ENFORCEMENT OF FOREIGN ARBITRAL AWARDS—THE UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Sigval Bergesen, a Norwegian owner of three cargo vessels, and Joseph Muller Corporation, a Swiss company, entered into shipping contracts for the transportation of chemicals and propylene in 1969, 1970, and 1971.1 Each contract contained a clause providing for arbitration in New York in the event of dispute.2 In 1972, after disagreements arose while performing the 1970 and 1971 contracts, Bergesen made a demand for arbitration of his claims for demurrage, shifting and port expenses.3 Muller denied liability and asserted counterclaims.4 A panel of arbitrators in New York held hearings and rendered a written decision in favor of Bergesen on December 14, 1978.5

Bergesen initially sought enforcement of the award in Switzerland; however, Muller successfully resisted enforcement for more than two years.6 On December 10, 1981, shortly before expiration of the applicable statute of limitations,7 Bergesen filed a petition in the United States District Court for the Southern District of New York to confirm the award under provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.8 Muller contended that the Convention could not pro-

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2 Bergesen, 710 F.2d at 929. There is no dispute that the contracts contained enforceable arbitration clauses. Bergesen, 548 F. Supp. at 651.
3 Bergesen, 710 F.2d at 929-30.
4 Id. at 930. The panel rejected all of Muller's counterclaims except one. The net award to Bergesen was $61,406.09 with interest. Id.
5 Id. The initial panel of arbitrators chosen by the parties was dissolved because of Muller's objections, and a second panel was selected through the offices of the American Arbitration Association. Id.
6 Id. at 930. Muller resisted the Swiss action on grounds that the arbitration did not fall within the Convention and that, to be enforceable as a judgment in Switzerland, the award had to be confirmed under the New York Civil Practice Law and Rules § 7150. Bergesen, 548 F. Supp. at 651-52.
7 The statute of limitations had a three year length. 9 U.S.C. § 207 (1976).
vide a basis for enforcement in the United States of an award rendered in the United States because such an award would not come within the Convention's definition of a "foreign" award. The district court rejected Muller's argument, however, and confirmed Bergesen's award holding that the Convention applied to arbitral awards rendered in the United States where foreign interests were involved. On appeal held: affirmed. An arbitral award pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the United States is a foreign award under the Convention and may be enforced in the United States. Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983).

Prior to the formulation of international agreements concerning foreign arbitral awards, enforcement of such awards was governed by the domestic law of the country where enforcement was sought. Attitudes toward enforcement of foreign arbitral awards varied from state to state, however, so that enforcement under this system was often unpredictable. This uncertainty diminished the use of arbitration in international trade. Two early international agreements dealing with commercial arbitration proved unworkable, largely because they were unsuccessful in increasing predictability of enforcement. Thus, a United Nations conference met in

U.N. Conv., supra note 8, art. I(1). This definition of scope has been characterized as "one of the most controversial clauses in the Convention." Contini, International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 8 AM. J. COMP. L. 283, 292 (1959).

Id. at 736. Traditionally the laws of most countries have distinguished between foreign and domestic awards. Awards regarded as foreign were often discriminated against. Id. at 739.

Id. at 736.

The two earlier treaties were the Geneva Protocol on Arbitration Clauses, Sept. 24 1923, 27 L.N.T.S. 157 and the Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301. For a discussion of the exact nature of the problems with these treaties, see Contini, supra note 9, at 288-90; Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of
New York in 1958 in an attempt to provide dependable uniform standards to govern international arbitration.\(^1\)

The conference was convened to draft a convention which would apply solely to “foreign” arbitral awards; however, the delegates were sharply split over what was to be considered a “foreign” award.\(^1\) The original draft provided that the Convention would apply only to the recognition and enforcement of awards rendered in a country other than that where enforcement was sought.\(^1\)

Under this territorial criterion, the nationality of an award would be determined exclusively by the place where it was rendered.\(^1\) The Western Europeans\(^1\) objected to this proposal arguing that other factors, such as the nationality of the parties, the object of the dispute, and the rules of arbitral procedure, should also be considered.\(^1\)

In response to these objections, eight European countries\(^1\) pro-

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To a large extent the conference was successful; as a result, the use of arbitration to resolve disputes has risen sharply in the last two decades. See generally Haight, International Arbitration, 14 Case W. Res. Int’l L.J. 253 (1982). As just one indication, the number of cases heard by the Court of Arbitration of the International Chamber of Commerce has risen from 32 in 1956 to 188 in 1976 and now averages around 250 annually. Id. See also Aksen, International Arbitration—Its Time Has Arrived!, 14 Case W. Res. Int’l L.J. 247 (1982); Harnik, Recognition and Enforcement of Foreign Arbitral Awards, 31 Am. J. Comp. L. 703 (1983).

Contini, supra note 9, at 292. The conference was split roughly between the countries of Western Europe on one side, and the common law, Latin American, and Eastern European countries on the other. Id.

Id.

See id. at 292; McMahon, supra note 8, at 740.

The Western European group was composed of the delegates of Italy, West Germany, France, and Turkey. Contini, supra note 9, at 292.

Id. These countries argued that the place where an award is made is often chosen merely as a matter of convenience and, where arbitration takes place by correspondence, it may be impossible to establish where an award was rendered. In addition, they pointed out that in some countries, such as France and Germany, the nationality of an arbitral award depends on the law governing the procedure. For example, an arbitral award rendered in London under German law is considered a domestic award in Germany, and an award rendered in Paris under foreign law is considered a foreign award in France. Id. See also McMahon, supra note 8, at 740; S. Exec. Doc. E, 90th Cong., 2d Sess. 18 (1968). Arguably, therefore, in states where this system prevails, the Convention should not mandate that all awards rendered abroad be regarded as foreign. Contini, supra note 9, at 292.

Austria, Belgium, Federal Republic of Germany, France, Italy, Netherlands, Sweden, and Switzerland. Contini, supra note 9, at 292 n.41.
posed that the Convention apply to awards "other than those con-
sidered as domestic in the country where enforcement is sought." This standard was strongly opposed, however, by a third group of
countries which included the United States. The third group of
countries was concerned that the "not considered as domestic" cri-
terion was vague and, therefore, would not lend itself to uniform
enforcement. They were particularly concerned that the standard
would be misunderstood and improperly applied by common law
nations; thus, they argued in favor of the territorial criterion ini-
tially proposed, because it provided a standard which could be ap-
plied with absolute uniformity.

The dispute was subsequently referred to a Working Party which formulated the compromise provision ultimately adopted in the Convention. In its final form, the Convention applies both to awards rendered in a country other than the country where en-
forcement is sought and to awards "not considered as domestic" in
the state where enforcement is sought. In addition to this state-

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22 Id. at 292-93.
23 The proposal was also opposed by Israel, the United Kingdom, El Salvador, Argentina, Colombia, Guatemala, and Japan. Id. at 293.
24 Id. These countries argued that while the territorial criterion was clear, the "not con-
sidered as domestic" test was susceptible to different interpretations and would not give the business world any certainty as to which awards would be covered by the Convention. Id.
25 Id. Under the law of common law nations, the place where the award is rendered is the
only criterion which determines whether an award is foreign or domestic. McMahon, supra note 8, at 740.
26 Contini, supra note 9, at 293.
27 The Working Party was composed of delegates from Colombia, Czechoslovakia, France, West Germany, India, Israel, Italy, Turkey, the USSR, and the United Kingdom. Id. at 293 n.44.
28 Id. The text proposed by the Working Party was adopted by the conference as the first
paragraph of article I of the Convention. For the text of this provision, see supra note 9.
29 Contini, supra note 9, at 293. The members of the Working Party representing the position of the Western European group agreed to this solution on the understanding that states would be permitted to exclude certain categories of awards rendered abroad from the application of the Convention. The conference ultimately decided not to permit these exclu-
sions. Thus, while the apparent intent of the Working Party was to restrict the territorial
principle, the final action taken by the conference had the opposite result of expanding the
Convention's coverage. Id. But see Gaja who argues that while at first glance "the award
must possess only a negative quality: either it is not made in the territory of the State where
recognition or enforcement are or it is not considered as a domestic award by the law of the
same state," there is a limit on this test in that in order to qualify the award must be made
under foreign municipal law. 1 G. GAJA, INTERNATIONAL COMMERCIAL ARBITRATION: NEW
YORK CONVENTION § I.A.3 (1984). According to Gaja, "no obligation exists under the Con-
vention to recognize awards if they were not made under a foreign municipal law, even if
they were made in the territory of a foreign state or were not considered as domestic
awards." Id.
ment of the Convention's coverage, the Convention contains two optional reservations which potentially limit its scope. One reservation provides that a signatory country may, on the basis of reciprocity, declare that it will apply the Convention only to awards rendered in the territory of another contracting state. The other regulation provides that the Convention will apply only to differences arising out of legal relationships considered as commercial under the state's national law. The United States elected to adopt both reservations when it acceded to the Convention.

The United States did not sign the Convention at the close of the conference in 1958. In fact, the United States did not approve

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50 The two reservations are set forth in article I(3) of the Convention which states: When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any state may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration. U.N. Conv., supra note 8, art. I(3). The conference rejected a number of other proposed reservations which would have excluded awards rendered abroad but considered as domestic in certain countries and awards relating to disputes having no clear international connection. Contini, supra note 9, at 295.

There are other limitations to a court's ability to hear a dispute under the Convention. For example, the subject matter of the award must be capable of settlement by arbitration under the law of the country. Also, the recognition or enforcement of the award must not be contrary to the public policy of that country. A discussion of the limitations, however, is outside the scope of this recent development. See generally U.N. Conv. art. V(2)(a)-(b); Comment, International Commercial Arbitration: The Nonarbitrable Subject Matter Defense, 9 Denv. J. Int'l L. & Pol. 119 (1980); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); McMahon, supra note 8, at 753 n.83.

51 U.N. Conv., supra note 8, art. I(3). Some commentators interpret this reservation as operating only to limit the territorial criterion set forth in article I(1) by carving out awards rendered in the territory of a state not a party to the Convention. On the other hand, there is some indication that this reservation was meant to affect the "not considered as domestic" criterion set forth in the second sentence of article I(1). This latter interpretation would give a country such as France or Germany, which considers an award rendered within its territory to be foreign if governed by foreign procedural law, the right to treat such awards as outside the scope of the Convention, unless other contracting states treated such awards as foreign for purposes of the Convention. McMahon, supra note 8, at 741 n.29.

52 U.N. Conv., supra note 8, art. I(3).

53 Mirabito, supra note 15, at 489.

54 The United States delegation to the Convention recommended that the United States not accede to the Convention for two reasons: 1) adherence to the Convention would confer no real benefits on the United States, and 2) the Convention would conflict with many state arbitration laws. The delegation also argued that commercial arbitration did not lie within the traditional treaty power of the United States. Mirabito, supra note 15, at 486. The then current Bricker Amendment problems and a now antiquated distrust of arbitration caused the United States to be an unenthusiastic and largely inactive participant in the Conven-
the Convention until 1968, and accession was delayed until 1970 to allow for passage of the necessary implementing legislation. This domestic legislation defines the scope of the Convention in completely different terms from those employed by the Convention. Rather than affirmatively stating that the Convention will apply when the territorial or the "not considered as domestic" tests are satisfied, the legislation appears instead to set forth circumstances under which the Convention will not apply. It provides that an agreement or award arising out of a relationship which is entirely between citizens of the United States will not be governed by the Convention unless the relationship involves property located abroad, envisages performance or enforcement abroad, or has some "reasonable relation" with a foreign state. Even though the legislation does not use the language of the Convention, some commentators have interpreted this provision as defining when an award will "not be considered domestic" and thus will be enforceable under the Convention in United States courts. Others argue that

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Mirabito, supra note 15, at 486.

Compare U.N. Conv., supra note 8, at 487. In 1968, President Johnson urged the Senate to recommend accession to the Convention. The President's letter of transmittal recommended that United States accession should occur only after passage of domestic legislation implementing the Convention. On October 4, 1968, the Senate consented to accession by a 57-0 vote. The supplemental legislation was in the form of a bill adding a new chapter 2 to the Federal Arbitration Act of 1925. Id. See infra note 50.

The legislation provides:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in section 2 of this title falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states . . .


Id. One commentator argued that this language is troublesome as "the nationality of the parties to the agreement or the subject-matter of the dispute would not be pertinent considerations in determining whether the agreement falls under the Convention." A.J. Van Den Berg, The New York Arbitration Convention of 1958 18 (1981).

One commentator states that section 202 of the implementing legislation may be construed to provide that awards rendered in the United States, other than those between citizens of the United States involving strictly domestic matters, are "not considered as domestic" awards and hence fall under the Convention. He questions, however, whether such an interpretation is correct. McMahon, supra note 8, at 740-43. See also Pisar, The United Nations Convention on Foreign Arbitral Awards, 33 S. Cal. L. Rev. 14, 18 (1959). Pisar
the "not considered as domestic" standard was not intended to be applied in the United States and that awards rendered in the United States are, therefore, not enforceable under the Convention.\footnote{40}

While the United States Supreme Court has not specifically decided this issue, the Court commented generally on the Convention in Scherk v. Alberto-Culver Co.\footnote{41} Scherk involved a contract between a United States company and a German citizen which provided for arbitration in Paris of any disputes.\footnote{42} Although the Court's decision to enforce the arbitration clause was not primarily based on the Convention, the Court cited the Convention as evidence of congressional policy in favor of enforcing arbitral awards whenever possible.\footnote{43} The Court stated that the goal and principal underlying purpose of the Convention is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which such agreements are observed and enforced.\footnote{44}

Although the Court in Scherk was not directly confronted with the question of whether awards rendered in the United States are enforceable in the United States under the Convention, lower federal courts have had several opportunities to decide the issue.\footnote{45} Two district courts reached divergent conclusions and provided little analysis. In Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co., A.G.,\footnote{46} a suit between two foreign corporations to confirm an arbitration award rendered in New York, the court simply

\footnote{40} M. Domke, The Law and Practice of Commercial Arbitration 369-71 (1968). For the view that traditional United States law has looked to the place where an award is rendered as the only criterion for determining whether an arbitral award is foreign or domestic, see McMahon, supra note 8, at 740. Dr. van den Berg goes further and argues that the Convention never applies to the enforcement of an arbitral award which is rendered in the country in which enforcement of such award is sought because such an award would be a domestic award. Supra note 38, at 19.

\footnote{41} 417 U.S. 506 (1974).

\footnote{42} Id. at 508.

\footnote{43} Id. at 520 n.15.

\footnote{44} Id. The Court also noted that the delegates to the Convention were concerned that courts of signatory nations might refuse enforcement of an award under the Convention based on parochial views of the desirability of the award. Id.

\footnote{45} The Court in Scherk instead enforced the award under the Federal Arbitration Act of 1925 which applies to domestic awards. Id.

stated that jurisdiction was based on the Convention. On the other hand, in *Diapulse Corp. of America v. Carba, Ltd.*, a suit between a Delaware corporation and a Swiss corporation involving modification of an arbitral award also rendered in New York, the court stated that the Convention did not apply "by its terms."

The appellate courts have also avoided the issue, choosing instead to base decisions on the Federal Arbitration Act of 1925 which covers domestic arbitration. The Second Circuit Court of Appeals in *I/S Stauberg v. National Metal Converters, Inc.* only addressed the issue of whether the district court had jurisdiction to enter judgment on an arbitral award under the Federal Arbitration Act of 1925 when the parties did not explicitly agree to such jurisdiction in the arbitration agreement. The court found that the district court had jurisdiction under the Federal Arbitration Act; thus, it refused to consider an alternative argument that jurisdiction would be proper under the Convention.

The same court again had the opportunity to decide the issue in *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, a suit between two foreign parties involving the enforcement in federal district court of an award rendered in New York. Marc Rich argued that although the suit was between two foreign parties, the award had been rendered in New York and should be considered domestic; thus, it was removed from the scope of the Convention. Andros, on the other hand, argued that the Convention should apply based on the language of the implementing legislation. While

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48 *No. 78 Cir. 3263* (S.D.N.Y. 1979), *remanded on other grounds*, 626 F.2d 1108 (2d Cir. 1980).

49 *Id.*

50 9 U.S.C. §§ 1-13 (1976). All provisions of the Federal Arbitration Act are applicable to actions under the 1970 legislation which implements the Convention to the extent the earlier act does not conflict with the later act or with the Convention. *Mirabito, supra* note 15, at 492.

51 500 F.2d 424 (2d Cir. 1974).

52 *Id.* at 425.

53 *Id.* at 425-26.

54 579 F.2d 691 (2d Cir. 1978).

55 *Id.*

56 *Id.* at 699 n.11. Marc Rich argued that the award fell under the Federal Arbitration Act of 1925 instead of the Convention. *Id.*

57 *Id.* Andros relied specifically on 9 U.S.C. § 202 which broadly restates the scope of the
the court found the dispute to be “intriguing,” it again refused to resolve it.\textsuperscript{58} The court justified its refusal by stating that regardless of whether the Convention was applicable, the award would be confirmed because the Convention’s grounds for vacating awards were no more liberal than those of the Federal Arbitration Act.\textsuperscript{59} Thus, it was not until *Bergesen v. Joseph Muller Corp.* that the Second Circuit faced the issue. In *Bergeson*, the court did not have the option of falling back on the Federal Arbitration Act of 1925 because the statute of limitations under that Act had expired.\textsuperscript{60}

To arrive at the conclusion that the Convention does allow enforcement in United States courts of an award rendered in the United States, the *Bergesen* court looked first to the history of the Convention.\textsuperscript{61} The court noted that although the Working Party had originally hoped to restrict the scope of the Convention, the inclusion of both the territorial and the “not considered as domestic” standards had the ultimate effect of greatly expanding the Convention’s coverage.\textsuperscript{62} Relying on the Supreme Court’s statement in *Scherk* that the purpose of the Convention was to encourage recognition and enforcement of foreign arbitral awards, the court concluded that the Convention’s provisions should be broadly construed to allow recognition and enforcement whenever possible.\textsuperscript{63} Accordingly, the court interpreted the Working Party’s

\textsuperscript{58} *Id.*

\textsuperscript{59} *Id.*

\textsuperscript{60} *Id.* The court reasoned that if the Convention applies, “a request for confirmation of an arbitral award must be granted unless one of the Convention’s grounds for refusal or deferral of recognition or enforcement of the award” set forth in section 207 of the implementing legislation appears. Noting that these grounds for refusal were to be construed narrowly, the court concluded that the Convention was “no more liberal than [the 1925 Act] on the matter of vacating awards.” Thus, “resort to the Convention would not alter the result” of the case. *Id.*

\textsuperscript{61} Under both the Federal Arbitration Act of 1925 and the 1970 legislation implementing the Convention, a motion to confirm an arbitration award must be made within one year of the award. 9 U.S.C. § 9 (1976). The implementing legislation, however, permits an application to a court having jurisdiction for an order of confirmation “within three years after an arbitral award falling under the Convention is made . . . .” 9 U.S.C. § 207 (1976). *Bergesen* sought enforcement under section 207 because the one year time limit had expired. *Bergesen*, 548 F. Supp. at 652.

\textsuperscript{62} *Bergesen*, 710 F.2d at 930.

\textsuperscript{63} See *id.* at 931. The court stated that under the Working Party’s compromise provision, “the Convention applies to all arbitral awards rendered in a country other than the state of enforcement, whether or not such awards may be regarded as domestic in that state.” The court then emphasized that the Convention “also applies to all awards not considered as domestic in the state of enforcement, whether or not any of such awards may have been rendered in the territory of that state.” *Id.* See also *Contini*, supra note 9, at 293-94.

\textsuperscript{64} *Bergesen*, 710 F.2d at 932. The court explicitly adopted “the view that awards ‘not
compromise provision to cover both awards rendered outside a state's territory as well as awards rendered within a state's territory which are "not considered as domestic" in that state. The court emphasized that the territorial criterion would operate to include all awards rendered abroad, even if some of those awards were considered domestic in the state of enforcement. The court also stressed that the "not considered as domestic" test would encompass awards rendered within the territory of the state of enforcement so long as the awards were considered nondomestic.

With this interpretive framework established, the court rejected the defendant's arguments for a narrow interpretation of the Convention. The defendant argued that the "not considered as domestic" test was intended to apply only to awards otherwise unenforceable in the territory where rendered due to the presence of some foreign component. The defendant also argued that because the United States adopted both reservations when it acceded to the Convention, Congress intended that the Convention be given a narrow construction. Finally, the defendant argued that the legislation implementing the Convention was not intended to apply to awards rendered within the United States.

Relying on Scherk, the court rejected each of the defendant's arguments as contrary to the Convention's purpose of encouraging enforcement of foreign awards. In particular, the Bergesen decision considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country. The court clarified this statement by listing awards "pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdictions" as awards which would fall within this definition. 

Bergesen, 710 F.2d at 931. But see Commentary Volume VII, 1982 Y.B. COMM. ARB. 291 (expressing the view that the Convention does not apply to the enforcement of an arbitral award rendered in the country where enforcement is sought).

Id. This result is in direct conflict with the Working Party's original intent to restrict the territorial criterion. See infra notes 77-78 and accompanying text.

Bergesen, 710 F.2d at 931.

Id. at 932. The defendant argued that "the purpose of the 'not considered as domestic' test was to provide for the enforcement of . . . 'stateless awards,' i.e., those rendered in the territory where enforcement is sought but considered unenforceable because of some foreign component." The court rejected this argument on the grounds that "some countries favoring the provision" did so "to preclude the enforcement of certain awards rendered abroad, not to enhance enforcement of awards rendered domestically." Id.

Id.

Id. at 933.

Id. at 932-33. Scherk, 417 U.S. at 520 n.15. The court also relied on Parsons & Whittemore Overseas Co. v. Société Generale de L'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974)
sion stated that although the reservations narrowed the scope of the Convention somewhat, its provisions should nevertheless be interpreted broadly.\textsuperscript{71} The opinion also emphasized that the legislation specifically defines which awards are "not considered as domestic," evidencing Congress' intent that such awards be enforceable in United States courts.\textsuperscript{72} The court found further support for its view of Congress' intent from sections of the implementing legislation which provide for jurisdiction and venue in disputes between two aliens.\textsuperscript{73} Thus, the Bergesen court concluded that, contrary to the narrow constructions urged by the defendant, the Supreme Court's interpretation of the Convention and the implementing legislation support enforcement of an award rendered between two aliens.\textsuperscript{74}

Although the court in Bergesen purported to base its expansive interpretation of the "not considered as domestic" clause partly on an analysis of the Convention's history, the court's interpretation and application seem inconsistent with discussions of the provision

where the court held that the public policy defense to enforcement of awards under the Convention should be construed narrowly. \textit{Id.} at 974.

\textsuperscript{71} \textit{Bergesen}, 710 F.2d at 933.

\textsuperscript{72} \textit{Id.} The court adopted the view that the Convention left each state free "to define which awards were to be considered nondomestic." See Pisar, supra note 39, at 18. The court reasoned that "[h]ad Congress desired to exclude arbitral awards involving two foreign parties rendered within the United States from enforcement" in United States courts, it would have spelled this out in its "definition" of nondomestic awards in section 202 of the implementing legislation. \textit{Id.} See also Sumitomo Corp. v. Parakopi Compania Maritima, 477 F. Supp. 737, 741 (S.D.N.Y. 1979), aff'd mem., 620 F.2d 286 (2d Cir. 1980).

\textsuperscript{73} \textit{Bergesen}, 710 F.2d at 933. Section 203 of the implementing legislation has been held to provide "jurisdiction for disputes involving two aliens." See also Sumitomo Corp., 477 F. Supp. at 740-41. Section 203 provides: "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203 (1976). The district court in Sumitomo reasoned that to hold that subject matter jurisdiction was lacking where all parties involved were foreign entities would frustrate the Convention's goal of encouraging the recognition and enforcement of foreign arbitral awards. Sumitomo Corp., 477 F. Supp. at 741. See also Scherk, 417 U.S. at 520 n.15. In addition to jurisdiction, the Bergesen court found that section 204 provides venue for an action between two aliens. \textit{Bergesen}, 710 F.2d at 933. The court also referred to section 206 of the legislation which provides: "[a] court having jurisdiction under this chapter may direct that arbitration be held . . . at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206 (1976). The court stated that "[i]t would be anomalous to hold that a district court could direct two aliens to [arbitrate] within the United States under the statute, but that it could not enforce the resulting award under the legislation . . . ." \textit{Bergesen}, 710 F.2d at 933.

\textsuperscript{74} \textit{Bergesen}, 710 F.2d at 932-34.
during negotiations for the Convention. The "not considered as domestic" provision was initially proposed as an attempt to satisfy Western European nations that considered certain awards to be domestic even though rendered abroad. The proposal was intended to serve as an alternative to and limitation on the territorial standard so that those countries could avoid enforcing such awards. In contrast, the Bergesen court invoked the "not considered as domestic" test to reach the opposite result of enforcing awards rendered domestically.

The Bergesen court's expansion of the "not considered as domestic" test is particularly surprising in light of the United States delegates' opposition to the provision at the Convention. This opposition was such that when both the territorial and the "not considered as domestic" tests were adopted in the Convention, at least one commentator doubted whether the United States would ever apply the latter. While the Bergesen court acknowledged the United States delegates' opposition to the provision, it nevertheless rejected the defendant's argument that the provision was not intended to be applied in the United States. Thus, the court not only expanded the application of the "not considered as domestic" test, but also ignored traditional United States hostility toward the

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75 Id. at 930. The court discusses the history of the Convention at length, yet does not seem to consider the history as controlling its decision. Instead, the court bases its decision almost entirely on the Supreme Court's comments on the Convention in Scherk. See id. at 932-33.

76 See supra note 20 and accompanying text.

77 Contini, supra note 9, at 293.

78 Bergesen, 710 F.2d at 932-33. While the court acknowledges that the original purpose of the "not considered as domestic" criterion was to restrict the territorial concept, it nevertheless adopts a literal reading of the compromise provision provided by the Working Party. Id. at 931.

79 See supra notes 23-25 and accompanying text. The Bergesen court acknowledged the United States delegates' opposition to the provision; however, the court did not consider this opposition in reaching its decision that the provision should be applied within the United States. Bergesen, 710 F.2d at 931. It is interesting to note that in another recent decision involving international commercial arbitration, the Ninth Circuit adopted a narrow construction of the language in the arbitration agreement. Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458 (9th Cir. 1983). The case involved an agreement between a California corporation and a Korean contractor which provided for arbitration of "any disputes arising hereunder." The court held that this clause was narrow and evidenced an agreement to arbitrate only those disputes which arose directly out of the contract itself. Id.

80 McMahon, supra note 8, at 740. McMahon states that the negotiating history of the Convention "does not indicate that a country such as the United States, which considered awards as foreign only if rendered abroad, was expected to apply the "not considered as domestic" criterion. See generally M. Domke, supra note 40, at 369-71.

81 Bergesen, 710 F.2d at 933.
provision.\textsuperscript{83} On the other hand, the court's decision to enforce an award rendered in the United States under the "not considered as domestic" criterion is not inconsistent with the legislation implementing the Convention in the United States.\textsuperscript{83} The legislation states that an agreement arising out of a relationship which is entirely between citizens of the United States is not enforceable under the Convention unless it bears some "reasonable relation" to a foreign state.\textsuperscript{84} This section of the legislation has been interpreted as "providing that awards rendered in the United States, other than those between citizens of the United States in strictly domestic matters are 'not considered as domestic'" and are, therefore, enforceable under the Convention.\textsuperscript{85} The Bergesen court similarly concluded that the provision defines which awards are "not considered as domestic" in the United States.\textsuperscript{86} Applying this definition, the court reasoned that because Congress did not specifically exclude an award rendered between two aliens from the scope of the Convention in the provision, Congress intended that such an award be considered "nondomestic" and, thus, enforceable under the Convention.\textsuperscript{87} While Congress never specifically states that it is defining the "not considered as domestic" criterion, the court's interpretation effectuates congressional intent regarding the scope of the Convention.\textsuperscript{88} The legislative history of the provision indicates that Congress intended to ensure that awards between United States citizens would be excluded from the Convention's coverage where no foreign contacts were involved.\textsuperscript{89} Neither the language of the statute nor the legislative history indicate an intent that other awards rendered in the United States be unenforceable under the Convention.\textsuperscript{90}

\textsuperscript{83} See supra notes 75-80 and accompanying text.
\textsuperscript{85} For the text of this provision of the legislation, see supra note 37.
\textsuperscript{86} McMahon, supra note 8, at 740.
\textsuperscript{87} Bergesen, 710 F.2d at 933. See supra note 72.
\textsuperscript{88} Bergesen, 710 F.2d at 933.
\textsuperscript{90} The legislative history of section 202 indicates that it was intended to ensure that an award arising out of a relationship exclusively between citizens of the United States is not enforceable in United States courts unless it has a "reasonable relation with a foreign state." H.R. Rep. No. 1181, supra note 83.
\textsuperscript{91} The legislation only excludes awards rendered "entirely between citizens of the United States." 9 U.S.C. § 202 (1976). But see McMahon, supra note 8, at 740-43. McMahon ini-
Regardless of whether the court’s decision is consistent with the United States delegates’ position at the Convention or with the United States implementing legislation, its broad interpretation of the Convention's scope has several beneficial aspects. First, the court’s broad interpretation furthers the Convention’s underlying purpose of increasing the enforcement of foreign arbitral awards. The decision serves this purpose by adding awards rendered within the United States but “not considered as domestic” as another category of awards which may be enforced under the Convention. Thus, the overall instances of enforcement of foreign awards will increase. This increased enforcement is most readily apparent in cases such as Bergesen where the Convention provides a forum for enforcement of an award which was otherwise unenforceable.

Second, the court’s broad interpretation of the Convention’s scope encourages arbitration as an alternative to litigation. To the extent that the decision allows for increased enforcement of foreign arbitral awards, it provides an incentive for parties to place arbitration clauses in international contracts because of the increased certainty that any resulting awards will be enforced. The initially notes that the language of section 202 supports the interpretation that all “awards rendered in the United States, other than those between citizens of the United States in strictly domestic matters, are not considered as domestic awards’ and, hence, fall under the Convention.” Id. at 740. McMahon asserts however, that the legislative history supports the argument that this construction is too broad. The legislative history demonstrates “that the Act was not meant to broaden Federal authority nor apply to interstate commerce” but is limited to arbitrations arising out of foreign commerce. Id. at 742. McMahon reasons that the above construction would allow enforcement in the United States of “all awards rendered in the United States between a United States citizen and a foreign national regardless of whether the dispute arose out of interstate commerce.” Id. at 742-43. Not every transaction involving a foreign national is considered as being in foreign commerce, thus the Act would infringe on the traditional jurisdiction of state courts if given the broad construction suggested by its language. Id. at 743.

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91 See Scherk, 417 U.S. at 520 n.15.
92 Bergesen, 710 F.2d at 931.
93 See id. at 932.
94 See supra note 60 and accompanying text. This assumes that Muller could continue to successfully resist enforcement in Swiss courts. See supra note 6 and accompanying text.
95 See McMahon, supra note 8, at 735. “Arbitration is speedier, more efficient and economical, and better suited to the settlement of disputes involving parties of diverse nationalities” than is litigation. See generally Mirabito, supra note 15, at 471; Bagner, Enforcement of International Commercial Contracts by Arbitration: Recent Developments, 14 Case W. Res. L.S'l. 573 (1982); Aksen, supra note 15; Haight, supra note 15.
96 See McMahon, supra note 8, at 735. McMahon asserts that arbitration has advantages over litigation “only so long as specific performance of an agreement to arbitrate will be readily ordered and arbitral awards receive the benefit of summary enforcement proceedings. . . .” Id.
decision, therefore, benefits international businessmen by increasing the extent to which they may rely on binding arbitration and by decreasing the need to anticipate the expense and inconvenience of possible litigation in planning international transactions.97

Third, under the Convention's reciprocity provisions, the court's decision will enable United States businessmen to demand enforcement of awards rendered abroad which are "not considered as domestic" in the countries where rendered.98 Had the Bergesen court decided not to apply the Convention to awards rendered within the United States, other contracting nations could similarly refuse to enforce awards between United States citizens rendered within their territory on the basis of lack of reciprocity.99 These countries could legitimately refuse enforcement of such awards under the Convention even though they did not consider the awards to be "domestic."100 Under the court's decision, however, other contracting nations are obligated to enforce awards between United States citizens rendered within their territory based on the Convention's reciprocity provisions.101

Finally, the court's broad interpretation provides a fair result between the parties in Bergesen. The parties agreed in advance to binding arbitration and, after such arbitration had taken place, one party sought to avoid its enforcement.102 Had the Bergesen court refused to allow enforcement of the award in the United States, this avoidance scheme probably would have been successful because no other forum for enforcement existed.103 Thus, the court's decision carries out the initial agreement of the parties by prevent-

97 See McMahon, supra note 8, at 735; see also Mirabito, supra note 15, at 471.
98 See McMahon, supra note 8, at 741-42. The Convention incorporates the principle of reciprocity in two separate provisions. The first reference to reciprocity appears in the first reservation of article I(3). See supra note 30. In addition, article XIV incorporates a general principle of reciprocity: "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." U.N. Conv., supra note 8, art. XIV.
99 McMahon, supra note 8, at 741.
100 Id. at 741 n.29.
101 See supra note 98.
102 Bergesen, 710 F.2d at 930. See supra note 6 and accompanying text.
103 Bergesen, 548 F. Supp. at 651-52. The only other forum for enforcement of the award was Switzerland; however, the award was unlikely to be enforced in Switzerland because the Swiss court apparently agreed with Muller that confirmation of the award in New York was a condition precedent to obtaining an enforceable judgement on the award in Switzerland. Id.
ing one party from wrongfully avoiding its effects.\textsuperscript{104}

Despite these beneficial aspects, a major drawback of the decision is the court's failure to precisely delimit the parameters of its holding.\textsuperscript{106} The court defined the "not considered as domestic" criterion to encompass awards pronounced under foreign law or involving parties domiciled or having their principal place of business abroad.\textsuperscript{108} The court then stated that an award rendered between two aliens comes within this definition.\textsuperscript{107} It is not clear from the court's decision, however, whether other combinations of aliens and United States citizens involved in arbitration will fall within the definition.\textsuperscript{108} In particular, it is unclear whether the "not considered as domestic" criterion applies to an award rendered between an alien and a United States citizen.\textsuperscript{109} The implementing legislation states that an award arising out of a relationship which is entirely between United States citizens shall not be deemed to fall under the Convention.\textsuperscript{110} This statement seems to imply that as long as both parties are not United States citizens, an award will "not be considered as domestic" in the United States.\textsuperscript{111} The court reasons that because Congress did not specifically exclude an award between two aliens, such an award is "not considered as domestic" and is thus enforceable.\textsuperscript{112} Under such reasoning, an award rendered between a United States citizen and an alien would also be "not considered as domestic" because it was not specifically excluded by Congress from the Convention's scope.\textsuperscript{113} The court, however, seems to limit its decision to a situation involving two alien parties; thus, all that is clear from the opinion is that an award between two aliens or an award rendered in accordance with foreign law is "not considered as domestic" in

\textsuperscript{104} See Bergesen, 710 F.2d at 932-34.
\textsuperscript{106} The court emphasized that an award arising out of a dispute between two aliens is enforceable in the United States under the Convention. Id. at 932. The court also stated that awards rendered in accordance with foreign law or involving parties having their principal place of business outside the United States will be enforceable under the Convention. Id. The court did not make clear, however, whether it adopted the view that all awards other than those exclusively between United States citizens involving purely domestic matters are enforceable under the Convention. See supra note 90.
\textsuperscript{108} Bergesen, 710 F.2d at 932.
\textsuperscript{107} Id.
\textsuperscript{109} See supra note 105.
\textsuperscript{110} Id.
\textsuperscript{111} See supra note 108.
\textsuperscript{112} Bergesen, 710 F.2d at 933.
\textsuperscript{113} See McMahon, supra note 8, at 740.
\textsuperscript{111} See McMahon, supra note 8, at 740.
the United States.

The Bergesen case marks the first time a circuit court has directly addressed the issue of the applicability of the Convention. Although the opinion is somewhat at odds with history\textsuperscript{114} and is lacking in precision,\textsuperscript{115} it is a tremendous step forward in resolving some of the questions surrounding the enforcement of foreign arbitration awards. Whether the courts in future cases will again fall back on the Federal Arbitration Act of 1925 whenever possible, however, or whether future decisions will continue to delineate the scope of the Convention, remains to be seen.

\textit{Susan P. Brown}

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\textsuperscript{114} See \textit{supra} notes 75-82 and accompanying text.

\textsuperscript{115} See \textit{supra} notes 105-113 and accompanying text.