FOREIGN NATION JUDGMENTS—IF STATE LAW PROVIDES FOR THE ENFORCEABILITY OF FOREIGN JUDGMENTS, THE JUDGMENT IS ENFORCEABLE WITHOUT DETERMINATION OF WHETHER THE ARBITRATION AWARD ON WHICH IT IS BASED IS INDEPENDENTLY ENFORCEABLE UNDER THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.

Wishing to attract industry to the Island Territory of Curaçao, plaintiffs[1] agreed on January 12, 1968, to build to specification an industrial park for Solitron Devices, Inc., a New York manufacturer of electronic products. Upon completion of the park's largest factory building, defendant was to put its manufacturing industry into operation within twelve months and create at least one hundred jobs.[2] By April 13, 1970, the buildings were complete; however, defendant treated the contract as unilaterally terminated by plaintiffs because there had been both a minimum wage increase and riots in the islands. Plaintiffs proceeded to arbitration under the terms of the contract[3] and received an award on August 13, 1970.[4] The award was duly filed and judgment duly entered under the law of the Netherlands Antilles.[5] Plaintiffs then petitioned the district court for confirmation of the arbitration award and enforcement of the Curaçaoan judgment against defendant. The district court enforced the

[1] Plaintiffs were the Central Government of the Netherlands Antilles and the Island Territory of Curaçao. Both of these political entities were a part of the Kingdom of the Netherlands.

[2] Plaintiffs contracted to establish an industrial park of approximately 60 acres which would include two factory buildings, an access road, and sea water pipes to the building cites. In return defendant was to lease the buildings for 20 years at a specified rent, to operate a factory within the larger building, and to use or sublease the smaller building. Defendant agreed to have its electronic manufacturing industry operating within 12 months of the larger building's completion and to create at least 100 jobs. By January 1, 1974, defendant was to provide total employment for at least 3,000 persons. The contract stipulated that the laws of the Netherlands Antilles were applicable, that all disputes legal or factual would be submitted to a board of arbitration whose decision would be binding, and that defendant's domicile for everything pertaining to the contract's execution was the office of its attorney in Willemstad, Curaçao.

[3] Defendant did not participate in the arbitration proceedings; however, defendant was given notice of all hearings and was duly informed of the other procedures followed.

[4] The arbitrators did not allow damages for plaintiffs' total investment in the industrial park, but they did allow 53,602 NAfls (Netherlands Antilles guilders) as the cost of an acid neutralization plant intended solely for defendant and 192,482 NAfls for 17 months lost rent on the main buildings. The arbitrators also awarded 423,671.35 NAfls as damages for defendant's failure to create 100 jobs. However, no damages were allowed for failure to create the original 100 jobs beyond December 31, 1973, and no damages whatsoever were allowed for defendant's failure to establish 3,000 jobs by January 1, 1974, because calculations in both areas would have been speculative. One-half of the fees and expenses of the arbitrators was awarded as well as 90,000 NAfls for foreign travel expenses to help attract industry in lieu of Solitron. Against the total award defendant was granted a setoff of 266,424.05 NAfls for the value of its structural steel and air conditioning plant.

[5] After the award was filed, defendant had three months in which to bring an action to annul the award. Since defendant did not do so, a "writ of execution" enforceable in the "Court of First Instance" was issued and served by mail on defendant.

judgment and alternatively enforced the award; whereupon, defendant appealed. *Held*, the foreign judgment of Curaçao is enforceable under Article 53 of the New York Civil Practice Law and Rules.[6] In so holding, it is not necessary to determine whether or not the arbitration award is independently enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards by virtue of 9 U.S.C. § 201 *et seq.* (1970). *Island Territory of Curaçao v. Solitron Devices, Inc.*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States as far as the immediate parties and the underlying cause of action are concerned.[7] Although recognition is a prerequisite to enforcement of the judgment,[8] it is possible that a judgment may be recognized and yet remain unenforced.[9] Early American decisions involving the recognition and enforcement of foreign judgments necessarily looked to English precedent.[10] In England a foreign judgment on a contract debt was adjudicated to be only prima facie evidence of debt.[11] Therefore, all defenses raised in the original proceeding could be asserted again in an action on the judgment.[12] Several American states proceeded to adopt this view,[13] and when English courts began to recognize foreign non-admiralty judgments as

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[6] N.Y. CIV. PRAC. §§ 5301-09 (McKinney Supp. 1972-73).

[7] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971) [hereinafter cited as RESTATEMENT (SECOND)]. "Comment a" defining the scope of this rule states that the "[s]ection is limited to judgments rendered in a contested proceeding or, in other words, to judgments that are not rendered by default." However, "comment d" qualifies this statement by permitting judgments in rem or quasi in rem. Other default judgments (such as the one in the case at bar) will be recognized provided that the foreign court had jurisdiction and that the defendant was given adequate notice and opportunity to be heard. RESTATEMENT (SECOND) § 98, comments *a* and *d* at 368-70 (1971). *See* Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009 (E.D. Ark. 1973); Cherun v. Frishman, 236 F. Supp. 292 (D.D.C. 1964); Falcon Mfg., Ltd. v. Ames, 53 Misc. 2d 332, 278 N.Y.S.2d 684 (Civ. Ct. 1967); RESTATEMENT (SECOND) OF CONFLICT OF LAWS at 1-4 (Tent. Draft No. 11, 1965).

[8] Borm-Reid, *Recognition and Enforcement of Foreign Judgments*, 3 INT'L & COMP. L.Q. 49, 50 (1954).

[9] "For example, polygamy is lawful in certain countries, but a judgment given in connection therewith would be unenforceable in England, being contrary to public policy." *Id.* at 50.

[10] Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220, 224-29 (1972) [hereinafter cited as Peterson]; von Mehren & Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 L. & POL. IN INT'L BUS. 37, 43 (1974) [hereinafter cited as von Mehren].

[11] Walker v. Witter, 99 Eng. Rep. 1 (K.B. 1778). *See also* 11 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 271 (1938).

[12] Peterson, *supra* note 10, at 225; *cf.* Tourigny v. Houle, 88 Me. 406, 34 A. 158 (1896); Jordan v. Robinson, 15 Me. 167 (1838); *see* Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law*, 33 MICH. L. REV. 1143 (1935).

[13] Burnham v. Webster, 4 F. Cas. 781 (No. 2,179) (C.C.D. Me. 1846); Cummings v. Banks, 2 Barb. 602, 605 (N.Y. Sup. Ct. 1848); Buttrick v. Allen, 8 Mass. 273, 5 Am. Dec. 105 (1811). This doctrine was approved in dicta in Connecticut, Delaware, Illinois, Kentucky, New Hampshire, Ohio, Pennsylvania, Rhode Island, and Virginia.

conclusive, American courts followed.[14] English courts now accept a foreign judgment as conclusive as long as certain requirements are met.[15] However, American courts have not afforded the protection of the full faith and credit clause to judgments of foreign nations. Since there is no international equivalent to the clause, they have taken "refuge in ill-defined notions of 'comity' and, more recently, in expanded theories of res judicata."[16] The matter of defenses is also a difficult problem, but the public interest requires that there be an end to litigation.[17] Consequently, a foreign nation judgment will be recognized in the United States provided that it is a valid judgment[18] rendered by a foreign court having jurisdiction and provided that it follows the *Hilton v. Guyot*[19] guideline. This guideline permits recognition if:

> . . . [t]here has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting, or fraud in procuring the judgment. . . .[20]

Therefore, conclusive effect should be given foreign nation judgments if the aforementioned requirements are met, but in *Hilton*[21] the Court held that since there was no reciprocity or mutuality by the French courts, the specific judgment involved would be afforded only prima facie effect.[22]

Since the common law regarding foreign nation judgments developed with-

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[14] A Connecticut court held that valid foreign judgments were entitled to conclusive effect when used as a defense. Griswold v. Pitcairn, 2 Conn. 85 (1816); *see* Fisher, Brown, & Co. v. Fielding, 67 Conn. 91, 34 A. 725 (Sup. Ct. Err. 1895); *cf.* Taylor v. Phelps, 1 Har. & G. 492 (Md. 1827). *But cf.* Burham v. Webster, 4 F. Cas. 781 (No. 2,179) (C.C.D. Me. 1846).

[15] The foreign court must have been competent to adjudicate the matter, and the foreign judgment must not have been obtained by fraud or proceedings contrary to natural justice. The judgment cannot be contrary to English public policy, and it must also be final and conclusive in the country in which it was rendered. Borm-Reid, *Recognition and Enforcement of Foreign Judgments*, 3 INT'L & COMP. L.Q. 49, 50 (1954).

[16] Peterson, *supra* note 10, at 230.

[17] Baldwin v. Iowa State Travelling Men's Assoc., 283 U.S. 522, 525 (1931).

[18] A judgment is valid if:

> (a) the state in which it is rendered has jurisdiction to act judicially with respect to the persons affected and the subject matter of the action; and
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> (b) a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected; and
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> (c) it is rendered by a court with competency to render it; and
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> (d) there is compliance with such requirements of the state of rendition as are necessary for the valid exercise of power by the court.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS at 2 (Tent. Draft No. 10, 1964).

[19] Hilton v. Guyot, 159 U.S. 113 (1895).

[20] *Id.* at 202.

[21] *Id.*

[22] *Id.* at 227-28.

out the benefit of statute, issues of reciprocity, fraud, public policy, notice, and jurisdiction became important considerations. Although the decision in *Erie R.R. v. Tompkins*[23] meant that *Hilton* was not binding on federal courts sitting in the states,[24] the majority of states continued to apply the *Hilton* test. Of those states which expressly rejected the *Hilton* rule regarding reciprocity, New York was the most notable.[25] Then in 1964 the Supreme Court restricted the reciprocity requirement to certain specific circumstances.[26] While the reciprocity requirement has been restricted, American courts will recognize fraud as a defense if it is extrinsic.[27] Extrinsic fraud is that which occurs outside the court proceeding; *e.g.*, preventing a party from participating in the proceeding, whereas intrinsic fraud[28] is that which is a part of the proceeding, such as perjury. American courts will not deny recognition to a foreign nation judgment merely because the court procedure, laws, or customs of that foreign nation are different from those of the United States.[29] However, American courts will deny recognition to foreign nation judgments if they are seriously offensive to the public policy of the state in which the court is sitting.[30] The public policy defense is often used as an underlying rationale to justify the other defenses, including those of notice[31] and jurisdiction.[32] Notice incorporates

[23] 304 U.S. 64 (1938).

[24] *See* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); Iraq v. First Nat'l Bank, 350 F.2d 645 (7th Cir. 1965), *cert. denied*, 382 U.S. 982 (1966); Domingo v. States Marine Lines, 340 F. Supp. 811 (S.D.N.Y. 1972); Svenska Handelsbanken v. Carlson, 258 F. Supp. 448 (D. Mass. 1966); Compania Mexicana Rediodifusora Franteriza v. Spann, 41 F. Supp. 907 (N.D. Tex. 1941), *aff'd*, 131 F.2d 609 (5th Cir. 1942); Bata v. Bata, 39 Del. Ch. 258, 163 A.2d 493 (Sup. Ct. 1960), *cert. denied*, 366 U.S. 964 (1961); *cf.* Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185 (1912); Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926); RESTATEMENT (SECOND) § 98, n. 1 (1971).

[25] *See* Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926); Cowans v. Ticonderoga Pulp and Paper Co., 219 App. Div. 120, 219 N.Y.S. 284 (3d Dep't), *aff'd*, 246 N.Y. 603, 159 N.E. 669 (1927); 2 BEALE, CONFLICT OF LAWS 1381-89 (1935).

[26] The Supreme Court ruled that reciprocity applied only to the question of enforcement of a foreign in personam judgment by a foreign national against a citizen of the United States. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 411 (1964).

[27] *See, e.g.*, MacKay v. McAlexander, 268 F.2d 35 (9th Cir. 1959); Tamimi v. Tamimi, 38 App. Div. 2d 197, 328 N.Y.S.2d 477 (2d Dep't 1972).

[28] *See, e.g.*, Harrison v. Triplex Gold Mines, Ltd., 33 F.2d 667 (1st Cir. 1929); Harges v. Harges, 46 Misc. 2d 994, 261 N.Y.S.2d 713 (Sup. Ct. 1965).

[29] *See* Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970); Regierungspraesident Land Nordrhein-Westfalen v. Rosenthal, 17 App. Div. 2d 145, 232 N.Y.S.2d 963 (1st Dep't 1962); Newton v. Hunt, 59 Misc. 633, 112 N.Y.S. 573 (Sup. Ct. 1908), *modified*, 134 App. Div. 325, 119 N.Y.S. 3 (1st Dep't 1909), *aff'd*, 201 N.Y. 599, 95 N.E. 1134 (1911).

[30] *See, e.g.*, Adamsen v. Adamsen, 151 Conn. 172, 195 A.2d 418 (1963); Yoder v. Yoder, 24 Ohio App. 2d 71, 263 N.E.2d 913 (1970).

[31] *See, e.g.*, Donohue v. Donohue, 236 N.Y.S.2d 890 (Sup. Ct. 1962) (inadequate service of process on incompetent).

[32] Jurisdiction is often dependent upon notice. *See* note 6 *supra*. However, in the case at bar inadequte notice was not the basis for challenging jurisdiction. Defendant claimed the Curaçao Court of First Instance lacked jurisdiction because the contract terminated by reason of impossibil-

the larger topics of service and opportunity to defend, and it must be valid under the laws of the country rendering the judgment;[33] otherwise recognition will be denied.[34] Recognition will also be denied if the foreign court acquired jurisdiction over the persons or property involved by means violative of concepts of due process or judicial power. This rule applies even if the foreign court obtained jurisdiction pursuant to the law of its own country.[35]

Once these threshold questions are resolved, the issues of res judicata and finality become important. Regarding the judgment's res judicata or collateral estoppel effect, American courts differ in whether to apply the rules of the local forum or of the foreign forum.[36] Where the rules of the foreign forum are

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ity of performance due to changing wage rates. Likewise, fraud in the inducement was asserted as a defense because of alleged misrepresentations by Curaçao concerning the stability of the wage rates.

Since New York's statute is a recent codification of the common law, either defense would have been valid. The New York statute is modeled after the Uniform Foreign Money-Judgments Recognition Act, which has been enacted in seven states during the last decade. *See* UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT; N.Y. CIV. PRAC. §§ 5301-09 (McKinney Supp. 1972-73); Kulzer, *Recognition of Foreign Country Judgments in New York: The Uniform Foreign Money-Judgments Recognition Act*, 18 BUFFALO L. REV. 1 (1968); Kulzer, *Programs for Improving Foreign Judgment Enforcement in New York: The Uniform Enforcement of Foreign Judgments Act*, 18 BUFFALO L. REV. 53 (1968); JUDICIAL CONFERENCE REPORT, 2 McKinney's Session Laws of New York 2784 (1970).

The court determined that both defenses were questions for the Curaçaoan arbitrators, because as a general rule an arbitration clause survives the frustration of the contract, thereby maintaining jurisdiction over the dispute. Eastern Marine Corp. v. Fukaya Trading Co., 364 F.2d 80, 84-85 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966). *See also* Heyman v. Darwins, [1942] A.C. 356, 366 (1942), relied on by Augustus Hand, J., in *In re* Pahlberg, 131 F.2d 968 (2d Cir. 1942); Prima Paint Corp. v. Flood and Conklin Mfg. Co., 388 U.S. 395 (1967). *Cf. In re* Kramer & Uchitelle, Inc., 288 N.Y. 467, 43 N.E.2d 493 (1942), *limited in* Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 335-36, 174 N.E.2d 463, 465-66, 214 N.Y.S.2d 353, 356-58 (1961). Fraud in the inducement is also a question for the arbitrators. Prima Paint Corp. v. Flood and Conklin Mfg. Co., *supra*; Weinrott v. Carp, 32 N.Y.2d 190, 194, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973).

The contract was a bilingual agreement in English and Dutch and the district court noted that there were some minor problems in interpretation, especially with regard to the minimum wage controversy. Since the contract said nothing concerning the continued existence of a low wage rate and since defendant corporation was a "sophisticated bargainer," the court of appeals found it difficult to accept defendant's arguments that rising wage rates caused lack of jurisdiction due to impossibility of performance or that Curaçaoan officials made misrepresentations (fraud in the inducement) concerning them. By specifically setting out the details, assumptions, and applicable law, defendant would have avoided many of its problems.

[33] See note 3 *supra*. Under Netherlands' law plaintiffs followed all procedural "notice" requirements with regard to defendants.

[34] *See, e.g.*, Julen v. Larsen, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972); Parker v. Parker, 155 Fla. 635, 21 So.2d 141 (1945); Hager v. Hager, 1 Ill. App. 3d 1047, 247 N.E.2d 157 (1971); Fantony v. Fantony, 21 N.J. 525, 122 A.2d 593 (1956); *In re* Paramythiotis, 15 Misc. 2d 133, 181 N.Y.S.2d 590 (Sur. Ct. 1958); Banco Minera v. Ross, 106 Tex. 522, 172 S.W. 711 (1915).

[35] *See, e.g.*, Compagnie du Port de Rio de Janeiro v. Mead Morrison Mfg. Co., 19 F.2d 163 (D. Me. 1927); Rzeszotarski v. Rzeszotarski, 296 A.2d 431 (D.C. Ct. App. 1972); Jackson v. Stelco Employees' Credit Union Ltd., 203 So.2d 669 (Fla. Dist. Ct. App. 1967).

[36] *See, e.g.*, Leo Feist, Inc. v. Debmar Publishing Co., 232 F. Supp. 623 (E.D. Pa. 1964); Scott v. Scott, 51 Cal. 2d 249, 331 P.2d 641 (1958); Succession of Fitzgerald, 192 La. 726, 189 So. 116

applied, the party asking for enforcement must prove the effect of the judgment in the foreign country.[37] However, the majority of American courts, instead of considering which rules are applicable, merely apply their own rules concerning res judicata.[38] Foreign judgments must also be final and conclusive or American courts will neither recognize nor enforce them. This means that as a general rule the foreign judgment cannot be subject to further procedure in the foreign forum, especially with regard to possible reversal or modification.[39]

Enforcement of a foreign money judgment in the United States necessitates that it be reduced to a judgment of a United States court. The judgment will then be enforced under local law. Those states which have adopted the Uniform Enforcement of Foreign Judgments Act have an expedited administrative pro-

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(1939); Rankin v. Goddard, 54 Me. 28 (1866), *aff'd*, 55 Me. 389 (1868); Di Benedetto v. Di Benedetto, 284 App. Div. 982, 135 N.Y.S.2d 74 (2d Dep't 1954); *In re* Zietz' Estates, 207 Misc. 22, 135 N.Y.S.2d 573 (Sur. Ct. 1954), *aff'd*, 285 App. Div. 1147, 143 N.Y.S.2d 602 (2d Dep't 1955); Newton v. Hunt, 59 Misc. 633, 112 N.Y.S. 573 (Sup. Ct. 1908), *modified*, 134 App. Div. 325, 119 N.Y.S. 3 (1st Dep't 1909), *aff'd*, 201 N.Y. 599, 95 N.E. 1134 (1911).

[37] Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970). Since the effect of res judicata is broader in the United States, some courts reason that the foreign judgment should not be given greater scope in the United States than it would have had in the foreign country. *See* Bata v. Bata, 39 Del. Ch. 258, 163 A.2d 493 (Sup. Ct. 1960), *cert. denied*, 366 U.S. 964 (1961); Schoenbrod v. Siegler, 20 N.Y.2d 403, 230 N.E.2d 638, 283 N.Y.S.2d 881 (1967). *Compare In re* Cleland's Estate, 119 Cal. App. 2d 18, 258 P.2d 1097 (1953) *with* Rediker v. Rediker, 35 Cal. 2d 796, 221 P.2d 1 (1950).

[38] *See, e.g.*, Kohn v. American Metal Climax, Inc., 322 F. Supp. 1331 (E.D. Pa. 1970), *modified*, 458 F.2d 255 (3d Cir. 1972), *cert. denied*, 409 U.S. 874 (1972); Petition of Bloomfield S.S. Co., 298 F. Supp. 1239 (S.D.N.Y. 1969), *aff'd*, 422 F.2d 728 (2d Cir. 1970); Kane v. Central Am. Mining and Oil, Inc., 235 F. Supp. 559 (S.D.N.Y. 1964); Cannistraro v. Cannistraro, 352 Mass. 65, 223 N.E.2d 692 (1967); Perkins v. Guaranty Trust Co., 274 N.Y. 250, 8 N.E.2d 849, *modified*, 276 N.Y. 553, 12 N.E.2d 571 (1937). *See also* Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44, 61-62 (1962).

[39] *See, e.g., In re* Cleland's Estate, 119 Cal. App. 2d 18, 258 P.2d 1097 (1953); Algazy v. Algazy, 135 N.Y.S.2d 123 (Sup. Ct. 1954), *aff'd*, 285 App. Div. 1140, 142 N.Y.S.2d 365 (1955); Ambatielos v. Foundation Co., 203 Misc. 470, 116 N.Y.S.2d 641 (Sup. Ct. 1952); Munn v. Cook, 8 N.Y.S. 698, 24 Abb. N. Cas. 314 (Sup. Ct. 1890).

However, if the foreign judgment is "final" in the trial court and merely pending appeal in the foreign forum, American courts tend to enforce it. *See, e.g.*, Hearst v. Hearst, 150 N.Y.S.2d 746 (Sup. Ct. 1955), *appeal dismissed*, 2 App. Div. 2d 746, 156 N.Y.S.2d 959 (1956), *aff'd*, 3 App. Div. 2d 706, 159 N.Y.S.2d 753, *aff'd*, 3 N.Y.2d 967, 146 N.E.2d 792, 169 N.Y.S.2d 36 (1957).

The same is true in those states which have adopted the Uniform Recognition Act. The Act says that a money judgment may be enforced so long as it is "final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 2. *See also* N.Y. CIV. PRAC. § 5302 (McKinney Supp. 1972-73)

Nonetheless, the Act also provides that a U.S. court has the power to stay enforcement pending notification of the outcome of the appeal. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 6. In the case at bar defendant argued that the Curaçaoan judgment was not "final and conclusive." The court refused to look behind the Curaçaoan judgment to determine whether or not it was final and stated that such a determination would involve "a hypothetical judgment for future damages." Island Territory of Curaçao v. Solitron Devices, Inc., 489 F.2d 1313, n. 9 (1973) [hereinafter cited as *Solitron*]. *See* N.Y. CIV. PRAC. §§ 5302, 5306 (McKinney Supp. 1972-73).

cedure for recognizing each others' judgments.[40] The Uniform Enforcement Act does not apply to foreign nation judgments; however, the Uniform Foreign Money-Judgments Recognition Act[41] provides that a judgment which is recognized is also enforceable "in the same manner as the judgment of a sister state."[42] Since the Uniform Enforcement Act is one manner by which sister states enforce their judgments, its processes of enforcement are incorporated into the Uniform Recognition Act. Therefore, foreign nation judgments would be directly enforceable in those states which have adopted both acts.[43]

In *Solitron* the court of appeals held that the Curaçaoan judgment was enforceable under New York's codification of the Uniform Recognition Act; *i.e.*, Article 53 of the New York Civil Practice Law and Rules.[44] The court of appeals also held that the district court erred in deciding that the arbitral award was independently enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[45] Since state law "prevails in the absence of interference with the federal regulatory scheme,"[46] the court of appeals found that the New York statute was the only applicable law and decided the case accordingly.

Whether or not New York's state law should be applied in lieu of the Convention on Foreign Arbitral Awards is the crux of the case at bar and appears to make it a case of first impression. This is the first case in which the Convention on Foreign Arbitral Awards has been adjudicated inapplicable because of a court's distinction between an "arbitration award" and a "judgment on an award." The court determined that the Convention on Foreign Arbitral Awards applied only to arbitration awards and could not be used to enforce a judgment on an award.[47] The court should have analyzed the question more carefully than it did. The Convention on Foreign Arbitral Awards is codified

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[40] The Uniform Enforcement of Foreign Judgments Act provides that a judgment of a sister-state may be filed in the office of any county clerk of a state which has adopted the Act and it is thereafter treated as a judgment of both states (thereby applying full faith and credit). UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT § 2 [hereinafter cited as UNIFORM ENFORCEMENT ACT].

[41] UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT [hereinafter cited as UNIFORM RECOGNITION ACT].

[42] *Id.* § 3. *See also* N.Y. CIV. PRAC. § 5303 (McKinney Supp. 1972-73); von Mehren, *supra* note 10, at 72-73.

[43] The Uniform Recognition Act as adopted in New York does not allow for this type of direct enforcement, but it does provide another expedited means of enforcement. *See* N.Y. CIV. PRAC. §§ 3212(b), 3213 (McKinney 1970); New Cent. Jute Mills Co. v. City Trade & Indus., Ltd., 65 Misc. 2d 653, 318 N.Y.S.2d 980 (Sup. Ct. 1971).

[44] 489 F.2d 1313 (2d Cir. 1973).

[45] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-08 (1970) [hereinafter cited as the Convention on Foreign Arbitral Awards]. 489 F.2d at 1323.

[46] Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117, 140 (1973).

[47] 489 F.2d at 1318. The only case which has been decided under Article 53 of the New York Act did not mention the Convention on Foreign Arbitral Awards. *See* New Cent. Jute Mills, Co. v. City Trade & Indus., Ltd., 65 Misc. 2d 653, 318 N.Y.S.2d 980 (Sup. Ct. 1971); N.Y. CIV. PRAC. §§ 5301-09 (McKinney Supp. 1972-73).

in Chapter 2 of the Federal Arbitration Act; however, the court used Chapter 1 in interpreting the Convention. The court's interpretation implied that 9 U.S.C. § 9 (in Chapter 1) makes a distinction between an aribtration award and a judgment on an award,[48] but it does not. Section 9 of the Federal Arbitration Act provides that:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award. . . .[49]

The Federal Arbitration Act does not say, as the court asserts, that there is a distinction between an arbitration award and a judgment on an award which would prevent the application of the Convention on Foreign Arbitral Awards. Section 208 of the Convention on Foreign Arbitral Awards, as enacted in the United States, states specifically that Chapter 1 of the Federal Arbitration Act (of which the above quoted § 9 is a part) has residual application and applies only as long as it does not conflict with the Convention.[50] In § 207 the Convention defines specifically the procedure for confirming an arbitration award;[51] therefore, by its own reasoning the court should have applied the Convention and not the Federal Arbitration Act. The jurisdictional test for applying the Convention is whether or not the legal relationship was "commercial."[52] Nowhere does the Convention limit its jurisdiction because of a distinction between an award and a judgment on an award.[53]

The court rationalized its distinction between an arbitration award and a

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[48] 489 F.2d at 1319. This same court made a similar distinction in an interstate action involving the Federal Arbitration Act in Varley v. Tarrytown Associates Inc., 477 F.2d 209 (2d Cir. 1973).

[49] 9 U.S.C. § 9 (1970).

[50] The Convention on Foreign Arbitral Awards § 208 states as follows:
Chapter 1 - Residual application.
— Chapter 1 [§§ 1-14 of this title] applies to actions and proceedings brought under this chapter [§§ 201-208 of this title] to the extent that chapter is not in conflict with this chapter [§§ 201-208 of this title] or the Convention as ratified by the United States. (July 31, 1970, P.L. 91-368, § 1, 84 Stat. 693).

[51] The Convention on Foreign Arbitral Awards § 207 states as follows:
Award of arbitrators-Confirmation-Jurisdiction-Proceeding.
— Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter [§§ 201-208 of this title] for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention. (July 31, 1970, P.L. 91-368, § 1, 84 Stat. 693).

[52] *See* Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A.J. 821, 823 (1972).

[53] The district court held that the Convention on Foreign Arbitral Awards was applicable because the award arose out of a "legal relationship . . . considered as commercial." 356 F. Supp. 1, 12 (S.D.N.Y. 1973). However, the court of appeals did not discuss this facet of the case but decided the Convention was inapplicable solely on the rationale that the Convention did not apply to judgments rendered on an award. 489 F.2d at 1318-19. *See* 9 U.S.C. § 202 (1970).

judgment on an award by looking to the legislative history and intent behind the Convention on Foreign Arbitral Awards. The Senate Judiciary Committee expressed the view that the Convention would "serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both United States and foreign courts."[54] The Convention was also enacted as a second chapter within the Federal Arbitration Act to "avoid complicated interlineations."[55] The Senate Committee's analysis of § 207 states "that within 3 years after an arbitral award is made, any party to the arbitration may apply to any court having jurisdiction for an order confirming the award against any party to the arbitration."[56] The whole intent behind enactment of the Convention is to facilitate confirmation of awards and to avoid complicated interlineations, and yet the court interpreted this intent to include making a distinction between an arbitration award and a judgment on an award. Nowhere in the analysis of § 207 is the word "judgment" even mentioned; the section refers only to an "order confirming the award." The court could not rationally deny the applicability of the Convention on such a semantical distinction. To do so would necessitate that the court define and distinguish between an "award," an "arbitration award," a "judgment," a "judgment on an award," an "order confirming an award," *ad absurdum*. American law distinguishing between similar terms is complicated; a fortiori, distinguishing between these terms with regard to Curaçaoan law.

The court was called upon to enforce a Curaçaoan "judgment on an award" or in the alternative a Curaçaoan "arbitration award." The Curaçaoan Court of First Instance was compelled by the law of the Netherlands Antilles to wait three months for a challenge to the arbitration award before issuing a "writ of execution."[57] The final writ which was issued might have been an "order confirming an award" or even a "confirmation of an arbitration award" without being a "judgment" in the American sense of the word. Regardless of the term used to describe the "order" of the Curaçaoan Court of First Instance, it remained a court order issued in an arbitration context and should have been treated as such.

At one point the court made the following point:

> The same argument might be rejected on the basis that Curaçao having acted by granting *judgment on the arbitral award* was engaged in an *act of state*.[58] (emphasis added)

The court has equated a "judgment on an arbitral award" with an "act of state." How the court could rationalize making a "judgment on an arbitral

[54] H.R. REP. No. 1181, 91 Cong., 2d Sess. (1970).

[55] Letter from H. G. Torbert, Jr. to Congressman McCormack, December 3, 1969, in 1970 *U.S. Code Cong. & Ad. News* at 3603.

[56] 1970 *U.S. Code Cong. & Ad. News* at 3602.

[57] 489 F.2d at 1317.

[58] *Id.* at 1319, n.7.

award" an "act of state," and yet make a distinction between a "judgment on an arbitral award" and an "arbitral award" when it is unsure of the Curaçaoan terminology is difficult to reconcile. The court did not determine whether "the action on the arbitration award was merged in the Curaçaoan judgment,"[59] because it "would presumably be a matter of Curaçaoan law in the first instance."[60] No determination was made because the court did not know what the Curaçaoan law was on that topic. Similarly, the court was not sure of the full effect of the Curaçaoan "judgments" or the exact degree of their "finality."[61] Therefore, for the court to make an even finer distinction between an arbitration award and a judgment on an award was folly.

The intent of those enacting the Convention on Foreign Arbitral Awards was not to make fine distinctions but to facilitate and encourage doing business abroad.[62] Unencumbered access to the courts of different nations is a necessity to such encouragement. The entire trend of treaties between the Netherlands and the United States has been in this direction. Of those treaties still in force the oldest is the Convention for the Pacific Settlement of International Disputes.[63] It provides for arbitration when international disputes arise between the United States and the Netherlands. This agreement was expanded by two 1907 treaties, the Convention for the Pacific Settlement of International Disputes (1907)[64] and the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.[65] Under the latter treaty, arbitration was extended beyond disputes between two nations to include contract debts claimed by the nationals of one country against the government of the other.[66] This trend culminated in the Treaty of Friendship, Commerce and Navigation with the Netherlands,[67] which provides in part that:

> Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals

[59] *Id.* at 1318, n.4. *See* RESTATEMENT OF JUDGMENTS § 47 (1942). *See also* Pepper v. Bankers Life and Casualty Co., 414 F.2d 356 (8th Cir. 1969).

[60] 489 F.2d at 1318, n.4. *See* RESTATEMENT (SECOND) §§ 218, 187 (2), 188 (1971). *See also* Benton v. Singleton, 114 Ga. 548, 40 S.E. 811 (1902).

[61] 489 F.2d at 1323, n.9.

[62] 1970 *U.S. Code Cong. & Ad. News* at 3602.

[63] Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779 (1899), T.S. No. 392 (effective September 4, 1900).

[64] Convention for the Pacific Settlement of International Disputes, October 18, 1907, 36 Stat. 2199 (1907), T.S. No. 536 (effective January 26, 1910).

[65] Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, October 18, 1907, 36 Stat. 2241 (1907), T.S. No. 537 (effective January 26, 1910).

[66] *Id.* art. I at 2251.

[67] Treaty of Friendship, Commerce and Navigation with the Netherlands, March 27, 1956, [1957] 8 U.S.T. 2043, T.I.A.S. No. 3942 [hereinafter cited as Treaty of Friendship]. The Treaty applies to Curaçao. *See also* Bank Voor Handel En Scheepvaart, N.V. v. Kennedy, 288 F.2d 375 (1961); Hartman v. McNamara, 186 F. Supp. 293 (1960); Sohn, *International Tribunals: Past, Present, and Future*, 46 A.B.A.J. 23, 24 (1960).

> and agencies within the territories of the other Party, in all degrees of jurisdiction. . . .[68]

This "nationality clause" manifests a clear intent to facilitate court proceedings and broaden the jurisdiction of the courts of both nations.[69] Nowhere is a distinction made between an arbitration award and a judgment on an award. The Treaty of Friendship merely talks about "awards:"

> In conformity with subparagraphs (1) and (2) hereof, awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either party.[70]

In 1956 the Treaty of Friendship was a major step toward international cooperation in the recognition of another country's awards. This trend has been bolstered by subsequent treaties, such as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.[71] The Convention on Investment is inapplicable to the case at bar because its jurisdiction is limited to cases in which there is "mutual consent by the parties to submit . . . disputes to conciliation or arbitration through . . . facilities" established under the Convention.[72] Even so, the Convention on Investment states that once jurisdiction is established:

> Each Contracting State shall recognize an *award* rendered pursuant to this Convention as binding and *enforce the pecuniary obligations imposed by that award* within its territories *as if it were a final judgment* of a court in that State.[73] (emphasis added)

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[68] Treaty of Friendship, art. V, para. 1.

[69] The Treaty of Friendship broadens jurisdiction in article V, paragraph 2 as follows:
> Contracts entered into between nationals or companies of either Party and nationals or companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party.

[70] Treaty of Friendship, art. V, para. 2(b). Subparagraph (1) is the "nationality clause" cited in text accompanying note 68 *supra*. Subparagraph (2) is cited in note 69 *supra*. This same paragraph further provides that awards are enforceable in the United States subject to the common law limitations. The awards are enforceable in the Netherlands in the same way as awards referred to in the Convention on the Execution of Foreign Arbitral Awards. *See* Convention on the Execution of Foreign Arbitral Awards, 92 L.N.T.S. 301; accession by Curaçao on January 28, 1933, 130 L.N.T.S. 457. The United States has acceded to the Convention on the Execution of Foreign Arbitral Awards to the extent that it is incorporated in the Treaty of Friendship. Examination of both treaties reveals that any question of reciprocity is moot in the case at bar. The courts of the Netherlands appear to have a broad area in which they will recognize United States awards. *See also* notes 25 & 26 *supra*.

[71] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, August 27, 1965, [1966] 17 U.S.T. 1270, T.I.A.S. No. 6090 [hereinafter cited as the Convention on Investment]. This Convention is incorrectly cited in the case. 489 F.2d at 1317-18.

[72] Convention on Investment, art. 25.

[73] *Id.*, art. 54, para. 1.

The Convention on Investment further provides that:

> A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide *that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*[74] (emphasis added)

These two statements evince a tendency among nations to avoid making the type of distinction made by the court between an arbitration award and a judgment on an award. The court should have considered these factors before denying the applicability of the Convention on Foreign Arbitral Awards by means of such a distinction.

This case is the only case which has dealt with the Convention on Foreign Arbitral Awards, and Leonard Quigley has written the only article interpreting the Convention.[75] Quigley states that:

> The primary utility of the convention, of course, will arise when the practitioner seeks to enforce an award finally resulting from arbitration. . . . The whole thrust of the convention is to ease that path of enforcement. . . .[76]

In tracing the history of the Convention on Foreign Arbitral Awards, Quigley quotes the president of the 1958 conference as saying:

> . . . [I]t was already apparent that the document represented an improvement. . . . *It gave a wider definition to awards to which the Convention applied*; . . . [and] *it gave the parties greater freedom in the choice* of arbitral authority and *of the arbitration procedure.* . . .[77] (emphasis added)

The entire historical trend has been away from the distinction which the court made between an arbitration award and a judgment on an award. Once the Convention on the Recognition of Foreign Judgments in Civil and Commercial Matters[78] has been approved by the United States and the Netherlands,[79] this distinction will be forever eliminated. Article 2 of this Convention states specifically that:

> This Convention shall apply to all decisions given by the courts of a Contract-

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[74] *Id.*

[75] Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A.J. 821 (1972).

[76] *Id.* at 824.

[77] *Id.* at 821.

[78] *See The Extraordinary Session of the Hague Conference on Private International Law: Draft Convention on the Recognition of Foreign Judgments in Civil and Commercial Matters, opened for signature*, Mar. 17, 1969, 15 AM. J. COMP. L. 362 (1967). Text also in 5 INT'L LEGAL MAT'LS 636 (1966) [hereinafter cited as Draft Convention].

[79] Several leading authorities are not only advocating approval but also predicting it. *See* Nadelmann & von Mehren, *The Extraordinary Session of the Hague Conference on Private International Law*, 60 AM. J. INT'L L. 803 (1966); Nadelmann & Reese, *The Tenth Session of the Hague Conference on Private International Law*, 13 AM. J. COMP. L. 612 (1964). *But see*, von Mehren, *supra* note 10, at 43. *See generally*, Homburger, *Recognition and Enforcement of Foreign Judgments*, 18 AM. J. COMP. L. 367, 368, n.3, 394-95 (1970).

[80] Draft Convention, art. 2.

> ing State, irrespective of the name given by that state to the proceedings which gave rise to the decision *or of the name given to the decision itself such as judgment, order or writ of execution.*[80] (emphasis added)

Clearly, the court erred in creating a distinction which has never before been recognized in a treaty between the United States and the Netherlands. Such a distinction was contrary to the intent of those persons enacting the Convention on Foreign Arbitral Awards. This intent to facilitate confirmation of awards is evident in the history of treaties between the two countries and in the specific language used in the Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. International policy demands that American courts apply uniform rules to foreign nation judgments and that they do not continue to confuse foreign investors and courts by applying diverse state laws. Absent ratification of the Draft Convention, the court should have applied the Convention on Foreign Arbitral Awards. Unless American courts broaden their vistas, international commerce and investment will bypass the United States and shop for a more stable forum.

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