THE UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE FIRST FOUR YEARS

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I. INTRODUCTION

As international trade has rapidly expanded in recent years, there has been a simultaneous increase in the number of disputes arising from additional commercial contacts across national borders. The legal, economic, and technical problems in bringing a suit abroad, obtaining evidence, getting a judgment, and enforcing that judgment are numerous. It is logical then that businessmen have turned to another method, commercial arbitration, to settle disputes among themselves. Arbitration has the advantages of being economical, expeditious, informal, and impartial.¹ In many cases, the arbitrators, who are generally chosen by the parties to the dispute, have expertise in the particular business the dispute involves.² Of course, once having obtained the arbitration of a commercial dispute, the problem of getting the arbitral award enforced within the judicial system still exists.

The purpose of this paper is to examine the various legal regimes in force that facilitate this enforcement and especially to consider the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,³ recently adopted by the United States, and its effects upon the enforcement of foreign arbitral awards.


¹ For a look at the advantage arbitration could provide over adjudication by some not-so-impartial courts see Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892 (S.D.N.Y. 1968).

² While Secretary of Commerce, Herbert Hoover stated that "[n]ot only does this trade machinery relieve the congestion in the courts, but it relieves the taxpayer from assessment for additional facilities. In other words, business taxes itself to pay the cost of keeping commercial peace." Foreword to American Arbitration Association, Yearbook of Commercial Arbitration in the United States at vii (1927).

II. ENFORCEMENT IN THE ABSENCE OF A TREATY

A. Enforcement in the United States

Early in the development of the common law, commercial arbitration was regarded with disfavor by the law courts. In the 1746 case of *Kill v. Hollister*, the English court of King’s Bench stated that extrajudicial attempts to solve disputes by arbitration tended to “oust” the jurisdiction of the courts. This fear led the courts to declare that an agreement to settle future disputes by arbitration was revocable at any time prior to the handing down of the arbitral award. By the time the United States separated from the mother country, the hostility to commercial arbitration had been firmly established in American courts.

This antagonism persisted until the 1920’s, when legislation served to moderate the common law aversion to arbitration. Beginning with a New York act in 1921, some 22 states adopted arbitration statutes, which have more or less overturned the common law view. On the federal level, the Federal Arbitration Act (hereinafter referred to as the 1925 Act) was adopted in 1925. The 1925 Act provides for the specific enforcement of arbitration agreements in the federal courts and for the staying of litigation instituted by one party in defiance of an arbitration agreement between the parties. The 1925 Act also permits the federal

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5 In his opinion in Kulukundis Shipping Co. v. Amtorg Trading Corp., Circuit Judge Jerome Frank said:

Lord Campbell explained the English attitude as due to the desire of the judges, at a time when their salaries came largely from fees, to avoid loss of income. Indignation has been voiced at this suggestion; perhaps it is unjustified. Perhaps the true explanation is the hypnotic power of the phrase, “oust the jurisdiction.” Give a bad dogma a good name and its bite may become as bad as its bark.

Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983-84 (2d Cir. 1942).

6 See Tatsuuma Kisen K.K. v. Prescott, 4 F.2d 670 (9th Cir. 1925), in which the court held that an arbitration clause was void and unenforceable when the clause required arbitration as a precondition to a court action.

7 N.Y. Civ. Prac. §§ 1448-69 (McKinney 1963). This act makes agreements to arbitrate future disputes valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Also, any court action brought despite such agreement is to be stayed and referred to arbitration on the defendant’s motion. See Contini, *International Commercial Arbitration*, 8 AM. J. COMP. L. 283, 284 (1959).


10 Id. § 4.

11 Id. § 3.
court in the district in which the award was rendered to confirm the award. However, the scope of the 1925 Act is not all-encompassing. The 1925 Act is applicable only to arbitration clauses either incorporated into contracts which involve interstate or foreign commerce or into maritime transactions. A party desiring to utilize the 1925 Act must also satisfy all the usual requirements to gain access to the federal courts. Arbitration clauses in foreign contracts which do not affect the "foreign commerce" of the United States are not within the scope of the 1925 Act. A contract involving only the commerce of foreign nations, despite the fact that a citizen of the United States is a party, is beyond the 1925 Act's limits.

The nexus between the 1925 Act and the doctrine of *Erie R.R. v. Tompkins*, that federal courts could not create substantive law in diversity cases, has not been constant. In *Bernhardt v. Polygraphic Co. of America* the Supreme Court held that the 1925 Act was not applicable to a diversity suit involving interstate or foreign commerce and that the parties' rights were governed only by state law. However, a later case from the Second Circuit, *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, held that the 1925 Act was applicable to a diversity suit involving interstate commerce and indicated that the 1925 Act had created "a new body of federal substantive law affecting the validity and interpretation of arbitration agreements." In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* the Supreme Court applied the 1925 Act to an arbitration clause in a contract and spoke approvingly of the *Lawrence* analysis of federal substantive law. The Second Circuit also held in the *Lawrence* and in *Metro Industrial Painting Corp.*
v. Terminal Construction Co.\textsuperscript{23} that the 1925 Act was equally applicable in the federal and state courts.

The attitude of the United States toward the enforcement of foreign arbitral awards is now quite liberal.\textsuperscript{24} In Oilcakes & Oilseeds Trading Co. v. Sinason Teicher Inter American Grain Corp.,\textsuperscript{25} an English party obtained an arbitral award in the United Kingdom against a nonparticipating American party and secured an English judgment on that award. The New York action for enforcement was successful on the award rather than on the English judgment. The court determined that the award had not merged with the English judgment, enabling an enforcement action to be brought on the award even though the judgment itself was not entitled to recognition.

The court in Gilbert v. Burnstine\textsuperscript{28} determined that parties to a contract, incorporating an agreement to arbitrate in London, had in fact agreed to submit to the jurisdiction and arbitration laws of the United Kingdom. The court stated that such an agreement was not contrary to the public policy of the United States and that recognition and enforcement of a foreign arbitral award rendered in the United Kingdom should not be denied.

In a 1970 New York case\textsuperscript{27} involving two foreign corporations, the court granted the defendant's motion for a stay pending the arbitration of claims alleging breach of contract. In a subsequent New York case,\textsuperscript{28} the plaintiff moved for summary judgment on the basis of judgments obtained in an Indian court which had confirmed two arbitral awards in the plaintiff's favor. The court granted the motion and stated that [under N.Y. Civ. Prac. § 5305 (McKinney Supp. 1969-1970)] a foreign judgment is final and binding upon the parties to the extent that it grants or denies recovery of a sum of money and that such a judgment is enforceable. Thus, it appears that the courts of the United States will readily enforce foreign arbitral awards and foreign judgments on these awards.

\textsuperscript{23} 287 F.2d 382 (2d Cir. 1961), cert. denied, 368 U.S. 817 (1961). The court stated that if the 1925 Act is an exercise of the commerce and admiralty powers, the 1925 Act must apply not only to litigation in the federal courts, but also to suits in state courts.

\textsuperscript{24} See Restatement (Second) of Conflicts of Law § 220, Reporter's Note, at 725-26 (1972).


\textsuperscript{26} 255 N.Y. 348, 174 N.E. 706 (1931). "Consent is the factor which imparts power." Id. at 355, 174 N.E. at 706, 707.


\textsuperscript{28} New Cent. Jute Mills Co. v. City Trade & Indus., Ltd., 65 Misc. 2d 653, 318 N.Y.S.2d 980 (Sup. Ct. 1971).
The New York courts expanded this liberality in a 1969 case in which one court enforced a foreign award despite the fact that a bilateral treaty on friendship, commerce, and navigation (FCN) between the United States and Germany applied only to final arbitrations. The court stated that "[i]f our courts have heretofore extended broader recognition to foreign adjudications than required by the treaty, that recognition has not been abridged by the treaty."30

B. Enforcement of American Arbitral Awards in Foreign Countries

1. Enforcement in Common Law Countries

In common law countries, courts generally enforce American arbitral awards. As the law of the United States with regard to arbitration has changed, British law has also turned from the harsh rule of Kill v. Hollister toward a policy of favoring commercial arbitration. In East India Trading Co. v. Carmel Exports & Imports, Ltd.,32 the United States importer had obtained a favorable award resulting from the breach of a sales contract. The judgment of a New York supreme court33 in 1950, confirming the award, was enforced in the United Kingdom in 1952.

British courts will enforce both American awards and judgments on those awards.34 In Bankers & Shippers Insurance Co. v. Liverpool Marine & General Insurance Co.,35 suit was brought on a New York award where the English party had refused to appoint an arbitrator. The arbitration, having proceeded in his absence, ultimately was decided against the English party. The court refused to enforce the award, but the refusal was based solely on the ground that in appointing the arbitrators and securing the appointment of an umpire, the New York corporation did not conform to the requirements of New York's arbitration act. Otherwise, it appears that the court would have enforced the award.

34 See T. BLANCO WHITE, RUSSELL ON THE LAW OF ARBITRATION (15th ed. 1952). "An award which is complete and could be enforced in the country where it was made is enforceable in England at common law." Id. at 262. See also Domke, Note, 2 AM. J. COMP. L. 238 (1953).
2. Enforcement in Countries of the Civil Law Tradition

One could have anticipated that other common law countries would have an attitude similar to the United States with respect to arbitration. In civil law nations the policy also seems to be that foreign arbitral awards will be recognized and enforced.

In a recent German case, the dispute grew out of a contract between a German manufacturer and an American firm. The American party obtained a favorable award and attempted to get the award enforced in Germany. The award was duly entered by the highest court, the Bundesgerichtshof.

In a dispute between a New York manufacturer, Merry Hall & Co., and a French licensee, Gerstle, arbitration was held in New York City under the rules of the American Arbitration Association. The French licensee failed to appear and the tribunal decided against him. The New York manufacturer filed the award with the French court, and following an appeal by the French party, the award was enforced by the Court of Appeals in Paris. The French Court referred to an affidavit from the chairman of the arbitration board as proof of the validity of the award under New York law. The Court did not examine the merits of the case. Instead, it focused on whether the French party had the opportunity of a fair hearing and whether enforcement of the award would violate French public policy.

In a Swiss case involving a dispute between an American company and a Swiss company, the court enforced an award in favor of the American party. In rejecting the Swiss company’s allegation that arbitration was not the exclusive remedy, the court stated that “it is within the function of arbitral tribunals that they exclude the competence of ordinary courts.”

In the South American countries, with whom the United States does a great deal of commercial trading, arbitral awards have been enforced. In Revlon Products Corp. v. Salcedo Hermanos y Cia an award rendered against the Colombian party, followed by a New York supreme

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37 Domke, supra note 37, at 406.
39 72 GACETA JUDICIAL 1146 (1952). See also Hide Trading Corp. v. Field Echemigne Compania Lida., 68 GACETA JUDICIAL 139, No. 2087-88 [translated in 6 Arb. J. (n.s.) 159 (1951)].
court judgment confirming the award, was enforced by the Supreme Court of Justice of Colombia. The Court held that since the Colombian party had voluntarily submitted to arbitration in New York under the arbitral agreement, the national jurisdiction and public policy of Colombia were not affected.

In Japan, United States judgments on arbitral awards have also been enforced. In *American President Lines, Ltd. v. C. Subra Kabushiki* the district court of Tokyo ordered the execution of a United States district court judgment on an arbitral award unfavorable to the Japanese party. On the other hand, the Philippine court in *Eastboard Navigation, Ltd. v. Juan Ysmael & Co.* declined to enforce an arbitral award which had been decided against the Philippine party but nevertheless enforced a United States district court judgment on the award.

In most cases, arbitral awards and/or judgments on these awards have been confirmed. One reason United States awards have not always been enforced is lack of reciprocity, as demonstrated by the Spanish case of *Omni Fabrics, Inc. v. Hijo de Juan Artigas Alart S.A.* There the court refused to enforce an award that had been rendered in New York because of the lack of a showing of reciprocity in enforcing Spanish awards in the United States and because of the plaintiff's failure to comply with Spanish procedural requirements. Being a civil law court, the Spanish tribunal could have searched out an American law similar to Spanish code provisions; however, since many of the American rules relating to enforcement of arbitral awards are contained in the American law reporters, a Spanish judge would not be likely to find them. The disparity in enforcing awards as opposed to judgments on the awards calls for some unification of rules in this area. This has been partly solved by bilateral and multilateral treaties.

### III. THE TREATY ERA

#### A. The 1923 German Protocol and 1927 Geneva Convention

Although arbitration machinery has gradually changed, some inconsistencies still exist. There have been efforts to resolve differences by

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4. See Monlean, Note, 1965 BULL. MADRID B. ASS’N 96, 231. See also Domke, supra note 37, at 408-09.
multilateral methods. The first practical realizations of this multilateral approach came with the adoption of the 1923 Geneva Protocol on Arbitration Clauses (hereinafter referred to as the Protocol)47 and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.48

Under the Protocol, the contracting states agreed that a compact to arbitrate disputes between nationals of contracting states would be valid and irrevocable.49 The Protocol was concerned mostly with the validity of agreements to arbitrate future disputes between the parties to the contract. Contracting states were given the option of a reservation in which they could limit the arbitrability of a dispute to those that were considered commercial.50 The Protocol provided for a staying of court proceedings once arbitration had begun.51 In addition, each state undertook to execute awards made in its own territory "in accordance with the provisions of its national laws of arbitration."52

The Convention overrode the article 3 provisions of the Protocol which provided that an award would be enforced only in accordance with the law of the forum state. Instead, the Convention required that an arbitral award be recognized as binding and enforceable in accordance with the national law agreed to by the parties.53 This liberal provision allowed for the enforcement of an award in accordance with either the law of the place where the arbitration occurred or the law chosen by the parties.

Certain tests must be satisfied under the Convention in order to get one's award enforced by a contracting state. The award must arise from a valid arbitration agreement; the award must have been handed down by a properly constituted tribunal in conformity with local laws; it must be final in the state where rendered; and it must not violate the public policy of the country in which enforcement is sought. The burden of meeting these criteria appears to be on the person seeking enforcement; therefore, the person against whom enforcement is sought need only rebut one of the various tests to be successful.54 This placing of the

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49 Geneva Prot., *supra* note 47, art. 1.
50 *Id.*
51 *Id.* art. 4.
52 *Id.* art. 3.
53 Geneva Conv., *supra* note 48, art. 1.
54 See Quigley, *Accession by the United States to the United Nations Convention on the Recog-
burden of proof on what has turned out to be the unsuccessful party, in conjunction with other weaknesses, has resulted in the Convention not receiving widespread use. The other weaknesses include the following: (1) the treaty is applicable only to controversies between parties subject to the jurisdiction of different contracting states; (2) contracting states have the power by reservation to exclude all noncommercial activities from the scope of the Convention; (3) the validity of the agreement to arbitrate is determined solely by local law; and (4) the enforcement of awards rendered in a state not a party to the Convention is denied.55 The United States was not a party to either Geneva agreement, since domestic law at that time was not ready to accept an obligation to enforce American arbitral awards, not to mention awards rendered in foreign nations.

B. Arbitration Clauses in FCN Treaties

Although refusing to join in the multilateral Geneva efforts, the United States did attempt to cover the enforcement of awards in foreign countries through the vehicle of the bilateral treaty on friendship, commerce, and navigation.56 These bilateral treaties can handle problems peculiar to two trading partners better than broad multilateral agreements in which various states have differing problems and in which a least common denominator approach must be utilized.

The first of such treaties to contain an arbitration clause was the 1946 FCN treaty with China. The clause57 provided that an agreement to arbitrate would be given full faith and credit in both states, but that the award from such arbitration would be recognized only in the state where the award was rendered, a rather limited benefit.

In the United States-Ireland FCN treaty of 1950,58 the arbitration clause stated that agreements to arbitrate "shall not be deemed unenforceable within the territories of the other Party . . . . No award . . . shall be deemed invalid or denied effective means of enforcement . . . merely on the grounds that the place where such award was rendered is

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56 The United States presently has FCN treaties containing arbitration clauses with the following: Japan, Korea, the Republic of China, Iran, Israel, Haiti, Colombia, Ireland, Greece, Portugal, the Federal Republic of Germany, Denmark, and the Netherlands.
outside such territories . . . ." This last provision merely prohibited
a state from denying effect to an agreement or award solely because
of its foreign origin. However, it did not require enforcement. The most
liberal arbitration clause appeared in the 1956 United States-
Netherlands FCN treaty.\textsuperscript{60} The treaty states that awards which are final
“shall be deemed conclusive in enforcement proceedings brought before
the courts of competent jurisdiction of either Party.”\textsuperscript{61} This treaty then
goes beyond the principle of mere nondiscrimination to one of conclu-
siveness and imposes a duty to enforce the award.

In several American cases involving foreign arbitration, the courts
have enforced foreign awards because of the existence of a pertinent
FCN treaty. In \textit{Von Engelbrechten v. Galvanoni & Nevy Bros.},\textsuperscript{62} a
German national sought a judgment in New York to enforce an award
handed down by a German arbitration court. The court, enforcing the
award, relied upon the portion of the United States-Germany FCN
treaty\textsuperscript{63} which states that arbitral awards “which are final and enforce-
able shall be deemed conclusive . . . in the courts . . . of either
Party.”\textsuperscript{64} The case of \textit{Landegger v. Bayerische Hypotheken und Wechsel
Bank}\textsuperscript{65} was also concerned with the enforcement of a German arbitral
award pursuant to the United States-Germany FCN treaty. Citing
\textit{Von Engelbrechten}, the court in \textit{Landegger} confirmed the judgment
and enforced the German award, stating that it read the treaty as
“including among the German arbitration awards that will be . . .
enforced in the United States the class of awards which are ‘final and enforceable’ under the laws of Germany. However, we do not read the
Treaty as limiting the category of awards enforceable here to this
class.”\textsuperscript{66} The court thus interpreted the treaty quite broadly and ex-
tended it to foreign arbitral awards, final or otherwise.\textsuperscript{67} In the case of
\textit{In the Matter of Fotochrome, Inc.},\textsuperscript{68} the district court stated that, pur-
suant to the United States-Japan FCN treaty,69 "conclusive Japanese awards which do not violate our public policy are conclusive in this country as well."70

On the other hand, in a foreign case involving the United States-Greece FCN treaty71 and the enforcement of an American award in Greece, the Greek court declined to enforce the award. The notice of the place and time of the arbitral proceeding required by New York statute was declared to be too short and, therefore, against the public policy of Greece.72 Public policy is a permissible exception to the enforcement requirement.73

The advantage of the FCN treaty approach in this field is that the two parties, when they wish to amend their treaty to reflect modern national policies on arbitration, have to deal only with the other party, whereas in a multilateral treaty, renegotiation is much more difficult simply because of the number of parties involved. The disadvantages are that: (1) there are not very many of these treaties in existence, and (2) they do little to promote uniformity of rules of international arbitration law because of the differing treaty provisions.

C. Other International Mechanisms for Arbitration

1. The International Chamber of Commerce Program

International businessmen, perhaps because of the lethargy displayed by their governments in developing rules of arbitration, have set up among themselves private means of dispute settlement. The best known of these devices is the International Chamber of Commerce74 (ICC) with its Court of Arbitration. To have the ICC take jurisdiction of a dispute, parties usually must provide for it in their contract, perhaps using the ICC's model arbitration clause.75 Over 2,000 disputes have been handled by the ICC since its inception in 1919.76

73 FCN Treaty with Greece, supra note 71, art. VI, para. 2.
75 The model arbitration clause of the ICC states that "[a]ll disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the ICC by one or more arbitrators appointed in accordance with the rules."
The court chooses the place of arbitration, and the law of the chosen country governs the arbitration's procedural aspects not covered by ICC rules. In a sense, arbitration is compulsory since once the parties have agreed to arbitrate, the arbitration will commence and an award will be rendered even if one party does not participate. The court itself does not appoint arbitrators, but rather selects a group from which the disputants can choose an arbitral panel. The panel's award must then be approved by the court.

It has been estimated that 90 percent of the ICC awards have been complied with voluntarily. In cases of noncompliance, either the national laws of the country in which the award is sought to be enforced or that nation's treaty obligations determine whether compliance is mandatory. Furthermore, the ICC's facilities are open not only to disputes between private parties, but also to disputes between private parties and governmental entities. Awards in the latter situation have been enforced in the lower courts.

The interest of the ICC in international arbitration led to its support of the 1923 and 1927 Geneva agreements, and finally to its proposal to the United Nations for a new convention on the "Enforcement of International Arbitral Awards." This proposal culminated in the adoption of the plans for a 1958 U.N. convention.

2. The European Convention on Arbitration

In their move towards political and economic unification, the European states have attempted to harmonize their laws on the enforcement of arbitral awards. The 1957 European Convention for the Peaceful Settlement of Disputes has a weak enforcement provision. If a party refuses to comply with an award, the other party may apply to the Committee of Ministers of the Council of Europe. The Committee only has the authority to make recommendations, and such recommendations must be approved by a two-thirds majority of the Committee membership.

In 1961 the European Convention on International Commercial

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79 INTERNATIONAL CHAMBER OF COMMERCE, ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS (I.C.C. Brochure No. 174).
The United Nations Arbitral Convention was approved. By 1969 some 14 states had ratified it, and it became effective on January 7, 1974. This Convention has as signatory states both Western and Eastern European States. The Convention deals with substantive rules regarding arbitration and also contains detailed rules on the arbitration procedure, including rules governing the place of arbitration and the appointment of arbitrators. The Convention also applies to disputes between private parties and public bodies such as state commercial trading organizations.

3. The Convention on the Settlement of Investment Disputes

In addition to the Geneva agreements, there has been one other nonregional, multilateral effort to utilize arbitration to settle disputes: the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (CSID). This treaty, which has been ratified by the United States, is designed to settle disputes between a foreign investor of one state and a host state. The CSID sets up arbitration machinery in the Centre for the Settlement of Investment Disputes, which is under the auspices of the World Bank. The CSID has received much support from capital-exporting states like the United States who seek to protect the overseas holdings of their national investors. The CSID differs from both the Geneva agreements and the FCN treaties in that it does not apply to disputes between two private parties.

One unusual feature of the CSID is its voluntary aspect. It does not establish a system of compulsory arbitration. The fact that a state has ratified the CSID does not bind it to utilize the Centre, since consent in each dispute is the keynote of the CSID. Such consent may be expressed (within an agreement to arbitrate) in the investment contract between the concerned state and the foreign investor, or when the dispute arises, consent may be given via mutual agreement of the parties. Once the award has been rendered, it is binding on the parties as a

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83 These countries include the following: the USSR, Ukrainian SSR, Romania, Yugoslavia, Hungary, Czechoslovakia, Belorussian SSR, Austria, Bulgaria, Poland, France, and the Federal Republic of Germany.
85 Article 25(1) of the Convention states that its Centre has jurisdiction over "any legal dispute arising directly out of investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."
final adjudication, and contracting states are required to equate a CSID award with a final judgment of its own courts. One advantage of the CSID is that it does not oblige the domestic court to enforce awards rendered under the authority of a foreign tribunal, but rather obligates the domestic court to enforce an award from an independent international body.

Unfortunately, no Latin American countries are among the 68 nations that have ratified the CSID. The CSID was in many ways aimed at Latin America in an attempt to find some international machinery to settle disputes involving investors from capital-exporting countries. Latin America, for historical and political reasons, has long distrusted the use of arbitration. This attitude is evidenced by the fact that only one Latin American country, Nicaragua, has an FCN treaty with the United States guaranteeing the reciprocal enforcement of arbitral agreements and awards. The CSID may also be considered a failure, at least presently, since by 1972 the Centre had been asked to arrange arbitration in only one dispute.

4. AID and GATT Arbitration

In 1961 the Agency for International Development (AID) placed an arbitration clause in its contract of guarantees under the Foreign Assistance Act. A year later, Congress gave the President the power to suspend aid to any country which nationalized or expropriated property belonging to American citizens. Congress provided, however, that aid would not be cut off if the foreign government took remedial steps, such as submitting the underlying dispute to conciliation or arbitration. Also, the General Agreement on Tariffs and Trade (GATT), article

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86 Id. art. 53(1) states that the award "shall be binding and shall not be subject to appeal or to any other remedy except those provided by this Convention."
87 Id. art. 54(1) states 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 should treat the award as if it were a final judgment of the courts of the constituent state."
91 Strauss, supra note 46, at 49.
92 Id. at 48.
UNITED NATIONS ARBITRAL CONVENTION

23, provides for conciliation as a method of dispute settlement between the contracting states who are parties to it. Article 23 provides that a state may "with a view to satisfactory adjudication of the matter, make written representations . . . to the other Contracting Party . . . ." By 1959 there had been many such representations under article 23.84

IV. THE ADOPTION OF THE U.N. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS—HISTORICAL BACKGROUND

Since little use was made of either of the Geneva agreements and since there had been an increase in international commercial contacts, support developed for the adoption of a new multilateral convention on commercial arbitration. In 1953 the ICC asked the U.N. Economic and Social Council to draw up a convention dealing with the enforcement of arbitral awards rendered in other countries. The Council in 1954 established an ad hoc committee to study the ICC's proposed convention.85 After giving consideration to the ICC's proposals, the Council produced its own draft convention,86 which it then circulated among member states for their comments. Encouraged by the response, the Council called a conference to draft a convention on the subject and to consider the "possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes . . . ."87 Representatives of 45 nations convened from May 20 to June 10, 1958, to work out the details of such a convention. In its Final Act88 on June 10, 1958, the conference adopted the Convention it had drafted. Ten nations signed the Convention on that day, followed by 13 other nations soon thereafter.89

However, the United States failed to sign at that time90 and did

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84 See Hollis, Dispute Settlement and the General Agreement on Tariffs and Trade, in INTERNATIONAL TRADE ARBITRATION, A ROAD TO WORLD WIDE COOPERATION 77 (M. Domke ed. 1959).
90 The reasons given for nonparticipation by the United States were as follows:
1. The convention, if accepted on a basis that avoids conflict with State laws and judicial procedures, will confer no meaningful advantages on the United States.
2. The convention, if accepted on a basis that assures such advantage, will override the arbitration laws of a substantial number of States and entail changes in State and possibly Federal court procedures.
not ratify the Convention until 1970. The United States delegation to the Convention had recommended that this country not accede to the Convention for two reasons: (1) adherence to the Convention would confer no real benefits to this country, and (2) the Convention would conflict with many state arbitration laws. It was also argued that commercial arbitration did not lie "within the traditional limits of the treaty power."101

The American delegation participated in the negotiation of the treaty, but its participation was minimal since it took no part in any of the three working sessions, pursuant to its instructions to participate "in a limited way."102 The American delegation had voted in favor of allowing the committee of experts to consider the ICC's draft proposal "as a gesture of support for arbitration generally but did not seek representation on the committee."103 This was unfortunate since the United States eventually adhered to this Convention and had thus precluded itself, by its lack of participation in the drafting stage, from arguing for clauses favorable to this country.

Although the official American position was not in favor of ratification, there was always substantial support for ratification, notably within the American Bar Association. At the annual meeting of the American Bar Association in 1922, the Committee on Commerce, Trade, and Commercial Law submitted a model treaty on arbitration for negotiation with foreign nations. The treaty was unanimously approved by the full membership.104 The draft treaty contained a provision stating that an agreement to arbitrate would be valid, enforceable, and irrevocable.105 The treaty also stated that arbitral awards made within the territory of a contracting state would be entitled to full faith and credit in the courts of other contracting states, subject only to collateral attack

3. The United States lacks a sufficient domestic legal basis for acceptance of an advanced international convention on this subject matter.
4. The convention embodies principles of arbitration law which would not be desirable for the United States to endorse.

UNITED STATES DELEGATION TO THE U.N. CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION, OFFICIAL REPORT 2 (1958) [hereinafter cited as U.S. DEL. REP.].

101 Id. at 23. This position was later reiterated by Secretary of State John Dulles: "I do not believe that treaties should, or lawfully can, be used to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern." Hearings on S.J. Res. I Before the Senate Comm. on the Judiciary, 83d Cong., 1st Sess., at 825 (1953).
102 U.S. DEL. REP., supra note 100, at 2.
103 Id. at 1.
104 47 AM. BAR ASSOC. ANN. REP. 288 (1922); for the text of the proposed treaty see A.B.A. REPORT, supra note 15, at 260-322.
105 Id. at 260, art. 1.
on the grounds of fraud, bad faith, etc. Finally, the treaty required that suitable jurisdiction be conferred on the courts to enforce arbitral agreements and awards.

In 1960, two years after the drafting of the Convention, the ABA Committee on the International Unification of Private Law recommended accession to the treaty by the United States and certain changes in the 1925 Federal Arbitration Act in order to implement the Convention.

In September 1960, the ABA House of Delegates adopted a resolution strongly recommending accession to the Convention and changes in the 1925 Act. By that time the ABA had received a multitude of letters from American businessmen favoring accession to the Convention.

The weight of American opinion favoring ratification finally caused the administration to act. In 1968, at the request of Secretary of State Rusk, President Johnson urged the Senate to recommend accession to the 1958 Convention. The submission was referred to the Senate Committee on Foreign Relations. The President's letter of transmittal recommended that American accession should occur only after the passage of domestic legislation needed to implement the Convention. On October 4, 1968, the Senate consented to accession by a 57-0 vote, subject to changes necessary in federal law. The supplemental legislation was in the form of a bill adding a new chapter 2 to the 1925 Act. The enactment was signed into law on July 31, 1970, subject to formal accession by the United States to the Convention. This instrument was filed with the United Nations on September 30, 1970, and the Convention came into force 90 days afterwards, making this country the 37th country to ratify the Convention.

Among the countries that have ratified the Convention are the major trading partners of the United States, including France, Italy, West Germany, Japan, and some Communist states such as the USSR, Czechoslovakia, Poland, and Romania. Conspicuously missing from

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106 Id. art. 2.
107 Id. art. 3.
108 Id. at 194-236.
110 Id. at 28-42.
111 Id. at 1.
the list are most of the Latin American countries; Ecuador and Mexico are the only two which have ratified the Convention. This is not surprising, however, in view of the Latin American attitude concerning arbitration. Another non-ratifying nation is the United Kingdom, although its accession had been recommended. Due to the large number of participating countries, this Convention could be invaluable in settling transnational arbitral problems. The next section will discuss how the Convention proposes to meet this task.

V. THE U.N. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS—A CURRENT ANALYSIS

A. Provisions of the Convention

Under article I, the Convention is made applicable to a state other than the state where the recognition and enforcement of such awards are sought and also to awards not considered domestic by the enforcing state. The last phrase was inserted and supported on the ground that it was the place of arbitration that determined whether an award was foreign. For example, under Belgian law an award rendered in Belgium under the law of a foreign country is considered a Belgian award; an award rendered in another country under the law of Belgium would be considered a foreign award. However, an award made in France under foreign law is regarded as a nondomestic award.

Article I, paragraph 2, states that an arbitral award must be one that has arisen out of a voluntary agreement to arbitrate, whether before ad hoc or permanent arbitral bodies. Paragraph 3 permits a contracting state, by submitting a proper reservation, to declare that it will apply the Convention “on the basis of reciprocity.” A second permitted reservation is the commercial limitation that a state may choose to apply the Convention only to disputes “arising out of legal relationships . . . which are considered as commercial.” These limitations were inserted,

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115 The states that have ratified the Convention are: Austria, Bulgaria, Belorussian SSR, Cambodia, the Central African Republic, Ceylon, Czechoslovakia, Ecuador, Finland, France, the Federal Republic of Germany, Ghana, Greece, Hungary, India, Israel, Italy, Japan, Madagascar, Morocco, the Netherlands, Niger, Nigeria, Norway, the Philippines, Poland, Romania, Switzerland, Syria, Thailand, Trinidad and Tobago, Tunisia, Ukrainian SSR, USSR, the United Arab Republic, the United Republic of Tanzania, and Mexico.


117 U.N. Conv., supra note 3, art. I(1).


119 U.N. Conv., supra note 3, art. I(3).
among other reasons, for the benefit of states like Belgium where arbitra-
tion is limited to commercial transactions. Unless a state has availed
itself of the reciprocity reservation, it would be obligated to apply the
Convention to awards rendered in a foreign state, whether or not that
state is a contracting state to the Convention. The United States and
24 other countries have adopted both these reservations.

Another part of the Convention, article II, deals with agreements to
arbitrate and requires each contracting state to recognize an agreement
in writing to arbitrate disputes. It is unclear what kinds of agreements
the contracting states are required to recognize. During the treaty’s
negotiations, the German delegate had proposed that language be in-
cluded to the effect that the recognition of arbitral agreements must be
related to an award capable of enforcement under the Convention. Neverthe-
less, the word “enforce,” pertaining to the arbitral agreement,
was omitted from article II. Thus, it appears that a state is not required
to enforce specifically the arbitration agreement by ordering the recalci-
trant party to arbitrate. Article II further limits the recognition duty of
a state to matters “capable of settlement by arbitration,” due to the
fact that in some countries certain matters are not resolved by arbitra-
tion. In the United States, for instance, disputes affecting the title to
realty are not arbitrable. Much latitude is then left to a nation or a
tribunal in deciding whether the question is capable of arbitration, and
for this reason, article II is somewhat weak. Article II also requires a
state to “refer the parties to arbitration.” However, this article does
not relate to agreements providing for a stay of court proceedings for
awards capable of enforcement.

Article III pertains to the basic treaty obligation; that is, the duty of
each state to “recognize arbitral awards as binding and enforce them
in accordance with the rules of procedure of the territory where the
award is relied upon.” The states have been left free to set up
different procedures for the enforcement of foreign and domestic
awards, as long as they do not go beyond the point where they impose
substantially more onerous conditions or higher fees or charges on the
enforcement of awards under the Convention than they impose on the

120 Id. art. II(1).
121 J. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS
27 (1958).
122 U.N. Conv., supra note 3, art. II(1).
124 U.N. Conv., supra note 3, art. II(3).
124.1 Id. art. III.
recognition and enforcement of domestic awards. The Convention prohibits states from treating foreign awards substantially less favorably than they treat domestic awards, but it does not indicate how favorably foreign awards are in fact to be treated. Presumably by ratifying the Convention, a state which has no rule by which even domestic awards can be enforced must now provide some enforcement procedure for those awards coming within the Convention.

Article IV sets forth the procedure which the proponent of an award must follow to get his award recognized and enforced in the contracting state. To conform with that procedure, he must: (1) file an application for recognition and enforcement of the award with the competent authority, (2) submit the original arbitration agreement or a certified copy, (3) supply the arbitration award or a certified copy, and (4) provide a translation of the award and the agreement. This simple method by which the proponent of the award can get the award recognized and enforced contrasts sharply with the way in which the 1927 Geneva agreements imposed a heavy burden of proof on the proponent seeking enforcement of the award.

The grounds under which the defendant can challenge the enforcement of an award are detailed in article V. Paragraph 1(a) of article V states that an award may be refused recognition and enforcement where the agreement to arbitrate was included under the law the parties had agreed would be applicable, or under the law of the place where the award was rendered. Thus, it appears that the choice of law of the parties should be incorporated in the arbitration agreement. There should be no enforcement of an award against a party who did not agree to arbitrate.

Article V, paragraph 1(b), inserts a due process requirement into the Convention, and it applies where the defendant was not given proper notice of the arbitration proceedings or of the appointment of an arbitrator. On the other hand, paragraph 1(c) permits a challenge to enforcement on the grounds that the award was rendered on a dispute not contemplated within the original agreement to arbitrate or that the arbitral decision was beyond the scope of the dispute which was submitted. This paragraph also states that if the arbitrable matters agreed upon can be separated from those not arbitrable, recognition and enforcement will be given to the arbitrable matters only.

125 Quigley, supra note 54, at 1066.
126 Quigley, Convention on Foreign Arbitral Awards, 58 A.B.A.J. 821, 824 (1972) [hereinafter cited as Quigley, Convention].
127 See notes 48-55 supra and accompanying text.
Paragraph 1(d) relates to the correctness of the arbitral procedure and the composition of the arbitral tribunal. The defendant must prove that the tribunal's composition or the procedure used was not in accord with the arbitration agreement or not in accord with the law of the country in which arbitration took place. Proving this last point involves proving elements of foreign law. Generally, this will be a heavy burden for the defendant to sustain.\(^{128}\)

A similar defense is allowed under paragraph 1(e) when the award has not yet become binding or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award has been made. The most difficult question an enforcing court will have to decide is how to handle an award which has not been set aside and is still subject to review in the rendering state. The term "binding" was used in place of "final" because of the difficulty in ascertaining the legal meaning of the latter.\(^{129}\) The effect of using "binding" is that the court in which enforcement is sought must determine what the word means in the jurisdiction of the court in which the award is rendered.

Paragraphs 2(a) and 2(b) differ from paragraph 1 in that paragraph 1 requires that the defendant arguing against enforcement raise the various defenses contained therein. In paragraphs 2(a) and 2(b), the enforcing court may, in its own discretion, take certain action. According to paragraph 2(a), the court can raise the defense that in the enforcing country such subject matter is not arbitrable, and under paragraph 2(b) enforcement can be denied if the award rendered is contrary to the enforcing forum's public policy. Of course, no real definition can be given to the term "public policy"; so there is some room for abuse of this provision (via political and economic reasons) in the enforcing forum.

Article VI allows the enforcing court to stay its enforcement proceedings if a party has applied for a setting aside or suspension of the award in the rendering country. This article complements the defense in article V, paragraph 1(e), that the award is not yet binding or has been set aside.

Article XI obligates federal states, with respect to those articles of the Convention which come within the authority of the individual states, to recommend implementation of the Convention to their state governments. By accession, the United States is fully bound by the Convention,

\(^{128}\) Quigley, Convention, supra note 126, at 825.

and other contracting states cannot refuse enforcement of American awards on the grounds that some of our states have antiquated arbitration laws.\footnote{Quigley, Convention, supra note 126, at 826.}

Finally, article XIV contains a reciprocity clause which provides that a contracting state will not be entitled to avail itself of the Convention against another contracting state except to the extent that it is itself bound. This article gives a contracting state the right to deny enforcement because of another state's reservations, such as a commercial reservation.

B. The United States Implementing Legislation

In drafting the domestic implementing legislation contained in the 1970 Arbitration Act (hereinafter referred to as the 1970 Act),\footnote{9 U.S.C. §§ 201-08 (1970).} the path taken was to add a new chapter 2 to the original 1925 Act. All provisions of the 1925 Act are applicable to actions under the 1970 Act to the extent the earlier act does not conflict with the later act or with the Convention. Section 201 of chapter 2 of the 1970 Act states that the Convention shall be enforced in accordance with sections 202 through 208.

Section 202 specifies which agreements or awards fall within the Convention. An agreement or award arising out of a legal relationship exclusively between two American citizens is not enforceable unless there is a reasonable nexus between them and a foreign nation. Also, in this section the United States exercises the "commercial" reservations permitted under article I(3) of the Convention. Commerce is already defined in section 1 of the 1925 Act; therefore, in the 1970 Act it was only necessary to expand the definition of commerce to include foreign commerce. In the opinion of the State Department, this reservation is applicable both to the recognition and enforcement of arbitral awards under article I(3) of the Convention and to the recognition of an arbitration agreement under article II.\footnote{See Comment, United States Foreign Arbitral Awards Convention: United States Accession, 2 Calif. W. Int'l L.J. 67, 75 (1971) [hereinafter cited as Comment].}

As already noted, the United States has ratified the Convention subject to the "reciprocity" reservation of article I(3). However, the implementing law does not mention how this reciprocity is to be applied, and this is needed since this country wishes to apply a reciprocity stan-
Since there are no official guidelines, the government is free to act as it desires on the reciprocity reservation.\(^{134}\)

Section 203 grants original jurisdiction over actions falling within the Convention to the federal district courts, regardless of the amount in controversy. This last provision was necessary since section 4 of the 1925 Act\(^{135}\) was applicable only if the $10,000 federal jurisdictional amount was present. Another important section is section 205, which allows the defendant in an enforcement action to remove the action from a state to a federal district court. This is a necessary provision since the federal legislation has placed international arbitration with respect to the coverage of the Convention within federal court jurisdiction.

Section 206 states that a court may, in accordance with the arbitration agreement, require that arbitration be held either within or outside this country, and appoint arbitrators. The court, in its discretion under section 206, might well prefer that arbitration be held in this country to protect the American party or might decide that American arbitrators are more qualified to decide a particular disputed subject.\(^{136}\)

A "statute of limitations" is enumerated in section 207, which provides a 3-year limit for a party to apply to the competent court for confirmation of the award. This section also states that the court must confirm the award unless an article V defense is proved.\(^{137}\)

C. Cases Involving the Convention

1. Cases in the United States

Although the Convention has been in effect in this country for 4 years, there have been few cases in which it has been applied. *Landegger v. Bayerische Hypotheken und Wechsel Bank*,\(^ {138}\) a 1972 case, considered the question of the enforcement of an arbitral award involving an American citizen and a German party, whose state had also ratified the Convention. However, the court failed to mention the Convention or its applicability to the case, and enforced the award on the basis of the


\(^{134}\) Comment, supra note 132, at 77.


\(^{136}\) Comment, supra note 132, at 79.


FCN treaty between Germany and the United States.\textsuperscript{139}

In \textit{Island Territory of Curaçao v. Solitron Devices, Inc.}\textsuperscript{140} the Convention was applied only in the lower court decision. Solitron, an electronics concern, had entered into a contract with Curaçao, a part of the Netherlands, which itself had acceded to the Convention. The contract provided that any disputes arising from the contract would be settled by arbitration, that the laws of the Netherlands Antilles would be applicable to the agreement, and that the decision of the arbitral tribunal would be final. Solitron attempted to breach the agreement and declined to arbitrate. The arbitration proceeded without Solitron and an award in favor of Curaçao was rendered, finding Solitron in breach of contract. Curaçao then brought the award to its own courts for enforcement, and a judgment was entered in its favor.

Referring to the Convention, Solitron advanced several reasons why the award should not be enforced by the American court: (1) the contract with Curaçao was "governmental," and the Convention applied only to "commercial" matters; (2) the award was not final and was contrary to American public policy; and (3) the contract and arbitration agreement were terminated by impossibility of performance, and as a result there was a lack of jurisdiction over Solitron in Curaçao. Solitron also claimed that the award could not be enforced under article 53 of the New York statute\textsuperscript{140,1} because the Convention had preempted that statute. Finally, Solitron stated that the whole matter was governed by the CSID, which had been ratified by the United States and the Netherlands.\textsuperscript{141}

As to the first point, the appeals court made no comment. However, the lower court stated that research had failed to reveal what was meant by "commercial" as used in the Convention and concluded that it was meant to exclude matrimonial and domestic awards, political awards, and the like.\textsuperscript{142} The court then stated that, judging by any text the

\textsuperscript{139} It is possible that the court construed the Convention as inapplicable because the date the Convention came into force was after the date the contract between the parties was executed. The Convention came into force for the United States on February 2, 1971, and for Germany on September 23, 1961. However, the contract calling for arbitration was made on January 30, 1961, before the Convention came into force in either country. In the preparations for the Convention, it was never discussed whether its provisions could be applied retroactively. It appears that the position of the United States, upon which the judge might have relied in not applying the Convention, is that treaties have no retroactive effect. See N.Y.U. Comment, \textit{supra} note 67, at 159-60.


\textsuperscript{141} 489 F.2d at 1317.

\textsuperscript{142} 356 F. Supp. at 13.
contract in question was "clearly" commercial and cited one authority who declared that commerce was meant to be used in the broadest sense. Finally, the court said that even if it were not commercial, the Curaçao judgment could itself be enforced in New York, since the applicable New York statute had no commercial limitation. It is submitted that the implementing legislation should give some information as to what the commerce reservation means, whether it applies to quasigovernmental awards or matrimonial awards etc. This needed clarity can be easily achieved by amendments to the 1970 Act.

Solitron’s second argument was that the award was not final and was contrary to American public policy. After summarily dismissing the public policy grounds, the court said that the possibility of appellate review vanished when Solitron did not attempt to have the award annulled in Curaçao within the 3-month period set out under Curagaoan law; so for all purposes, the award was final.

Solitron’s third point was that in the contract between itself and Curaçao, jurisdiction was conferred by consent of the parties and by Solitron’s fixing as its contractual domicile the office of a notary public in Curaçao. Solitron asserted that this consent and domicile were revoked before the arbitration took place. The court stated that this contention was "frivolous because [Solitron] had agreed . . . to submit to arbitration in Curaçao and that the laws of the Antilles should be applicable."

Solitron then argued that the judgment of the Curaçaoan court could not be enforced under article 53 of the New York law. The court rejected this argument, stating that “[t]he Convention in no way purports to prevent states from enforcing foreign money judgments . . . .” The court went on to state that the Convention is applicable only to foreign awards, not judgments, and thus New York was not prohibited from enforcing the Curaçaoan judgment on the award in question. Solitron’s final argument was that the applicable convention in this case was the CSID. However, the CSID is applicable only when there is an agreement to submit disputes to the CSID Centre, and such agreement was obviously lacking.

143 Id. at 13.
144 Quigley, Convention, supra note 126, at 823.
145 489 F.2d at 1322.
146 Id. at 1323.
147 Id. at 1320.
148 Id. at 1317.
149 Id. at 1318.
The court concluded by holding that the Curaçaoan judgment was to be enforced under the New York statute, affirming the district court on this point. The appellate court shied away from affirming the lower court on the grounds of the Convention, stating that “we need not determine the correctness of the alternative ground advanced by the district court that the award was enforceable under the Convention . . . .”\(^\text{150}\) It is not evident why the court did not affirm on these grounds, since throughout the opinion the court continually demonstrated that the Convention was applicable and rejected Solitron's defenses as to the application of the Convention. Perhaps the court felt more secure in deciding the case on the basis of “domestic law.”

A recent case, *In the Matter of Fotochrome, Inc.*,\(^\text{151}\) also considered the Convention. In this case the federal district court reversed the decision of the bankruptcy court. Following a dispute, the American and Japanese parties were awaiting a decision from the Commercial Arbitration Association in Japan. The American party filed a chapter 2 arrangement in the Eastern District of New York, and the bankruptcy judge then restrained all other claims against the debt. Subsequent to the actions of the bankruptcy judge, the arbitration panel handed down its award, which in Japan has the force of a judgment and is conclusive and final between the parties.\(^\text{152}\)

The bankruptcy judge refused to recognize the award because of his restraining order and ruled that the Japanese claim be tried de novo in the bankruptcy court. The Japanese party appealed and supported its right to enforcement by invoking the Convention and the United States-Japan FCN treaty.\(^\text{153}\) Reversing the bankruptcy court, the federal district court stated that under the Convention, foreign arbitral awards “are treated much like a judgment under the Full Faith and Credit Clause . . . .”\(^\text{154}\) The court noted that the United States had acceded to the Convention more than 4 years after the contract involved was signed and shortly after the award in Japan was rendered. It then stated that “it is likely the treaty controls enforcement actions commenced after the effective date of the Convention, even if the foreign proceedings and award preceded the Convention . . . .”\(^\text{155}\) The court cited one au-

\(^\text{150}\) *Id.* at 1323.
\(^\text{152}\) *Id.* at 33.
\(^\text{155}\) *Id.* at 30.
authority in support of this position, although there was also some authority contra. The court then said that the Convention requires American courts to grant the same finality to the award in this country as had been granted in Japan. The court held that the Japanese award was entitled to confirmation proceedings in the United States if the award could not be defeated by the defendant using one of the article 5 defenses of the Convention. The issues in the underlying dispute were thus res judicata. The court then found that the treaty took precedence. Citing the Curacao case, the court held that the Japanese award, since it was the equivalent of a Japanese judgment, could also be enforced under the New York statute on the recognition and enforcement of foreign-country money judgments [N.Y. Civ. Prac. §§ 5301-09 (McKinney Supp. 1973-1974)].

In 1974 the Supreme Court decided the case of Scherk v. Alberto-Culver Co. The action was brought by an American company, Alberto-Culver, against Scherk, a German citizen. Alberto-Culver had purchased ownership rights in Scherk’s trademarks. The contract of sale stated that any dispute which arose from the agreement would be settled by arbitration before the ICC in Paris, France. Since the trademark rights so transferred were subject to substantial encumbrances, Alberto-Culver offered to rescind the contract. Upon Scherk’s refusal, an action was brought for damages in the federal district court in Illinois, in which Alberto-Culver alleged violations of section 10(b) of the Securities Exchange Act of 1934. Scherk then filed a motion to stay the action pending arbitration in Paris pursuant to the parties’ agreement. The district court relied upon Wilko v. Swan, which held that an arbitration agreement did not preclude a purchaser of a security from seeking a judicial remedy in lieu of arbitration. This was because section 14 of the Securities Act of 1933 provided that the right to select a judicial forum could not be waived under the Securities Act. Distinguishing Wilko and reversing the decision below, the Supreme Court stated that:

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156 Quigley, Convention, supra note 126, at 822.
157 N.Y.U. Comment, supra note 67, at 159-60.
159 Id. at 33.
160 Id. at 34.
161 489 F.2d 1313, 1319 (2d Cir. 1973).
162 377 F. Supp. at 33.
166 417 U.S. at 514.
An agreement to arbitrate . . . [is a] forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute . . . .

. . . [T]he agreement to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provision of the Arbitration Act.167

The Court states further that "[w]ithout reaching the issue whether the Convention . . . would require of its own force that the agreement to arbitrate be enforced . . . we think that this country's . . . ratification of the Convention . . . provide[s] strongly persuasive evidence of congressional policy consistent with the decision we reach today."168 Thus, the Court basically ignored the Convention and enforced the agreement to arbitrate on other grounds. The court of appeals in the Curacao decision had also ignored the Convention by enforcing the foreign judgment on the award under the applicable New York law and not reaching the question of whether the award involved in Curacao could be enforced under the United Nations Convention.169

In a strong dissent in this five-to-four decision, Justice Douglas stated that article II(3) of the Convention requires a court to refer the parties to arbitration unless the agreement cannot be arbitrated. Since the transaction between Scherk and Alberto-Culver involved securities, the 1934 Securities Exchange Act invalidated the arbitration agreements to the extent that the agreement purported to prevent a defrauded party from seeking relief in federal court.170

2. Foreign Cases Involving the Convention

The Convention has been effective for some time in other countries, and several cases have been decided relating to enforcement of awards under it. A decision in Switzerland, J.A. van Walsum N.V. v. Chevalines S.A.,171 dealt with the written form of a Dutch arbitration agreement. An Austrian case172 upheld the presentation of a Dutch award to the Austrian court when enforcement was sought, and a Ger-

167 Id. at 519-20.
168 Id. at 521 n.15.
171 64 Revue Suisse de Jurisprudence 86 (Tribunal de Genève 1967).
172 Judgment of Nov. 17, 1967, 9 Zeitschrift für Rechtsvergleichung 123 (Sup. Ct.).
man case\textsuperscript{173} dealt with the validity of an unsigned arbitration agreement.

The Convention was applied in \textit{Compagnie de Saint Gobain v. Fertilizer Corp. of India, Ltd.} by the French court on May 15, 1970, and the Indian High Court of Delhi on August 28, 1970. An award rendered in New Delhi under ICC rules was recognized as final and binding on the parties.\textsuperscript{174} A petition to stay the proceedings was dismissed by the Indian Supreme Court on November 17, 1970.\textsuperscript{175}

VI. CRITIQUE OF THE U.N. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The benefits of accession to the Convention by the United States are many. A country which at one time enforced American awards only through a long and tedious process will now, if it has acceded to the Convention, use the Convention's summary enforcement procedures. The procedures are uniform among all states which are parties to the Convention, and a person desiring to enforce his award need only comply with article IV of the Convention. Countries which previously did not enforce American awards are now required to do so.

Businessmen going abroad to have their awards enforced will have a better idea of what to expect and what defenses, under article V, paragraphs 1 and 2, will be available against them. They will also have an easier time in securing enforcement since the burden of proving the defenses of article V will be on their opponents.

However, there are some weaknesses in the Convention. First, under article V(2)(b), the enforcing court can refuse to enforce the award on public policy grounds. The practical effect of this provision is not known, but political forces may be influential. It should be noted that in the \textit{Curacao} case, the defendant raised this very point, alleging that enforcement of the Curaçaoan award would be contrary to American public policy.

When a court refuses without justification to enforce a foreign award, it is unclear what will happen because there are no penalties for improper nonenforcement. However, the state of the national whose award has been denied enforcement might, under the broad reciprocity clause of article XIV, refuse to entertain suits for enforcement of awards.

\textsuperscript{173} Judgment of May 25, 1970, 24 Wirtschafts- Wertpapier- und Bankrecht 1050 (Fed. Ct.).

\textsuperscript{174} Suit No. 122 - A/70 (India).

brought by nationals of the state refusing enforcement.

Another problem is the different treatment accorded arbitral agreements and arbitral awards. While article II deals with the recognition of arbitration agreements, both the scope and reservation clauses (articles I(1) and I(3), respectively) mention only the recognition and enforcement of awards. This may have been an oversight, and some of the literature suggests that articles I and II, when read together, can be interpreted to mean that the Convention requires arbitral agreements as well to be enforced.178

It should be noted that the Convention applies only to arbitral awards, as the court held in the Curacao case,177 thus leaving enforcement of foreign judgments on those awards to the state laws. However, even when there is a judgment, the Convention can be applied to the underlying award, since the doctrine of merger is inapplicable here.178

The United States has several bilateral FCN treaties with nations which are also parties to the Convention, such as Germany and Japan. The relative status of these two treaties is somewhat uncertain. However, it is certain that the FCN treaties remain important and will have substantial effects on the enforcement of American awards, since the treaties are based on the nationality of the parties, whereas the Convention is based on the place of arbitration. The distinction makes it important to choose the place of arbitration carefully. For example, notwithstanding the fact that France is a party to the Convention, an arbitral award made in London under an agreement between a French corporation and a United States corporation would not be entitled to recognition in the United States under the Convention, because the United Kingdom has not acceded to the Convention. On the other hand, it would come within the terms of the bilateral agreement with France. Also, the FCN treaties remain important since some countries with whom we have FCN treaties are not parties to the Convention.

The Convention has an additional point in its favor. Article I of the Convention applies to awards arising out of differences between persons, both physical and legal, and the United States has elected the "commercial" reservation.179 It appears that the Convention can be applied to trade between American nationals and foreign countries. This

177 489 F.2d 1313, 1319 (2d Cir. 1973).
view was intimated in the Curacao decision discussed above, where the court stated that commerce, as used in the Convention, was meant to be applied in its broadest sense. Thus, it appears that the Convention may, in some instances, overlap with the CSID, but the latter is applicable only to investment disputes and only where there is a national of one state and a host state party on either side.

Even though it has some deficiencies, the Convention is a workable means by which arbitral agreements and awards can be enforced across national borders. Although the Convention is not a panacea for all the problems which enforcement of foreign awards entails, and although it does not go as far as some desire in creating an international arbitration tribunal, it is at least a practical, realistic system that can operate in today's world.

181 Id. at 13; see Quigley, supra note 54, at 1061. See also Domke, The United States Implementation of the United Nations Arbitral Convention, 19 AM. J. COMP. L. 575, 579 (1971).