the efficacy of arbitration institutions in which is reposed the obligation not to violate the provision. *See, e.g.*, § 7 of the Commercial Arbitration Rules of the American Arbitration Association (AAA), effective October 1, 1977, reprinted in 5 J.G. WETTER, *supra* note 34, at 65; article 3 of the Arbitration Rules for the Court of Arbitration of the International Chamber of Commerce (ICC),

The inability to present a case defense was litigated in *Parsons & Whittemore Overseas Co. v. Société Générale De L'Industrie du Papier (RAKTA)*,<sup>57</sup> a leading N.Y. Convention decision. In that case the appellant claimed that this defense could be made out by a showing that the arbitrator denied an application to postpone an arbitral session, which application was made because a witness of the appellant's had a prior engagement on the day the arbitral session took place.<sup>58</sup> The Second Circuit took note of several factors in its rejection of this argument. First, the witness had submitted to the arbitrators an affidavit concededly containing most of the information to which he would have testified (the rest of which was available upon the appellant's request); second, the nonappearance was solely due to a commitment to lecture; and third, the arbitrators have a strong interest in adhering to a schedule set on the basis of convenience "to parties, counsel and arbitrators scattered about the globe."<sup>59</sup> On the facts, the court held that this was not a case that would constitute a denial of United States due process.<sup>60</sup> The court stated that when a party agrees to arbitrate, it may be agreeing to forego some of the advantages of litigation, such as compulsory process.<sup>61</sup>

The defense was also litigated before a district court in *Biotronik Mess-und Therapiegeraete GmbH. & Co. v. Medford Medical Instrument Co.*,<sup>62</sup> a case presenting a novel use of the phrase "unable to present its case." There, the party opposing enforcement argued that because legal rights under an agreement between the parties were not yet fully determinable,<sup>63</sup> its adversary's commencement of arbitration was premature, and the party opposing enforcement was therefore unable to present its case.<sup>64</sup> The court simply stated that this fact could have been made known to the arbitrators, and since it was not, the party's due process rights, violation of which is the essence of the article V(1)(b) defense, were not violated.<sup>65</sup> Had this fact been presented to the arbitrators but not taken into account, it is unclear what the result

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effective June 1, 1975, reprinted in *id.* at 89-90.

57. 508 F.2d 969 (2d Cir. 1974). For a more thorough discussion of the facts of this case, see *infra* text accompanying notes 131-37.

58. *Id.* at 975.

59. *Id.*

60. *Id.* at 975-76.

61. *Id.* at 975.

62. 415 F. Supp. 133 (D.N.J. 1976).

63. Medford conceded liability under the agreement that was the subject of arbitration, but alleged that it had a right to offset this liability by commissions that it earned under a separate agreement. *Id.* at 135-36.

64. *Id.* at 140.

65. *Id.* at 140-41.

would have been. In view of the deference given arbitral awards, the tenuous nature of the claim, and the reluctance of courts to review contract interpretations of arbitrators,<sup>66</sup> it may be assumed that this would not be a bar to enforcement.

### 3. Award Outside the Scope of the Submission

Article V(1)(c) provides that an award rendered on a dispute not within the scope of the agreement to arbitrate may be refused recognition and enforcement.<sup>67</sup> The portions of the award dealing with differences within the scope of the submission, however, may be recognized and enforced if they are severable.<sup>68</sup> This provision can be viewed as merely reiterating article V(1)(a), which provides that a party will be bound by an award only to the extent it covers issues he has agreed should be arbitrated.<sup>69</sup>

Several cases have discussed this defense, including *Parsons & Whittemore*,<sup>70</sup> in which the Second Circuit stated that the provision parallels section 10(d) of the Federal Arbitration Act,<sup>71</sup> and cited cases decided under the Act in its application of the N.Y. Convention provision.<sup>72</sup> The court construed the defense narrowly to create a presumption that the arbitration board acted within its powers.<sup>73</sup> Indeed, in that case, the court found that an award for loss of production, in the face of a contract provision that "neither party shall have liability for loss of production," was not outside the scope of the submission.<sup>74</sup> The court reasoned that so long as it could reasonably believe that the arbitral board had not ignored the contract term, it was not necessary for the court and the arbitrators to agree on a contract interpretation.<sup>75</sup> To

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66. See *infra* text accompanying notes 76-77.

67. The N.Y. Convention, art. V(1)(c) provides that recognition and enforcement may be denied if:

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced . . . .

N.Y. Convention, *supra* note 2, art. V(1)(c).

68. *Id.*

69. Quigley, *supra* note 32, at 1068.

70. 508 F.2d at 969.

71. 9 U.S.C. § 10(d) (1982).

72. 508 F.2d at 976.

73. *Id.*

74. *Id.*

75. *Id.* at 976-77.

hold otherwise, the court said, would be to gain from the court a reconstruction of the contract, a result wholly inconsistent with the policy of according deference to the arbitrator.<sup>76</sup>

A similar situation arose in *Fertilizer Corp. of India v. IDI Management, Inc.*,<sup>77</sup> where the arbitrators awarded consequential damages even though the parties' contract excluded such liability.<sup>78</sup> After *Parsons & Whittemore*, the district court in *IDI*, even if so inclined, would have had difficulty vacating the award. This is because the opinion of the arbitral panel in *IDI*, a "speaking award" in which the arbitrator's reasoning is stated, made specific reference to the liability exclusion in the contract, thus establishing beyond cavil that the panel was not ignoring the provision.<sup>79</sup> Here, as in *Parsons & Whittemore*, the court found no action outside the scope of the arbitrator's authority.

The court did, however, evaluate an argument that the legal theory upon which the arbitrators based their award was a pet theory of Lord Devlin's, the author of the award.<sup>80</sup> The argument should have been doomed at inception under a close reading of *Parsons & Whittemore*, which states that the arbitrator's interpretation of the contract need not coincide with the court's, as long as the relevant contract provisions were not ignored.<sup>81</sup> The *IDI* court, however, went so far as to verify that Lord Devlin's theory was indeed a viable one, blessed by scholarly recognition.<sup>82</sup> The court, then, seemed to inquire into the legal basis upon which the award rested—a rare occurrence in judicial review of claims for enforcement of arbitral awards.<sup>83</sup>

#### 4. Arbitral Authority or Procedure Violative of Relevant Rules

Article V(1)(d) states that it shall be a defense to confirmation of an award if the composition of the arbitral body, or the procedure used, was not in accordance with the agreement of the parties, or, failing such agreement, with the law of the situs of the arbitration.<sup>84</sup> This

76. *Id.* at 976.

77. 517 F. Supp. 948 (S.D. Oh. 1981).

78. *Id.* at 950.

79. *See id.* at 959. The clause regarding consequential damages was held inapplicable because of the respondent's fundamental breach. *Id.*

80. *Id.* at 954.

81. *See supra* text accompanying note 75.

82. 517 F. Supp. at 959.

83. This unnecessarily opens the door to judicial investigation of the legal theories upon which an award is based. Such an investigation cannot find justification in any of the N.Y. Convention's express defenses to enforcement, and whether it should be grafted on is indeed questionable.

84. The N.Y. Convention, art. V(1)(d) provides that an award may be denied enforcement if:

section is the product of a compromise between antagonistic negotiating forces.<sup>85</sup> One negotiating faction fought for a delocalized arbitration which need not be tied to the law of any country.<sup>86</sup> Another sought to force the arbitration to be carried on in accord with the law of the situs.<sup>87</sup> The result is in full accord with neither position and is capable of two interpretations.

Because procedure must be in accord merely with the law which the parties agree to, the argument can be made that it need not be in accord with any preexisting national rules. This interpretation seems to follow most logically from the language of the provision and is more consistent with the reforms advocated by scholars in the field.<sup>88</sup> Conversely, the provision can be construed as being restricted to the law of a particular country.<sup>89</sup> It appears that United States courts might be justified in asserting the latter interpretation, insofar as the parties agree to procedure which does not accord with basic due process no-

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

N.Y. Convention, *supra* note 2, art. V(1)(d).

85. Quigley, *supra* note 32, at 1068-69. One group argued for "complete subjection of the arbitral procedure to the law of the country where the award was made," the other advocated "contractual freedom to designate an arbitral procedure independent of the law of any country." *Id.* at 1068.

86. On delocalized arbitration, see Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981).

87. The United States led this faction. See G.W. HAIGHT, *supra* note 4, at 56-59. This is not surprising because the deference accorded the arbitral award in the United States, although not as great in the late 1950's as now, was great enough to encourage businessmen to conduct their arbitrations here. Thus, the United States faction wanted to have United States law govern most of the commercial arbitrations in the world.

The United States judicial posture stood in gross contradistinction to the English procedure of the time, whereby either of the parties could compel the arbitrator to "state the case." Under this practice, the parties could force judicial resolution of any issue that was even colorably legal (as opposed to factual). The loss of the use of award funds that resulted from the interminable court delays prompted legislation from Whitehall that precluded the stated case procedure, allowing instead for limited appeal by consent of all parties or leave of the court. Arbitration Act, 1979 ch. 1, *reprinted in* 49 HALSBURY'S STATUTES OF ENGLAND (3d ed. 1980). On this Act, see literature annotated at 2 G. DELAUME, *supra* note 1, § 13.16 n.15. The House of Lords emphasized in no uncertain terms just how limited the right to review had become in *Pioneer Shipping Ltd. v. B.T.P. Tioxide (The Nema)*, [1981] 3 W.L.R. 92, *reprinted in* 20 I.L.M. 1099 (1981).

88. See, e.g., 2 G. DELAUME, *supra* note 1, § 13.13, at 88. Some scholars see in the offering a new international merchant law, see, e.g., Cremades, *The Impact of International Arbitration on the Development of Business Law*, 31 AM. J. COMP. L. 526 (1983).

89. The distinction between localized and delocalized arbitration procedures is pointed out in Quigley, *supra* note 32, at 1068-69.

tions.<sup>90</sup> It should be noted that the Geneva Protocol on Arbitration Clauses of 1923<sup>91</sup> is more restrictive, and expressly states that the proceedings shall be governed by the law of its situs.<sup>92</sup> However, this protocol, by virtue of article VII of the N.Y. Convention,<sup>93</sup> is the governing law only for those parties to the protocol which have not ratified the N.Y. Convention.<sup>94</sup>

The question of the improper composition of the arbitral tribunal has at least once been litigated as falling under article V(1)(d).<sup>95</sup> In *Imperial Ethiopian Government v. Baruch-Foster Corp.*,<sup>96</sup> the defense was based on an allegation that the president of the arbitration panel

90. The United States delegate to the drafting conference stated in 1958, that "United States adherence to the convention would be misleading" insofar as this provision is concerned, because "courts have tended to regard party choice of law as contrary to public policy, at least with respect to some subject matter." Quigley, *supra* note 32, at 1069 n.85 (quoting Official Report of the United States Delegation to the United Nations Conference on International Commercial Arbitration 20 (Aug. 15, 1958)). Cf. *Parsons & Whittemore Overseas Co. v. Société Générale De L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974), where the court stated that "[e]nforcement of foreign arbitral awards may be denied on . . . [public policy grounds] only where enforcement would violate the forum state's most basic notions of morality and justice." *Id.* at 974.

91. 27 L.N.T.S. 157, reprinted in 3 G. DELAUME, *supra* note 1, app. 2, bk. A, at 5 (rev. ed. 1984).

92. 3 G. DELAUME, *supra* note 1, app. 2, bk. A, at 5 (rev. ed. 1984). Similarly, article 5(1)(d) of the Inter-American Convention of 1975, reprinted in 14 I.L.M. 336, forbids the use of the procedures of a transnational arbitration organization, such as the International Arbitration Association.

93. The N.Y. Convention, art. VII(2) provides:

(2) The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [27 L.N.T.S. 157; 92 L.N.T.S. 301] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

N.Y. Convention, *supra* note 2, art. VII(2).

94. The European Convention on International Commercial Arbitration, April 21, 1961, 484 U.N.T.S. 364, reprinted in 3 G. DELAUME, *supra* note 1, app. 2, bk. A, at 37 (rev. ed. 1984) (European Convention) and bilateral treaties on point can also muddy the waters. For example, the European Convention provides procedures for the appointment of arbitrators, but the only three EEC states to ratify the Convention, Italy, Germany and France, entered into a subsequent agreement which entrusts matters regarding the composition of arbitral tribunals to the courts having jurisdiction, and thus moots the effect of the European Convention. 2 G. DELAUME, *supra* note 1, § 13.11, at 75.

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

96. *Id.* Although the issue was nominatively cast in terms of article V(1)(d), the case is more instructive on the interplay between the discovery rules of the Federal Rules of Civil Procedure and the N.Y. Convention. See *id.* at 336-37. The court declined to so cast the issue. See *id.* at 337. It is the opinion of this writer, however, that the value of the case is revealed under such an analysis.

had a material connection with the Ethiopian Government, a party to the arbitration.<sup>97</sup> The district court confirmed the award in spite of an allegation that the losing party should have been able to obtain discovery in the court action regarding the connection between the arbitrator and the adverse party.<sup>98</sup> The court reasoned that any objection to the composition of the panel had been waived.<sup>99</sup>

The Fifth Circuit affirmed, but declined to adopt the district court's waiver theory.<sup>100</sup> It determined that the evidence was sufficient for the district court to find that the movant lacked good faith in its effort to obtain discovery.<sup>101</sup> The court also found that it was within the district court's power to deny the discovery motion.<sup>102</sup>

## 5. Nonbinding or Overturned Award

The defense set out in article V(1)(e) states that there shall be a defense to the award if it "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."<sup>103</sup>

The provision was a response to concerns that the award should not be given binding effect in one country when it is not binding in the eyes of the law under which it was made.<sup>104</sup> The countervailing consideration was the desirability of avoiding the "double *exequatur*," which requires judicial recognition (i.e. confirmation) of the award in both the rendering state and in the state in which enforcement is sought.<sup>105</sup>

The defense was litigated in *Fertilizer Corp. of India v. IDI Management, Inc.*<sup>106</sup> where it was alleged that because Indian courts review speaking awards for errors of law,<sup>107</sup> and since the speaking award at

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97. *Id.* at 335. It was conceded that the president of the arbitration panel was a member of the committee that drafted the civil code for Ethiopia. *Id.*

98. *Id.*

99. *Id.* The objection to the composition of the arbitral panel was raised by Baruch more than six months after it was notified of the award. *Id.* at 336.

100. *See id.* at 335.

101. *Id.* at 337.

102. *Id.*

103. The N.Y. Convention, art. V(1)(e) provides that it shall be a defense to enforcement if:

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

N.Y. Convention, *supra* note 2, art. V(1)(e).

104. *See* Quigley, *supra* note 32, at 1069.

105. *Id.* at 1069.

106. 517 F. Supp. 948 (S.D. Oh. 1981).

107. The award was being reviewed by an Indian court to determine whether the

issue was under review by the Indian courts, it could in no sense be considered final, and should not be given binding effect.<sup>108</sup> The United States court, however, interpreted both the contract and the relevant Indian law as indications that an award should be binding when rendered.<sup>109</sup> Ultimately, the court relied on a statement in a law review article by the General Counsel of the American Arbitration Association<sup>110</sup> to find that the award was enforceable.<sup>111</sup> The critical language quoted by the court is: "The award will be considered 'binding' for the purposes of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact that recourse may be had to a court of law does not prevent the award from being 'binding'."<sup>112</sup>

*Fertilizer's* finding regarding the "binding" effect of an award must be viewed in the light of article VI.<sup>113</sup> That provision was drafted to improve upon the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927,<sup>114</sup> which provides that an award would not be considered binding if an appeal was pending in the rendering country.<sup>115</sup> Article V provides that a pending appeal only allows, and does not compel, the court to adjourn its decision, whereas article VI allows the court in the enforcing country to require suitable security from the party opposing enforcement of the award as a condition to such enforcement.<sup>116</sup>

In applying article VI, the court in *Fertilizer* acknowledged the

arbitrators could properly award consequential damages when the contract expressly provided otherwise. *Id.* at 956. For a more thorough discussion of the facts of this case, see *supra* notes 79-80 and accompanying text.

108. 517 F. Supp. at 956.

109. 517 F. Supp. at 956-57.

110. Aksen, *American Arbitration Association Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw. U. L. Rev. 1 (1971).

111. 517 F. Supp. at 957-58.

112. *Id.* at 958 (quoting Aksen, *supra* note 110, at 11).

113. The N.Y. Convention, art. VI provides:

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

N.Y. Convention, *supra* note 2, art. VI.

114. Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, 92 L.N.T.S. 301, reprinted in 3 G. DELAUME, *supra* note 1, app. 2, bk. A, at 11 (rev. ed. 1984).

115. *Id.* art. I(d).

116. N.Y. Convention, *supra* note 2, art. VI.

N.Y. Convention's objective of encouraging the recognition and enforcement of arbitral awards.<sup>117</sup> The court also was mindful of the fact that IDI had been unable to collect on another award rendered against IDI in India.<sup>118</sup> Nevertheless, to avoid the possibility of inconsistent results, the court refused to enforce the award until it was considered final under Indian law.<sup>119</sup>

## 6. Arbitrability

The last two express defenses of the N.Y. Convention differ from the first five in that they may be raised by the court *sua sponte*.<sup>120</sup> The first of these two is article V(2)(a). It provides that the court which is petitioned for enforcement may deny the request if "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of [the enforcing] country."<sup>121</sup> This defense may be viewed as otiose in light of the second of these two defenses,<sup>122</sup> which renders unenforceable those awards contrary to the public policy of the enforcing state.<sup>123</sup>

The types of cases in which article V(2)(a) will yield a decision against enforcement are, at present, a subject of speculation.<sup>124</sup> Virtually all of the litigation relating to amenability of a claim to arbitral

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117. 517 F. Supp. at 961.

118. *Id.* The other award, known as the Methanol award, was rendered under the Indian Arbitration Act and an appeal to the Indian courts was pending on it at the time this case was heard. *Id.* at 950. IDI conceded that the Indian courts had enforced the award and required IDI to post security. *Id.* at 962. The Indian Government, however, did not allow withdrawal because of foreign exchange regulations. *Id.* at 950.

119. *Id.* at 962.

120. The first five express defenses of the N.Y. Convention have also been said to differ from the last two in that the former deal with allegations that the award is defective while the latter deal with situations in which enforcement "would offend some basic concepts of the recognizing country." See 2 G. DELAUME, *supra* note 1, § 13.20, at 126.

121. N.Y. Convention, *supra* note 2, art. V(2)(a).

122. See *infra* text accompanying note 126.

123. French delegates to the N.Y. Convention objected to the inclusion of article V(2)(a) on the ground that such a review would undermine the independence of the international award, and the Germans argued that the relevant objections could be handled under the public policy defense of article V(2)(b). See Quigley, *supra* note 32, at 1070 nn. 88-89 (citing G.W. HAIGHT, *supra* note 4, at 66).

124. One court has alluded, in dicta, to the possibility of nonenforceability of awards rendered in antitrust disputes under this section, as well as under the public policy section. See *Parsons & Whittemore Overseas Co. v. Société Générale De L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974). Also, the practices under state arbitration law may provide guidance.

settlement has, in the United States, taken place under the public policy defense.<sup>125</sup>

## 7. Public Policy

The final express defense of article V has been the most frequently litigated. Article V(2)(b) provides that recognition and enforcement of an award may be refused if the "competent authority" in the enforcing state finds that "[t]he recognition or enforcement of the award would be contrary to the public policy of that country."<sup>126</sup> In light of the leeway given the enforcing state by this provision,<sup>127</sup> interdicted in large measure only by the reciprocity clause,<sup>128</sup> it is not surprising that it has generated more litigation than any other provision.

The *Parsons & Whittemore*<sup>129</sup> case is the leading authority for a narrow construction of the public policy defense. There, the Court of Appeals for the Second Circuit construed the public policy defense in the context of the "pro-enforcement bias" of the N.Y. Convention and asserted that the reciprocity considerations militated against an expansive reading of the clause.<sup>130</sup>

Parsons & Whittemore initiated suit to foreclose RAKTA from collecting on a letter of credit.<sup>131</sup> RAKTA counterclaimed for enforcement of an arbitral award rendered in its favor.<sup>132</sup> RAKTA had contracted with Parsons & Whittemore for the latter to construct and temporarily run a paperboard mill in Egypt.<sup>133</sup> The Agency for International Development (AID), a branch of the United States Depart-

125. One authority has stated that when discussing the issue of public policy, "the issue of arbitrability of the dispute can, for all practical purposes, be merged." 2 G. DE LAUME, *supra* note 1, § 13.20, at 128. One case, however, that does deal with article V(2)(a) as a distinct defense will be treated *infra* at notes 143-45 and accompanying text, with the public policy defense cases.

126. The N.Y. Convention, *supra* note 2, art. V(2)(b). It is interesting to note that the conference excluded the language of the Geneva Convention, that contrariness to the fundamental principles of law of the enforcing country would likewise be grounds for nonrecognition. One writer persuasively contends that this step should be interpreted as a broadening of the definition of public policy included in the N.Y. Convention. See Quigley, *supra* note 32, at 1070-71.

127. Quigley states that the provision "has the effect of relegating the ultimate decision on the efficacy of the Convention to the good faith of the Contracting States." Quigley, *supra* note 32, at 1070.

128. The reciprocity clause grants states the right to place restrictions on the enforcement of awards rendered in states which have similar enforcement restrictions. N.Y. Convention, *supra* note 2, art. XIV. See *infra* notes 174-85 and accompanying text.

129. 508 F.2d 969 (2d Cir. 1974).

130. *Id.* at 973-74.

131. *Id.* at 971.

132. *Id.*

133. *Id.* at 972.

ment of State, had financed RAKTA's role in the contract which contained both *force majeure* and arbitration clauses.<sup>134</sup> On the eve of the Arab-Israeli Six Day War, many of Parsons & Whittemore's American work crews quit Egypt, and thereafter, the Egyptian Government expelled all Americans except those who would apply and qualify for a special visa.<sup>135</sup> AID subsequently withdrew its financial backing.<sup>136</sup> The parties disputed whether the resulting postponement was justified under the *force majeure* clause and RAKTA invoked the arbitration clause.<sup>137</sup>

Parsons & Whittemore's public policy defense centered on the withdrawal of financial backing by the executive branch. It argued that the arbitrators should have found that Parsons & Whittemore *had* to remain away from Egypt, a course dictated by the action of the State Department.<sup>138</sup> Parsons & Whittemore contended that the award violated the public policy of the United States by holding wrongful a party's compliance with the implied, but no less imperative, wishes of the executive branch.<sup>139</sup> The court had "little hesitation" in dismissing this argument, pointing out that to confuse a political "national policy" with the type of "public policy" that the N.Y. Convention contemplates as grounds for nonenforcement of an arbitral award would contravene the "circumscribed public policy doctrine" that was envisioned by its framers.<sup>140</sup>

Closely aligned with this argument was Parsons & Whittemore's contention that the subject matter of the dispute was not arbitrable and that therefore, under article V(2)(a), the resulting award should not be enforced.<sup>141</sup> The argument was premised on the fact that the dispute had a significant impact on United States foreign policy.<sup>142</sup> Therefore, it was argued, the dispute could not "be placed at the mercy of foreign arbitrators 'who are charged with the execution of no public trust' and whose loyalties are to foreign interests."<sup>143</sup> The argument was summarily dismissed by the court, which stated that categories of cases may be nonarbitrable, but single cases, in which "an issue of national interest may incidentally figure," are not.<sup>144</sup> Moreover, the court

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134. *Id.*

135. *Id.*

136. *See id.*

137. *Id.*

138. *See id.*

139. *See id.* at 974.

140. *Id.*

141. *See id.*

142. *See id.* at 975.

143. *Id.* at 975 (quoting Brief for Appellant at 23).

144. *Id.*

indicated that even if ad hoc determinations of nonarbitrability were to be allowed, the national interest of the Parsons & Whittemore claim would not rise to the level at which nonarbitrability should be declared.<sup>145</sup>

Another public policy defense, alleging fraud in the proceedings, was denied in *Biotronik Mess-und Therapiegeraete GmbH. & Co. v. Medford Medical Instrument Co.*<sup>146</sup> There, Medford, although never appearing at the arbitration, argued that the failure of the successful party to enter into evidence any information about an alleged agreement said to affect the claim constituted fraud.<sup>147</sup>

In rejecting Medford's defense, the court adopted *Parsons & Whittemore's* narrow construction of the public policy defense.<sup>148</sup> The court, however, would likely have held against Medford even under a broad reading of the defense by reasoning that a party does not commit fraud merely by failing to present its opponent's case. It is, in a sense, unfortunate that such an unconvincing set of facts confronted the court in the *Biotronik* case. A more egregious case of fraud might have led the court to declare that although fraud under the law of the enforcing court is not articulated as an express defense to enforcement, it is a defense cognizable under the rubric of the public policy defense. As it stands, this question remains unresolved.

Duress has also been recognized as a defense cognizable under the public policy section. In the case of *Transmarine Seaways Corp. of Monrovia (M.S. Ocean Voyager) v. Marc Rich & Co.*,<sup>149</sup> District Judge Haight reviewed a complex maritime transaction and stated that if the agreement which was the subject of the arbitration was obtained by duress, an award based on that agreement's validity could not be sustained.<sup>150</sup> Because Marc Rich could not shoulder the heavy burden of proving duress, however, the court found no violation of United States public policy.<sup>151</sup>

In *Transmarine*, a second public policy violation was asserted. In this argument, Marc Rich reiterated an objection it raised at the arbi-

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145. *Id.* The court reasoned that if *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974) found no public policy objections to the arbitrability of United States securities laws in a transnational dispute, where such laws had already been deemed by the Supreme Court to be nonarbitrable in the domestic sphere, then, *a fortiori*, no public policy objection should be found in the case before it. *See id.*

146. 415 F. Supp. 133, 137 (D.N.J. 1976).

147. *Id.* at 137. For a more thorough discussion of the facts of this case, see *supra* notes 63-64 and accompanying text.

148. *Id.* at 139.

149. 480 F. Supp. 352 (S.D.N.Y. 1979).

150. *Id.* at 358.

151. *Id.* at 361.

tration, that the presence of one of the arbitrators on the panel was improper.<sup>152</sup> Rich disclaimed any specific allegations of bias, but did object to an appearance of bias.<sup>153</sup> Rich placed primary reliance for its position<sup>154</sup> on the Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty*.<sup>155</sup> In that case, the award was vacated because a "supposedly neutral" arbitrator failed to disclose its financial relationship with one of the parties.<sup>156</sup> In *Transmarine* the contention was raised that the arbitrator's company "represented another company, which in turn asserted a claim (entirely unrelated to those at bar) against Rich."<sup>157</sup> Judge Haight distinguished *Commonwealth* and other cases cited by Rich, noting that they all involved a finding of impropriety only after disclosure of financial remuneration flowing from a party to the arbitrator in question.<sup>158</sup> The court found no appearance of bias since the relationship in question was "far too tenuous . . . to require the disqualification of an experienced and respected maritime arbitrator, particularly where Rich offers no challenge to [the arbitrator's] personal integrity."<sup>159</sup>

In determining the question of "appearance of bias," the *Transmarine* court applied the same "reasonableness" standard that was articulated in *Commonwealth*.<sup>160</sup> In applying the reasonableness standard, the court noted that the maritime arbitration community in New York was "relatively small, and closely knit,"<sup>161</sup> and that commercial relationships between arbitrators and parties were inevitable.<sup>162</sup> Although not viewing financial involvement as an absolute prerequisite to a finding of impropriety, the court was unwilling to allow tenuous rela-

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152. 480 F. Supp. at 357. Although this type of public policy violation has been asserted in other cases, see, e.g., *Fertilizer Corp. of India*, *infra* notes 165-69 and accompanying text, it might be more appropriately asserted under article V(1)(d). This article allows a defense where the composition of the arbitral body is not in accord with the parties agreement or applicable law. See *supra* notes 84-102 and accompanying text.

153. *Id.* at 356.

154. *Id.* at 357-58.

155. 393 U.S. 145 (1968), *reh'g denied*, 393 U.S. 112 (1969).

156. The arbitrator was paid \$12,000 in consulting fees from the successful party. *Id.* at 146.

157. 480 F. Supp. at 358.

158. See *id.* at 357-58. The cases cited by Rich involved "direct financial or professional relationships." *Id.* at 357.

159. *Id.* at 358.

160. *Id.* at 358. The Supreme Court in *Commonwealth Coatings* said: "We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might *reasonably* be thought biased against one litigant and favorable to another." 393 U.S. at 150 (emphasis added).

161. 480 F. Supp. at 358.

162. See *id.*

tionships to disrupt the arbitration system.<sup>163</sup> To Judge Haight, therefore, the threshold of the reasonable appearance of bias standard would seem to be a formidable one.

The composition of a tribunal was also examined under the public policy defense in *Fertilizer Corp. of India v. IDI Management, Inc.*<sup>164</sup> There, the district court again found no impropriety even though an arbitrator had received remuneration from one of the parties for formerly representing that party in another arbitration.<sup>165</sup> The court distinguished this case from the facts of *Commonwealth* and stated that nondisclosure of the arbitrator's relationship caused insufficient corruption of the proceedings to warrant setting aside an award.<sup>166</sup> One factor contributing to the result was that the panel was in any event unanimous.<sup>167</sup> Another contributing factor which was used to distinguish this case from *Commonwealth* was that in *Fertilizer* the questioned arbitrator was selected by one of the parties to the arbitration, whereas in *Commonwealth* the questioned arbitrator was selected by the arbitrators who were appointed by the parties.<sup>168</sup>

The foregoing applications of the public policy defense of arbitrator impropriety reveal a judicial willingness to circumscribe its scope. This interpretation is in accord with the narrow construction of the public policy defense set out in *Parsons & Whittemore*.<sup>169</sup> Still, parties

163. See *id.* If all arbitrators were disqualified simply because of an "appearance of bias," resolution of these types of maritime disputes through arbitration would be undermined. See *id.* In fact the practice in the United States is for arbitrators to be paid by the party appointing the arbitrator. See Smit, *supra* note 28, at 6.

164. 517 F. Supp. 948 (S.D. Oh. 1981).

165. *Id.* at 953-55. IDI Management had alleged that one of the arbitrators, Mr. B. Sen, had served as counsel to Fertilizer in at least two other legal or arbitral proceedings "and that no disclosure was made to IDI." *Id.* at 953.

166. *Id.* at 954.

167. *Id.* at 953.

168. *Id.* at 955. A common practice in selecting arbitration panels is for each party to select an arbitrator, and for the arbitrators to select a third, neutral arbitrator. See 2 G. DELAUME, *supra* note 1, § 13.11, at 74. It should not be surprising, therefore, if the parties select as their arbitrator one who may be sympathetic to their cause.

169. See *supra* text accompanying notes 129-30. The narrow construction of the public policy defense was also reaffirmed in *Fotochrome v. Copal*, 517 F.2d 512 (2d Cir. 1975).

In *Fotochrome*, a contract for the purchase of cameras made in Japan was entered into between Fotochrome, an American corporation, and Copal, a Japanese corporation without any jurisdictional ties to the United States. The contract contained an arbitration clause. A dispute arose, and arbitration was commenced in Japan. After 14 sessions over almost two years, Fotochrome sought and was granted leave to examine two witnesses. It never produced them.

After four sessions were aborted because of Fotochrome's failure to produce the witnesses, the arbitration panel threatened to terminate the arbitration if they were not

should encourage arbiters to disclose any relationships that might result in an appearance of bias.

## 8. Reciprocity

The N.Y. Convention's article XIV provides that "[a] Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention."<sup>170</sup> The article may be interpreted as giving states the right to accord reciprocal treatment by not recognizing certain awards rendered in states which have either made express reservations to the N.Y. Convention or restrictive interpretations to the Treaty.<sup>171</sup>

In *Fertilizer Corp. of India v. IDI Management, Inc.*,<sup>172</sup> the district court construed article XIV so that it would apply to the express reservations.<sup>173</sup> Thus, courts may *de facto* adopt in specific cases the reservations which have been adopted by the state in which the award sought to be enforced was rendered.<sup>174</sup> This result was reached despite arguments to the contrary emanating from the legislative history of the N.Y. Convention.<sup>175</sup> The court reasoned that although the "nondomestic awards exclusion" reservation has its own independent reciprocity provision, and the "commercial awards only" reservation has none at all, article XIV has no restrictive language in it.<sup>176</sup> The court denied

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produced at the next scheduled session. Five days before that session, Fotochrome filed a petition in bankruptcy in the United States, and a day later, the referee issued an order enjoining, *inter alia*, the continuance of any arbitration. The tribunal in Japan decided that the order did not apply to it and rendered an award for Copal.

The award was filed in Japan and became, in effect, a binding judgment there. Copal filed a proof of claim in the United States bankruptcy proceeding. Fotochrome moved for a hearing on the merits of the claim in the bankruptcy court. The referee in bankruptcy granted Fotochrome's motion but District Judge Weinstein reversed, holding that the bankruptcy order had no extraterritorial effect and did not reach Copal, which had insufficient jurisdictional contacts with the United States.

The Second Circuit affirmed, but avoided reaching the issue of whether reconditioning a bankrupt is the kind of public policy which falls within the scope of article V(2)(b). It stated that the award should be given binding effect by a court if a confirmation was sought. The court stated that a proceeding to enforce could not be held in the bankruptcy court, but only in a district court where all appropriate defenses, including the public policy defense, could be raised. *See generally id.*

170. N.Y. Convention, *supra* note 2, art. XIV.

171. *See* Quigley, *supra* note 32, at 1074.

172. 517 F. Supp. 948 (S.D. Oh. 1981).

173. *Id.* at 952-53.

174. *Id.*

175. *Id.*

176. *See id.* at 953.

the argument that India's courts have been shown to restrict the use of the N.Y. Convention to the benefit of its nationals and to the prejudice of others. Thus, the court found no reciprocity bar to enforcement, despite an expansive reading of the reciprocity provision.<sup>177</sup>

In *Audi N.S.U. Auto Union Aktiengesellschaft v. Overseas Motors, Inc.*,<sup>178</sup> the district court summarily dismissed an argument based on the reciprocity provision of the "nondomestic awards exclusion" reservation. In this case an award was rendered in Switzerland and petitioner, a West German company, sought to confirm the award in the United States.<sup>179</sup> The court concluded that although the Federal Republic of Germany opted for the "nondomestic awards exclusion" reservation, since the award was rendered in Switzerland, this reservation was inapplicable. The award would be enforceable in petitioner's home courts,<sup>180</sup> and therefore, it should be enforceable in the United States.<sup>181</sup>

#### IV. CONCLUSION

In addition to the express defenses, several implied defenses have been litigated, including nonretroactivity of the N.Y. Convention<sup>182</sup> and manifest disregard of the law by the arbitrators.<sup>183</sup> This review of the cases, however, demonstrates that to achieve nonenforcement of a foreign arbitral award is usually a herculean feat. This is true even when the award is reduced to judgment in the rendering state.

The judiciary has been notably reluctant, in adjudicating the defenses, to find conditions warranting nonenforcement. Coupled with the binding nature of the agreement to arbitrate, the overriding lesson to be gleaned from this note is that planning *before* the international contract is entered into is crucial. A thorough canvass of the advantages and disadvantages of forgoing judicial review of the merits of a dispute should be undertaken with an eye toward ascertaining which party will initiate third-party dispute resolution.

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177. *Id.*

178. 418 F. Supp. 982 (E.D. Mich. 1976).

179. *Id.* at 983.

180. *Id.*

181. *Id.*

182. *See, e.g., Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (S.D. Oh. 1981).

183. *See supra* note 44.

