

INTERNATIONAL ARBITRATION AND ENFORCEMENT IN U.S. FEDERAL COURTS

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I. INTRODUCTION

In the international arena, the advantage of arbitration over litigation as a method of dispute resolution is no longer subject to debate.¹ One reason for this trend is that private international arbitration agreements allow parties to draft provisions suited to their particular needs in anticipation of future disputes.² Indeed, arbitration agreements are in essence a type of forum selection agreement that attempts to

1. For example, the ICC International Court of Arbitration, an organization “founded in 1923 by the Paris-based International Chamber of Commerce (ICC) for the specific purpose of providing for the resolution of international business disputes,” has seen its docket grow considerably in the last twenty years. Eric A. Schwartz, *The Resolution of International Commercial Disputes Under the Auspices of the ICC International Court of Arbitration*, 18 HASTINGS INT’L & COMP. L. REV. 719 (1995) (noting that as of 1995, “more than 8000 requests for arbitration have been submitted to the ICC court, with about two-thirds of those since 1973”); see also 1995 *Statistical Report*, ICC Int’l Ct. Arb. Bull., May 1996, at 3, 4 (1996) (noting that the number of cases increased from 285 in 1987 to 427 in 1995).

2. See JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT 59–60 (1997) (noting the ability of parties to customize arbitration proceedings, pertaining to both substantive and procedural issues).

avoid many of the problems related to jurisdiction.³ Such problems range from whether a court has jurisdiction over the defendant⁴ to the unattractiveness of disputing or attempting to enforce a judgment in the other party's country, where the tribunal may be more inclined to favor its own nationals.⁵ In other words, international businesses have a strong incentive to avoid the local bias that may be faced when arguing a dispute in the courts of other countries. Arbitration also provides flexibility, speed, and financial savings in international disputes, whereas litigation can be slow and costly.⁶ Arbitration also foregoes the need for a judge and the accompanying formal proceedings. Instead, the parties agree on an impartial third person to act as arbitrator.⁷ Typically the arbitrator is more informed than judges or juries about the subject of the dispute and the customs of the industry and can preside over the proceedings without formal procedural requirements, such as rules of evidence, which often create an overly adversarial environment.⁸ Thus, the increasing use of international

3. See ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 331-32 (1993). Lowenfeld defines a forum selection clause as a provision in a contract providing that all or specific disputes arising out of the agreement will be resolved in a court of a chosen country. See *id.* at 281.

4. Under U.S. jurisprudence, the assertion of jurisdiction over the defendant must not violate the due process clause of the U.S. Constitution. See U.S. CONST. amends. V, XIV; see also George A. Davidson, *Jurisdiction Over Non-U.S. Defendants*, in *INTERNATIONAL COMMERCIAL LITIGATION* 1998 31, 33-81 (PLI Commercial Law Practice Course Handbook Series No. A4-4539, 1998) (summarizing the very important body of case law addressing courts' jurisdiction over defendants).

5. See LOWENFELD, *supra* note 3, at 332.

6. See Steven A. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78, 78-79 (1985) (presenting proponents' arguments that arbitration is not only speedier, less costly and less formal, but also more confidential). *But see* Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 61 (1982) (asserting that such advantages are available in domestic arbitration but not in international disputes). For a fair analysis of both the advantages and disadvantages of arbitration, see Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941 (1996).

7. See GABRIEL M. WILNER, 1 *DOMKE ON COMMERCIAL ARBITRATION* § 1:01 (rev. ed. 1995). The parties themselves may choose an arbitrator or provide for a process by which one may be chosen. See The Federal Arbitration Act, 9 U.S.C. § 5 (1994).

8. See Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 277 (1982); JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY* 171 (1981) "Important and as effective as the adversary system can be, it is not without a deleterious side. It can be a hugely inefficient means of uncovering facts; its relentless

arbitration, when conducted under the auspices of an arbitral institution,⁹ shows that “privatized rulemaking” can, at least in the area of comparative law, serve as a practical tool to the international commercial community.¹⁰

The effectiveness of private international arbitration, however, is dependent “on substantial and predictable governmental and intergovernmental support.”¹¹ This reality leads to the irrefutable logic that in the absence of “reciprocal commitments and effective control,” there is little reason to believe that one country’s courts would allow its citizens’ property to be confiscated simply because a private actor has ruled so.¹² Taking this logic a step forward, “[w]ithout the assurance of enforcement by a national court in whose territory an award debtor’s property is located, international commercial arbitration simply will not work.”¹³ But it has worked.¹⁴ Unlike criminal law, where ideological and other differences between nations have prevented the forming of a unified rule of international law,¹⁵ in private, commercial matters, nations have been willing and able to reach some consensus.¹⁶ Without such a consensus, the explosive

formalities and ceaseless opportunities for splitting hairs are time consuming and expensive.” *Id.*

9. The great majority of international commercial arbitration is conducted under the rules of several private institutions. They include, among others, the International Chamber of Commerce (ICC) in Paris, the American Arbitration Association (AAA) in New York, the London Court of Arbitration (LCA), and the Stockholm Chamber of Commerce (SCC). Also, the United Nations Conference on International Trade Law (UNCITRAL) has promulgated rules which are then administered by other organizations. See W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* 107 (1992).

10. See Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 149 (1998).

11. REISMAN, *supra* note 9, at 107.

12. See *id.* at 139.

13. *Id.*

14. See *supra* notes 1 & 9 and accompanying text.

15. For an overview of the difficulties in reaching a unified transnational approach, see Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT’L L.J. 169 (1987) and Symposium, *Terrorism and the Law: Protecting Americans Abroad*, 19 CONN. L. REV. 697 (1987).

16. See THOMAS E. CARBONNEAU, *ALTERNATIVE DISPUTE RESOLUTION* 59 (1989). But note that consensus has not resulted in the establishment “of a set of meaningful worldwide standard.” *Id.* An example of successful consensus, the 1958 New York Arbitration Convention, is discussed further in Part II, *infra*. Conversely, The Warsaw Convention, “a multistate attempt to establish an international rule of law to regulate the liability of air carriers for the corporeal and material damages that result from the risks of air travel and

expansion of international commerce and the recognition of the global economy would be in doubt.¹⁷

The decision of an arbitrator, however, does not necessarily result in the resolution of a dispute. Parties to an arbitral proceeding will often resort to domestic proceedings in local courts to enforce either the agreement to arbitrate or the award decision reached by the arbitrator.¹⁸ With the assigned roles of an arbitral tribunal and domestic courts, it is inevitable that contradictory rulings may occasionally occur. This inconsistency can be particularly problematic when a domestic court and an arbitral tribunal disagree in implementation of enforcement provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Arbitration Convention of 1958" (Convention).¹⁹ Two recent federal court cases illustrate this dilemma: *In re Arbitration of Certain Controversies Between Chromalloy Aeroservices, Corp. and the Arab Republic of Egypt (Chromalloy)*²⁰ and *Alghanim & Sons v. Toys "R" Us (Toys "R" Us)*.²¹ Two important issues are raised by these two decisions. In *Chromalloy*, the issue is whether U.S. domestic arbitration law should be allowed to sustain an international award that was nullified under the national law of the rendering state.²² In *Toys "R" Us*, the court determines whether U.S. domestic arbitration law

transportation," illustrates the failure of transnational rulemaking. *Id.* at 61–65 (noting that the regulatory ineffectiveness of the Warsaw Convention is due to the efforts of some governments, including the United States, to modify its content). For a comprehensive discussion of the Warsaw Convention, see Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

17. See LOWENFELD, *supra* note 3, at 332–33; see also GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS 6 n.23 (1994) ("[I]n international cases, where jurisdictional problems are bound to arise in the event of dispute, the practice of incorporating arbitration clauses into contracts is becoming almost universal.") (quoting Justice Michael Kerr, *International Arbitration v. Litigation*, 1980 J. BUS. L. 164).

18. See generally Andreas Bucher, *Court Intervention in Arbitration*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? 29, 29–44 (Richard B. Lillich & Charles N. Brower eds., 1994). In the United States, the Federal Arbitration Act (FAA) grants to federal courts the power to enforce arbitration awards. See 9 U.S.C. §§ 2, 9–10 (1994). For an analysis of the FAA provisions, see BORN, *supra* note 17, at 188–91.

19. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2519, *codified in* 9 U.S.C.A. §§ 201–208 (1970) [hereinafter Convention].

20. 939 F. Supp. 907 (D.D.C. 1996) [hereinafter *Chromalloy*].

21. 126 F.3d 15 (2d Cir. 1997), *cert denied*, 118 S. Ct. 1042 (1998).

22. See *Chromalloy*, 939 F. Supp. at 914.

should govern the enforceability of an international award rendered in the United States.

This Comment will discuss defenses to enforcement of private international arbitration agreements. Part II will discuss the Convention and related parts of the Federal Arbitration Act (FAA) regarding enforcement of foreign judgments. Part III will critique the reasoning employed by the *Chromalloy* and the *Toys "R" Us* courts as they relate to the Convention and the implications of such decisions for international comity. This Comment then concludes in Part IV by asserting that arbitration can be a viable alternative to traditional international litigation provided that certain issues are addressed.

II. ENFORCEMENT OF ARBITRAL AWARD IN THE UNITED STATES

A. *The Federal Arbitration Act*

Before the passage of the FAA in 1925, courts were not adverse to allowing suits in violation of contractual agreements to arbitrate.²³ This attitude reflected a common law doctrine that permitted revocation of arbitration agreements at any time prior to the awarding of an arbitral award.²⁴ But the FAA changed that doctrine, since it states that arbitration agreements are "valid, irrevocable, and enforceable."²⁵ The FAA allows a party to petition a U.S. district court for an order to compel arbitration as stated in an agreement, to appoint an arbitrator if one has not been designated, and to enforce an award.²⁶ Other rights provided by the FAA include the right of the party allegedly to be in default under an agreement to demand a jury trial.²⁷ A jury has the power to rule on whether a valid agreement was made and whether one party has defaulted under such agreement.²⁸ Also, "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."²⁹ The FAA requires a court to stay litigation that is commenced in violation of a valid arbitration

23. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 512 & n.4 (1974).

24. See CARBONNEAU, *supra* note 16, at 105.

25. 9 U.S.C. § 2 (1994).

26. See *id.* §§ 4–5, 9.

27. See *id.* § 4.

28. See *id.*

29. *Id.*

agreement,³⁰ but nowhere does the FAA provide for a stay of arbitration. The FAA limits grounds for non-enforcement of arbitral agreements to “such grounds as exist at law or in equity for the revocation of any contract.”³¹ Section 10 of the FAA in particular allows courts to reverse arbitral awards on four grounds:

- (a) Where the award was procured by corruption, fraud, or undue means.
- (b) Where there was evident partiality or corruption in the arbitrators
- (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence . . . or of any other misbehavior. . . .
- (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.³²

The FAA provides for additional grounds under which an award can be attacked. These provisions, however, are in essence no different from similar provisions authorized by the Convention, discussed below.

B. *The New York Convention*

The origins of the Convention stem from some of the problems discussed in the introduction to this Comment. But an additional problem also existed. Sovereign states had been reluctant in the past to give equal weight to a private arbitrator’s decision and to another sovereign’s courts.³³ Much of the apprehension existed because international arbitration lacked the hierarchical institutions of domestic court systems.³⁴ These issues were addressed by the Convention, which was intended as a “universal charter.”³⁵ The Convention has now been ratified by over 100

30. *See id.* § 3.

31. *Id.* § 2.

32. *Id.* § 10.

33. *See REISMAN, supra* note 9, at 1–6. In the absence of a reviewing authority, a party alleging that an arbitrator did something not authorized by the agreement to arbitrate is simultaneously prosecutor, judge, and jury in *sua causa*. The potential for abuse is obvious.” *Id.*

34. *See id.* at 5.

35. *See CARBONNEAU, supra* note 16, at 65.

countries.³⁶ The United States ratified it in 1970.³⁷ The basic concept of the Convention “was to make arbitral awards rendered in a foreign state enforceable in any state party to the Convention.”³⁸ Thus, by adhering to the Convention, contracting states agree to recognize the arbitral process as a method of resolving disputes.³⁹ The U.S. Supreme Court noted the following:

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.⁴⁰

The operative section of the Convention is Article III, which states that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.”⁴¹ The Convention states that it applies to “awards made in the territory of a State other than the State where the recognition and enforcement . . . are sought”⁴² The Convention also applies to “arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”⁴³ What follows from the above provisions is that the Convention does not require the parties to be domiciled under the laws of the contracting states. Additionally, the provisions are silent on the nationality of the parties. Thus, it seems that the Convention applies to both arbitration awards rendered outside of the enforcing state and to nondomestic awards granted within the enforcing state.⁴⁴ This rationale accords with the goals of the

36. See 9 U.S.C.A. § 201 (West 1999).

37. *Id.*

38. LOWENFELD, *supra* note 3, at 344.

39. See CARBONNEAU, *supra* note 16, at 65.

40. Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

41. Convention, *supra* note 19, art. III, 21 U.S.T. 2519.

42. *Id.* art. I(1).

43. *Id.*

44. See Leonard V. Quigly, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1061 (1961); Bergesen v. Joseph Muller Corp., 710 F.2d 928, 931 (2d Cir. 1983).

Convention,⁴⁵ which are to make awards rendered in foreign state enforceable, as long as the other state is also a party to the Convention.⁴⁶ This also has the effect of removing the need to first confirm the award in the courts of the foreign state before attempting to enforce the judgment in some other state.⁴⁷

1. *Twin Goals of The New York Convention*

On its face, the Convention has in mind two important goals: to unify national law relating to the enforcement of foreign arbitral awards and to create a transnational rule of law that promotes arbitration as a form of dispute resolution.⁴⁸ The second of the two goals is accomplished by Article II of the Convention.⁴⁹ Article II states that each contracting state shall recognize an agreement between the parties and refer them to arbitration;⁵⁰ thus, “by clear implication, the Convention requires the court of a contracting state not to hear an action subject to a valid agreement to arbitrate, *i.e.*, the court is required to dismiss or stay its proceedings pending arbitration.”⁵¹ The purpose of the Article is to remove the international “hostility” toward arbitration, one that is rooted in the notion that arbitration

45. Another significant goal was to require national courts to recognize and enforce arbitration agreements and to refer parties to arbitration when the parties had entered into an agreement subject to the Convention. See Convention, *supra* note 19, arts. II(1), (3), 21 U.S.T. 2519.

46. The language of the Convention itself, in Article I(1), suggests that the state where the award was rendered does not have to be a party to the Convention. But in fact, more than two-thirds of the states that are parties to the Convention have elected to make the “declaration provided for in Article I(3), whereby they apply the Convention only on the basis of reciprocity, *i.e.*, only if the arbitration was held and the award was made in another state party to the Convention.” LOWENFELD, *supra* note 3, at 344.

47. See *id.* “Without such a convention, it had often been difficult or impossible to enforce an arbitral award outside the state in which the arbitration had taken place, where [a] defendant might well not be established or have assets.” *Id.*

48. See *supra* text accompanying note 40; BORN, *supra* note 17, at 20 (“An important aim of the Convention’s drafters was uniformity: they sought to establish a single, stable set of legal rules for the enforcement of arbitral agreements and awards.”) (citing ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 1–6 (1981). [hereinafter VAN DEN BERG, CONVENTION]. See also Quigly, *supra* note 44, at 1065 (explaining that “the drafting of [the Convention] was complicated by the desires of some delegates to institute a uniform system of international procedural rules of enforcement for foreign awards”).

49. See LOWENFELD, *supra* note 3, at 345.

50. See Convention, *supra* note 19, arts. II(1)–(3), 21 U.S.T. 2519.

51. LOWENFELD, *supra* note 3, at 345.

threatens the province of domestic tribunals to adjudicate disputes.⁵² Article II further states that a request to pursue arbitration can only be avoided by establishing that the agreement—Article II uses the words “subject matter capable of settlement by arbitration”⁵³ to narrow the breadth of such agreements—“is null and void, inoperative or incapable of being performed.”⁵⁴

The Convention does not define the words “subject matter capable of settlement by arbitration,”⁵⁵ but it does state which country’s laws govern the application of the above defense to enforcement of arbitral awards.⁵⁶ The defenses noted in Article V can be divided into two areas: arbitrability and public policy.⁵⁷

2. Case Law: *Wilko, Scherk & Mitsubishi*

The U.S. Supreme Court, through a series of opinions, has limited the availability of defenses to enforcement of arbitration agreements based on the nonarbitrability of the subject matter.⁵⁸ The cases finding in favor of arbitrability have led to a presumption of arbitrability.⁵⁹ This position is indicative of the Court’s strong policy in support of arbitration, “with special force in the field of international commerce.”⁶⁰ The policy reflects a sharp distinction from the past. In *Wilko v. Swan*, the court found that the Securities Act prohibited agreements to arbitrate claims in actions brought under section 12(2).⁶¹ Stressing the public policy reasons in support of the Securities Act, the Court asserted that arbitration is an inappropriate process for addressing

52. See CARBONNEAU, *supra* note 16, at 65.

53. Convention, *supra* note 19, art. II(1), 21 U.S.T. 2519.

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

55. *Id.* art. II(1).

56. See *id.* art. V(2)(a)–(b).

57. See *id.*

58. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (holding domestic law claims under the 1933 Securities Act arbitrable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding domestic securities claims under the 1934 SEA and RICO claims arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639, n.21 (1985) (holding antitrust claims arbitrable); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (holding claims under the 1934 Securities Exchange Act (SEA) arbitrable).

59. See *Mitsubishi*, 473 U.S. at 631, *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20–25 (1983).

60. *Mitsubishi*, 473 U.S. at 631.

61. See 346 U.S. 427 (1953), *overruled by Rodriguez de Quijas*, 490 U.S. 477 (1989).

securities disputes.⁶² Additionally, the Court questioned the ability of arbitrators to apply the Securities Act “without judicial instruction on the law,”⁶³ and the ability of a court to vacate an award not decided in accordance with the Securities Act.⁶⁴ The Court, however, began its change in perspective in two seminal cases, *Scherk v. Alberto-Culver Co.*⁶⁵ and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*.⁶⁶ The Court’s underlying rationale in both cases was the need to recognize a “sphere of international activity that, although subject to national jurisdiction, must be regulated in keeping with its essentially autonomous transnational character.”⁶⁷

In *Scherk*, Alberto-Culver, a well known U.S. producer of toiletries and hair products, claimed fraudulent misrepresentation in violation of provisions of the Securities Exchange Act of 1934, by Scherk, a German seller.⁶⁸ Part of the deal included certain foreign trademarks, which turned out to have substantial encumbrances.⁶⁹ In addition to the guarantees that the trademarks were unencumbered, the agreement also included an arbitration agreement, which provided for arbitral resolution of disputes arising from the contract.⁷⁰ The question then was whether the substance of the 1934 Securities Act rendered the dispute inarbitrable, which in turn nullified the contractual provision which provided for arbitration.⁷¹ The Supreme Court reversed the lower court’s ruling and ordered the parties to arbitrate.⁷²

The Court noted that without a contractual arbitration provision, considerable uncertainty would have existed in regard to the forum and the substantive law applicable to the dispute:

Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and

62. *See id.* at 438.

63. *Id.* at 436.

64. *See id.* at 436–37. The Court noted that “[i]n unrestricted submission[s] . . . the interpretations of the law by the arbitrators . . . are not subject . . . to judicial review for error in interpretation.” *Id.*

65. 417 U.S. 506 (1974).

66. 473 U.S. 614 (1985).

67. CARBONNEAU, *supra* note 16, at 118–19.

68. *See Scherk*, 417 U.S. at 508.

69. *See id.* at 508–09.

70. *See id.* at 508.

71. *See id.* at 513.

72. *See id.* at 506.

conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.⁷³

Congress “had expressly endorsed the emerging international stature of arbitration and implicitly recognized that the world marketplace did business on transnational and not national terms.”⁷⁴ The Court in *Scherk* seems to have endorsed the congressional intent behind ratification of the Convention.⁷⁵ Of course, the Court itself had previously taken a position on international contracting in *The Bremen v. Zapata Off-Shore Co.*,⁷⁶ and thus did not fail to repeat its warning that courts could undermine the international expansion of U.S. commerce by insisting on a “parochial concept that all disputes must be resolved under our laws and in our courts.”⁷⁷ Though the Court did not expressly rely on the Convention, it did note that express provisions of the FAA compelled enforcement of the agreement to arbitrate.⁷⁸ Conjecturing on possible reasons why the court failed to cite the Convention for its reasoning, one commentator has noted a “more narrowly-based decision relying upon the Convention would have had precedential weight in the international, but not domestic context.”⁷⁹ Regardless of its intent, the *Scherk*

73. *Id.* at 516.

74. CARBONNEAU, *supra* note 16, at 118.

75. *See id.* But note that the Court did not cite the Convention as support for its decision. However, in a footnote, the Court did state that its conclusion was “confirmed” by the U.S. ratification of the Convention. *See Scherk*, 417 U.S. at 519–20 & n.15.

76. 407 U.S. 1, 12 (1972) (concluding that absent compelling and countervailing reasons courts should honor contractual choice of forum).

77. *Scherk*, 417 U.S. at 519 (quoting *The Bremen*, 407 U.S. at 9). The Court in *Scherk* also noted that the expansion of American business would be slowed if courts required all disputes concerning commerce in world markets to be resolved “exclusively on our terms, governed by our laws, and resolved in our courts.” *Id.* at 519.

78. *See id.* at 519–20 & n.15.

79. Jonathan R. Nelson, *Judge-Made Law and the Presumption of Arbitrability*, 58 BROOK. L. REV. 279, 301 (1992).

Court created a precedent relied upon in later cases to increase the breadth of both the FAA and the Convention.

The Court in *Mitsubishi*, while upholding that antitrust claims arising out of international contracts were arbitrable, despite prior holdings finding such claims nonarbitrable in domestic cases,⁸⁰ continued to expand the scope of the Convention to accommodate the needs of transnational commerce.⁸¹ At issue in *Mitsubishi* was an international commercial dispute between a Japanese auto manufacturer, Mitsubishi Motors Corp.; a Swiss automobile dealer/franchisor, Chrysler International, S.A.; and a Puerto Rican dealer/franchisee, Soler Chrysler-Plymouth, Inc.⁸² Soler entered into a sales agreement with Chrysler and Mitsubishi that included a clause providing for arbitration of any disputes that might occur between Mitsubishi and Soler.⁸³ A dispute arose when Soler failed to meet sales requirements it had agreed to and Mitsubishi and Chrysler prohibited Soler from reexporting automobiles to Central and South America and the continental United States.⁸⁴ Soler then denied responsibility for the vehicles in its possession, prompting Mitsubishi to file a petition in federal court in Puerto Rico under the Convention and the FAA for an order to compel arbitration in Japan, pursuant to the agreement.⁸⁵ Soler counterclaimed, alleging, among other claims, antitrust violations and unfair trade practices.⁸⁶ Additionally, Soler argued that its antitrust claims were outside the arbitration clause and that as a matter of public policy such claims were not subject to resolution by arbitration.⁸⁷

The Supreme Court, in disagreeing with Soler's argument, concluded that courts must enforce arbitration agreements arising from an international contract out of "respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of

80. See, e.g., *American Safety Equip. Corp. v. J.P. Maquire & Co.*, 391 F.2d 821 (2d Cir. 1968) (holding that antitrust claims were not arbitrable). The *Mitsubishi* Court found it "unnecessary to assess the legitimacy" of that view in domestic cases, since it was deciding *Mitsubishi* on the ground that it involved an agreement in the international commerce context. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

81. See *Mitsubishi*, 473 U.S. at 630.

82. See *id.* at 617.

83. See *id.*

84. See *id.* at 617-18.

85. See *id.* at 618-19.

86. See *id.* at 619-20 (1985).

87. See *id.* at 624-25.

disputes.”⁸⁸ While distinguishing antitrust claims as applied in the domestic context from those involving international commerce, the Court cited with approval the presumption in favor of arbitration and the “liberal federal policy favoring arbitration agreements”⁸⁹ promulgated in *Moses H. Cone Memorial Hospital. v. Mercury Construction Corp.*⁹⁰ Finally, based on its decisions in *The Bremen* and *Scherk*, the Court concluded that the federal policies that favored enforcement of freely negotiated contractual choice-of-forum provisions and supporting arbitration applied with special force in the context of transnational commerce.⁹¹

Yet neither the Convention, the Act, nor its legislative history supports the Court’s statement that the policies of the Act apply with equal force in the transnational context.⁹² In fact, the Court agreed with the appeals court’s finding that the “subject matter” defense contemplated exceptions to arbitrability grounded in domestic law.⁹³ However, the Court asserted that in adopting the Convention, Congress did not intend to narrow the application of the Convention to specific matters.⁹⁴ Regardless of its reasoning, *Mitsubishi* reinforced and expanded the doctrine of *Scherk*.⁹⁵ In holding antitrust claims arising from international contracts arbitrable, the Court “avoided placing meaningful yet moderate national restraints on international arbitral adjudication.”⁹⁶ In the end, the Court impliedly gave approval to the view that the economies of the Western industrial nations have become so closely connected that participation in international trade implies obeying a set of rules independent of each countries’ own rules.⁹⁷

88. *Id.* at 629.

89. *Id.* at 625 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

90. 460 U.S. 1, 24 (1983). *Moses Cone* involved two domestic disputants, and therefore only the FAA was implicated. *See id.* at 19–20. But the Court’s categorical statement upholding the FAA left little doubt that the Court’s rulings “demonstrates that the Court has adopted a position supportive of the arbitral process’s institutional autonomy and systemic viability.” *See* CARBONNEAU, *supra* note 16, at 114.

91. *See Mitsubishi Motors Corp.*, 473 U.S. at 631–33.

92. *See id.* at 646 & n.11 (Stevens, J., dissenting) (implying that the transnational context has not been specifically mentioned in the Convention, the Act, or its legislative history).

93. *See id.* at 639 & n.21.

94. *See id.*

95. *See* CARBONNEAU, *supra* note 16, at 120 (explaining that “the *Mitsubishi* opinion reinforced and amplified” the *Scherk* doctrine).

96. *Id.*

97. *See id.*

Since its ruling in *Mitsubishi*, the Supreme Court has continued to expand the logic of *Scherk*. The Court has held the following to be “proper subject matter”: domestic securities law claims under the 1934 Securities Exchange Act,⁹⁸ domestic securities law claims under the 1933 Securities Act (thus overruling *Wilko*),⁹⁹ domestic civil claims under the Racketeer Influenced and Corrupt Organization Act (RICO),¹⁰⁰ and claims brought under the Age Discrimination in Employment Act.¹⁰¹ The Court has also invoked the Supremacy Clause to uphold the Act against state attacks attempting to preempt it.¹⁰²

The inference that follows from the above line of cases is that in the international commercial context, success in challenging an arbitral award based on public policy or non-arbitrability grounds is limited in light of the narrowing of those grounds as they exist under the Convention and the Federal Arbitration Act.¹⁰³

III. DEFENSES TO ARBITRATION

The Convention itself provides for several limited defenses to arbitration.¹⁰⁴ Article III of the Convention, which

98. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

99. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484–85 (1989).

100. See *McMahon*, 482 U.S. at 242.

101. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

102. See *Perry v. Thomas*, 482 U.S. 483, 491 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

103. The *Wilko* Court suggested that courts may vacate an award under the judicially developed ground of an arbitrator’s “manifest disregard” of the law. See *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953). Generally, American courts have not approved of such grounds for vacating an award. See, e.g., *Brandeis Intsel Ltd. v. Calabrian Chem. Corp.*, 656 F. Supp. 160, 165 (S.D.N.Y. 1987) (discussing how courts have applied the “manifest disregard” of the law approach). The party seeking to vacate an award based on “manifest disregard” must establish that the arbitrator understood but ignored governing law that is “well defined, explicit, and clearly applicable.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933–34 (2d Cir. 1986).

104. See Convention, *supra* note 19, art. V, 21 U.S.T. 2520. Article V contains an exclusive list of grounds on which a foreign arbitral award may be vacated: (1) absence of a valid arbitration agreement, including incapacity of the parties; (2) lack of a fair opportunity to present one’s case during a hearing; (3) the award exceeds the scope of the submission to arbitration; (4) impropriety in the makeup of the arbitral tribunal or improper use of procedure; (5) the award has not yet become binding or has been stayed; (6) nonarbitrability of the subject matter of the dispute; or (7) the award violates public policy. See *id.*

echoes its theme, requires the courts of signatory states to recognize and enforce foreign arbitral awards unless one of the defenses noted in Article V is applicable.¹⁰⁵ Read in tandem, however, Articles III and V confirm the strong presumption, noted above, in favor of foreign arbitral awards. Additionally, in light of the U.S. affirmative duty under the Convention and the role treaties play under the U.S. Constitution, it is clear that foreign arbitration awards carry more weight than foreign judgments.¹⁰⁶

Yet, Article V must also be read in light of Article VII, considered one of the more controversial provisions of the Convention.¹⁰⁷ Also considered a “more favorable right” provision, the Article has been interpreted as allowing for the application of a state’s domestic law or treaty when such laws provide for more favorable rulings.¹⁰⁸ This permits a party seeking enforcement to shop for the most favorable law available.¹⁰⁹ No U.S. court has addressed Article VII directly, but in *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*,¹¹⁰ the Second Circuit stated that the fundamental goal of the Convention was to eradicate any obstacles to enforcement and noted the Convention’s “general pro-enforcement bias.”¹¹¹ That conclusion agrees with the strong U.S. position favoring international arbitration.¹¹²

If Article VII can be interpreted as a pro-enforcement provision, then Article V’s defenses create a sort of tension between it and Article VII. After all, Article V’s exclusive list of defenses is an attempt to create uniformity, whereas Article VII’s message is that a party seeking enforcement may simply shop for the most favorable forum and law available.¹¹³

105. See *id.* art. III (“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . .”).

106. See U.S. CONST. art VI, cl. 2 (“[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land.”).

107. See Convention, *supra* note 19, art. VII, 21 U.S.T. 2520–21; Albert Jan van den Berg, *Should an International Arbitrator Apply the New York Arbitration Convention of 1958?*, in *THE ART OF ARBITRATION* 39, 43–44 (Jan C. Schultz & Albert Jan van den Berg eds., 1982). [hereinafter van den Berg, *Should an International Arbitrator Apply*].

108. See van den Berg, *Should an International Arbitrator Apply*, *supra* note 102, at 43–44.

109. See *id.* at 49.

110. 508 F.2d 969 (2d Cir. 1974).

111. *Id.* at 973.

112. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985).

113. One commentator has argued that the purpose of the New York Convention was “not to establish a comprehensive and unitary regime” for

However, allowing courts of the situs the primary responsibility to review arbitral awards may be the best idea. Such courts are generally in a better position to review the proceedings for compliance with procedural fairness and to guard against gross misapplication of justice. As Professor van den Berg has observed:

A losing party must be afforded the right to have the validity of the award finally adjudicated in one jurisdiction. If that were not the case, in the event of a questionable award a losing party could be pursued by a claimant with enforcement actions from country to country until a court is found, if any, which grants the enforcement. A claimant would obviously refrain from doing this if the award has been set aside in the country of origin and this is a ground for refusal of enforcement in other Contracting States.¹¹⁴

Such a standard creates the potential for abuse, since local considerations could result in unfavorable results for “out-of-towners.”¹¹⁵ Regardless of whether this standard would jeopardize the view of arbitration as truly international and not local, its application would seem to also violate Article V of the Convention, which gives the court where enforcement is sought the right to choose whether to grant the award.¹¹⁶

Under Article V(1)(b) of the Convention, enforcement of the a foreign arbitral award may be denied if the defendant can prove a lack of proper notice of the arbitration proceedings or lack of notice of the appointment of the arbitrator.¹¹⁷ Thus, the provision requires the arbitrator to conduct the arbitration proceeding in such a manner so that each party has a fair opportunity to present its case. In a leading case, the Second Circuit interpreted that article as

enforcement of arbitral awards, but instead to facilitate enforcement of foreign arbitral awards. See Jan Paulsson, *Rediscovering the New York Convention: Further Reflections on Chromalloy*, 12 Mealey's Int'l Arb. Rep. 20 (1997).

114. VAN DEN BERG, CONVENTION, *supra* note 48, at 355.

115. See Stephen T. Ostrowski & Yuval Shany, Note, *Chromalloy: United States Law and International Arbitration at the Crossroads*, 73 N.Y.U. L. REV. 1650, 1663 (1998).

116. See Convention, *supra* note 19, art. V, 21 U.S.T. 2520.

117. See *id.* art. V(1)(b).

essentially allowing “the application of the forum state’s standards of due process.”¹¹⁸

Yet the U.S. courts have not very been receptive of such a defense. In *Parsons*, the Court held that a U.S. corporation’s due process rights were not infringed when the tribunal refused to reschedule a hearing for the convenience of the American corporation’s witness, observing that such “is a risk inherent in an agreement to submit to arbitration.”¹¹⁹ In another case, the court refused to overturn an award when the U.S. party received notice of the proceedings but did not attend the hearings.¹²⁰ The courts have also refused to overturn arbitral awards based on Article V(1)(b) despite one party’s inability to fully cross-examine the other party’s witness¹²¹ or when the arbitral panels used an expert to advise it on New York contract and corporate law without having revealed the name of the expert or the content of the advice to the parties.¹²²

One example of an American court refusing enforcement because the losing party was “unable to present his case,” is *Iran Aircraft Indus. v. Avco Corp.*¹²³ The award was denied enforcement because the losing party had failed to present back-up invoices supporting an analysis of the amount of the claim by an international public accounting firm.¹²⁴

Article V(1)(c) obligates the arbitrator to confine her award to matters covered by the arbitration clause. This is because “[t]he jurisdiction of arbitrators depends on agreement of the parties, and if the arbitrators decide a matter not submitted to them, they have acted without jurisdiction and their award is defective.”¹²⁵ But whether a part of the damages awarded is consequential damages is a decision for the arbitrator to make, not the court reviewing it in an enforcement proceeding.¹²⁶

118. *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969, 975 (1974).

119. *Id.* at 975.

120. *See Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co.*, 415 F. Supp. 133, 140–41 (D.N.J. 1976).

121. *See Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1066–67 (N.D. Ga. 1980).

122. *See International Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, Indust. Y Commercial*, 745 F. Supp. 172, 174–75 (S.D.N.Y. 1990).

123. 980 F.2d 141, 145–46 (2d Cir. 1982).

124. *See id.* at 146.

125. LOWENFELD, *supra* note 3, at 363.

126. *See Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969, 976–77 (2d Cir. 1974); *see also Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int’l, Ltd.*, 888 F. 2d 260, 264–

Article V of the Convention contains several other defenses. Article V(1)(a) addresses the absence of a valid arbitration agreement.¹²⁷ Note that the defense agrees with the basic procedure a court would take in a contract dispute, like whether a valid contract even exists. Indeed, the Supreme Court has made clear that arbitration is a matter of contract, and that neither the Act nor the Convention requires a party to arbitrate when no meeting of the minds has occurred.¹²⁸ The fact that there exists a policy in favor of enforcement cannot alone suffice to create a valid agreement when none has been agreed upon.¹²⁹ A related defense, but one which rarely succeeds, is that the agreement was illegal or induced by fraud or duress.¹³⁰

Another Article V defense involves irregularities in the composition of the arbitral tribunal or problems with the procedure employed by the tribunal. In *International Produce, Inc. v. A/S Rosshavet*,¹³¹ for example, the court held that unless a claim of bias was shown, a nonpartisan arbitrator did not have to be disqualified because she was also a nonparty witness in a separate arbitration dispute involving the law firm representing one of the parties in the arbitration at issue. Courts have refused to vacate an award due to the mere appearance of bias.¹³² A practical explanation for this pattern may be due to the fact that it is not uncommon for arbitrators, who are often experts in their field, to know one of the parties involved in the dispute.

67 (2d Cir. 1989) (concluding that an award of consequential damages did not exceed the arbitrator's authority).

127. See Convention, *supra* note 19, art. V(1)(a), 21 U.S.T. 2520.

128. See *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648–49 (1986) (“Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.”).

129. See, e.g., *Adamovic v. Metme Corp.*, 961 F.2d 652, 654 (7th Cir. 1992) (finding the parties’ agreement “hopelessly ambiguous”); *Recold, S.A. de C.V. v. Montfort of Colorado, Inc.*, 893 F.2d 195, 197 (8th Cir. 1990) (“[A]rbitration remains a dispute resolution mechanism which is not imposed absent both parties’ consent”); *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 609 F. Supp. 75, 78 (S.D.N.Y. 1985) (“Arbitration is a matter of contract, and parties cannot be required to submit to arbitration of any dispute which they have not agreed to submit.”).

130. See, e.g., *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co., A.G.*, 480 F. Supp. 352, 358–61 (S.D.N.Y. 1979).

131. 638 F.2d 548, 551 (2d Cir. 1981).

132. See, e.g., *Transmarine*, 480 F. Supp. at 357–58; *Fertilizer Corp. of India v. IDI Mgmt, Inc.*, 517 F. Supp. 948, 954 (S.D. Ohio 1981). *But see* *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 147–48, 150 (1968) (overturning award because arbitrator failed to disclose a close financial relationship with one party).

An award may also be challenged on the grounds that it is not binding.¹³³ American courts have not generally required that all appeals in the country where the award was rendered to be exhausted before an award would be enforced. Instead, an award becomes binding when it has run its course as to all possible resolutions available before the tribunal, and no other tribunal may be contacted to examine the award.¹³⁴ Thus, for example, the court in *Fertilizer Corp. of India v. IDI Management* rejected a challenge to an award simply because Indian courts had not yet ruled on the award.¹³⁵ In *Island Territory of Curacao v. Solitron Devices, Inc.*, the court held that the possibility of future arbitration proceedings between the same parties had no effect on the award already rendered.¹³⁶

In addition to the defenses noted above, Article V(2) presents two defenses which can be essentially considered as one: the defense that claims that the subject matter is not capable of arbitration under the law of the country where enforcement is sought, and the defense alleging that “recognition or enforcement of the award would be contrary to the public policy of that country.”¹³⁷ These two defenses have been interpreted narrowly. In *Parsons & Whittemore, Overseas*, a construction firm, had a contract financed by the United States Agency for International Development (USAID) for construction and limited operation of a paper mill in Egypt.¹³⁸ War erupted in the region, and due to diplomatic relations, Overseas did not return to complete the project, arguing *force majeure*.¹³⁹ The Egyptian company that contracted with Overseas claimed breach of contract and invoked the ICC arbitration clause in the contract.¹⁴⁰

The arbitral tribunal ruled against Overseas, forcing Overseas to claim Article V defenses, mainly the public policy defense. In refusing to vacate the arbitral award, the court stated that “considerations of reciprocity—considerations

133. See Convention, *supra* note 19, art. V(1)(e), 21 U.S.T. 2520.

134. See Gerald Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.*, 3 SW. U. L. REV. 1, 11 (1971).

135. See 517 F. Supp. at 955–58.

136. See 356 F. Supp. 1, 12 (S.D.N.Y. 1973).

137. Convention, *supra* note 19, art. V(2)(a)–(b), 21 U.S.T. 2520.

138. See *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 972 (2d Cir. 1974).

139. See *id.*

140. See *id.*

given express recognition in the Convention itself—counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.”¹⁴¹ The court added, “Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.”¹⁴² The court’s ruling suggests that public policy is not intended to be an invitation to judicial second-guessing of arbitral awards.¹⁴³ However, a good example of a public policy defense to enforcement is asserted in *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*¹⁴⁴ There, the district court had refused to enforce an award requiring an American corporation to transfer communications equipment to Iran, a transfer that would have violated U.S. law.¹⁴⁵ The court held that such a transfer “would violate United States export restrictions” and refused enforcement of the award.¹⁴⁶ The court did state, however, that “if these restrictions are lifted within a reasonable time after this Order is entered, then the defendants must return or make available the equipment as directed by the Award.”¹⁴⁷ Consequently, American courts will not vacate an award that neither violates fundamental due process standards nor shows a complete disregard for the law.

An issue related to the public policy defense is whether the arbitrator is obligated to consider the public policy of the country where enforcement is sought.¹⁴⁸ A problem that arises from requiring the arbitrator to do so is that the arbitrator would then be forced into discovering where exactly enforcement will be sought.¹⁴⁹ Considering that multi-national corporations may have assets in several countries, the arbitrator would be placed in the position of an investigator tracking down assets of the losing party.¹⁵⁰ As Professor van de Berg has observed, “Even if these countries could be identified to the arbitrator before the award is

141. *Id.* at 973–74.

142. *Id.* at 974.

143. *See id.* at 977.

144. 969 F.2d 764 (9th Cir. 1992).

145. *See id.* at 768.

146. *Id.*

147. *Id.*

148. *See* van den Berg, *Should an International Arbitrator Apply*, *supra* note 107, at 48.

149. *See id.*

150. *See id.*

rendered, a cumulative application of the rules of public policy of several countries would be both impractical and improper.”¹⁵¹

A. *Chromalloy Opinion*

The *Chromalloy*¹⁵² case addressed the issue of conflict between an inconsistent judgment and an arbitral award. The case involved a U.S. company, Chromalloy Aeroservices, Inc. (CAS), a Delaware corporation with its principal place of business in San Antonio, Texas, who entered into a contract with the Egyptian Air Force to perform inspection, repair, and related services on Egyptian helicopters.¹⁵³ Part of the contract was an agreement stating that any dispute arising from the contract would be submitted to arbitration.¹⁵⁴ The Egyptian government, citing delays to the work, unilaterally terminated the contract, and the parties entered into a protracted arbitration.¹⁵⁵ The arbitration, in accordance with the agreement, took place in Egypt and was governed by Egyptian law.¹⁵⁶ An award was rendered, holding that under Egyptian law, Egypt was not entitled to terminate the contract because it failed to adhere to the formal notice period in the contract.¹⁵⁷ Egypt, however, refused to pay the award.¹⁵⁸ CAS then sought recognition and enforcement of the award in the U.S. District Court for the District of Columbia.¹⁵⁹ In the meantime, the Cairo Court of Appeals had nullified the arbitral award, citing the alleged failure of the arbitrators to apply the proper substantive law.¹⁶⁰ In the end, the district court granted CAS’s petition to recognize and enforce the arbitral award in the United States.¹⁶¹

In reaching its conclusion, the court observed that the issue was a matter of first impression:¹⁶² whether a U.S. court, applying the Convention, should enforce an international arbitral award that has been set aside by a court at the place of rendition. The court employed two lines

151. *Id.*

152. *Chromalloy*, 939 F. Supp. at 907.

153. *See id.* at 908.

154. *See id.*

155. *See Ostrowski & Shany, supra* note 115, at 1667.

156. *See id.*

157. *See id.*

158. *See id.*

159. *See Chromalloy*, 939 F. Supp. at 908.

160. *See Ostrowski & Shany, supra* note 115, at 1667–68.

161. *See Chromalloy*, 939 F. Supp. at 914–15.

162. *See id.* at 908.

of reasoning to justify its decision. First, the more favorable provisions of Article VII of the Convention enabled CAS to invoke Chapter One of the FAA for the recognition and enforcement of its award.¹⁶³ And thus, because under section 10 of the FAA a setting aside of an award by a foreign court did not qualify as grounds for nonenforcement,¹⁶⁴ and no “manifest disregard of the law” had taken place, the court would confirm the award.¹⁶⁵ The Egyptian government had relied on Article V(1)(e), which recognizes the setting aside of an award by a court at the situs as a possible ground for nonenforcement.¹⁶⁶ But the court stated that the language of Article V was permissive and, therefore, established a “discretionary standard.”¹⁶⁷ The language of Article VII, however, was mandatory and required maintenance of the party’s domestic law rights to the enforcement of the award.¹⁶⁸ Article VII states that: “The provisions of the present Convention . . . shall not deprive any interest[ed] party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the country where such award is sought to be relied upon.”¹⁶⁹ In the court’s opinion, “under the Convention, CAS maintains all rights to the enforcement of this Arbitral Award that it would have in the absence of the Convention.”¹⁷⁰ The court further noted that the award would be enforceable under the FAA’s deferential review standard.¹⁷¹ The court’s second line of reasoning relied on the weight due the decision of the Egyptian Court of Appeals.¹⁷²

The court first addressed the decision of the Egyptian Court of Appeals by looking at the arbitration agreement between the parties.¹⁷³ The agreement included the following clause: “It is . . . understood that both parties have

163. *See id.* at 909–10 (suggesting that the FAA would provide CAS with the right to enforce the award even in the absence of the Convention).

164. *See* 9 U.S.C. § 10 (1994) (providing that an arbitration award may be vacated for fraud, bias, or misconduct of arbitrator or improper execution or exercise of power exceeding that granted to the arbitrator).

165. *See Chromalloy*, 939 F. Supp. at 910–11.

166. *See id.* at 909.

167. *See id.* Compare Article V, using the term “may,” with Article VII, using the term “shall.” *See* Convention, *supra* note 19, arts. V, VII, 21 U.S.T. 2520–21.

168. *See Chromalloy*, 939 F. Supp. at 909–10.

169. Convention, *supra* note 19, art. VII, 21 U.S.T. 2520–21.

170. *Chromalloy*, 939 F. Supp. at 910.

171. *See id.*

172. *See id.* at 913.

173. *See id.* at 912.

irrevocably agreed to apply Egypt[ian] Laws and to choose Cairo as seat of the court of arbitration. . . . The decision of the said court shall be final and binding and cannot be made subject to any appeal or other recourse.”¹⁷⁴ The court viewed the first sentence as one establishing the choice of law to govern the arbitral hearing and the second sentence as prohibiting either party from appealing the decision of arbitral tribunal.¹⁷⁵ By this reading, the decision of the arbitrator was not subject to appeal and hence controlling.¹⁷⁶

Furthermore, in the court’s view the Egyptian Appeals Court’s setting aside of the award was simply a foreign judgment and, as such, no longer subject to be reviewed under the Convention, but rather under a variety of federal law provisions related to jurisdiction and venue, among others.¹⁷⁷ The court then concluded that enforcement of the Egyptian court judgment would “violate [a] clear U.S. public policy,” one that strongly favors “final and binding arbitration of commercial disputes.”¹⁷⁸ While rejecting the Egyptian Government’s arguments urging the court to consider international comity¹⁷⁹ and the conflict between the Convention and the FAA, the Court concluded that, “the award . . . is valid as a matter of U.S. law[,]” and thus “it need not grant *res judicata* effect to the decision of the Egyptian Court of Appeals at Cairo.”¹⁸⁰

The district court in *Chromalloy* is not alone in its interpretation of the Convention. For example, the Paris Court of Appeals has upheld a lower court decision granting enforcement of the *Chromalloy* arbitral award in France.¹⁸¹

174. *Id.* Despite the Egyptian government’s argument that the first sentence supersedes the second, the court reasoned that the two sentences must be read to not contradict one another. *See id.*

175. *See id.*

176. *See id.*

177. *See id.* at 910.

178. *Id.* at 913.

179. One court has provided the following definition:

Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. . . . [I]t is a nation’s expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.

Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3rd Cir. 1971).

180. *Chromalloy*, 939 F. Supp. at 914.

181. *See Chromalloy Award Survives Challenge*, MEALEY’S INT’L ARB. REPS., Apr. 1997, at 5.

The French court reasoned that under the 1982 Franco-Egyptian Treaty of Judicial Cooperation, domestic French law applied pursuant to Article VII of the Convention.¹⁸² In his analysis of *Chromalloy* and the French Court of Cassation's opinion in *OTV v. Hilmarton*, Professor Emmanuel observes that the policy underlying these decisions "exemplif[ies] a growing international consensus in favor of the enforcement of an arbitral award set aside by a court at the situs of the arbitration" and "reflect[s] the notion that the seat of an arbitration is not its fundamental anchor; at the recognition and enforcement stage, the place of enforcement is paramount"¹⁸³ This view likely reflects the reasoning that, while courts at the situs are in the best position to review an arbitral award, the likelihood of improper influence by one of the parties is an overriding concern, especially when that influence could help one party evade the arbitral award.¹⁸⁴ But even more relevant is the fairness of the foreign laws, because despite the validity of an award under foreign law, the foreign law may itself be violative of the public policy of the enforcement country.¹⁸⁵

B. The Toys "R" Us Opinion:

In *Toys "R" Us*, the issue was whether defenses not set forth in the Convention can be implied grounds for refusing enforcement of an award.¹⁸⁶ In November 1982, Toys "R" Us entered into an agreement with Alghanim & Sons in which it granted the Kuwaiti business a "limited right to open Toys "R" Us stores and use its trademark in Kuwait" and several other Middle Eastern countries.¹⁸⁷ Per the agreement, Alghanim opened four toy stores in Kuwait, only one of which resembled a U.S. Toys "R" Us store.¹⁸⁸ Between 1982 and 1993, the operation of the stores resulted in nearly \$7 million

182. *See id.*

183. Emmanuel Gaillard, *Enforcement of a Nullified Foreign Award*, 218 N.Y. L.J. 3 (1997).

184. *See* Gary H. Sampliner, *Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin*, MEALEY'S INT'L ARB. REPS., Sept. 1996, at 22 & n.18 (noting a "disturbing propensity" on the part of Egyptian courts to "nullify arbitral awards in favor of foreign parties against Egyptians or its government for seemingly arbitrary reasons").

185. *See id.* at 22.

186. *See* Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 17-18 (2nd Cir. 1997).

187. *Id.* at 17.

188. *See id.*

in losses.¹⁸⁹ Thus, in 1991 and 1992, the parties attempted to renegotiate the deal. Alghanim urged Toys “R” Us to assume greater responsibility for capital expenditures, an undertaking that Toys “R” Us was unwilling to accept.¹⁹⁰ In July 1992, Toys “R” Us sent Alghanim a notice of nonrenewal of the licensing agreement, stating that the parties’ agreement would terminate on January 31, 1993.¹⁹¹ Alghanim countered that the notice was late and that, consequently, the term of the agreement was extended for another two years.¹⁹²

Unable to agree to a settlement, the parties entered into arbitration, commenced by Toys “R” Us in New York City under the rules of the American Arbitration Association.¹⁹³ Toys “R” Us sought to terminate the agreement on December 31, 1993. Alghanim counterclaimed alleging breach of contract.¹⁹⁴ After nearly two years of proceedings, the arbitrator awarded Alghanim \$46 million plus interest for lost profits.¹⁹⁵ Alghanim then petitioned the U.S. District Court for the Southern District of New York to confirm the award under the Convention while Toys “R” Us argued that the award should be vacated or modified under the FAA because it was irrational and in “manifest disregard” of the law and the terms of the parties’ agreement.¹⁹⁶ Though it agreed with Toys “R” Us as to the parallel applications of the Convention and the FAA, the court nonetheless confirmed the award, “finding Toys “R” Us’s objections to the award to be without merit.”¹⁹⁷

On the issue of “overlapping coverage” between the Convention and the FAA, the court concluded that the Convention was applicable to the enforcement of the award because the transaction in question—the one giving rise to the arbitration—was “non-domestic” since the involved parties were of different nationality and the contract requested performance abroad.¹⁹⁸ The court mentioned that

189. *See id.*

190. *See id.*

191. *See id.*

192. *See id.*

193. *See id.* at 18.

194. *See id.*

195. *See id.*

196. *See id.*

197. *Id.*

198. *See id.* at 18, 19; *see also* Bergesen v. Joseph Muller Corp., 710 F.2d 928, 934 (2d Cir. 1983) (noting that since the FAA and the Convention “overlap in this case [the party seeking enforcement] has more than one remedy available and may choose the most advantageous”).

the Convention does not define non-domestic awards.¹⁹⁹ However, the court noted that:

9 U.S.C. § 202, one of the provisions implementing the Convention, provides that “[a]n 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.”²⁰⁰

The court further acknowledged that non-domestic awards are deemed as such, and hence subject to the Convention, not because they are made abroad, but because they are made “within the legal framework of another country.”²⁰¹

The court then addressed the grounds available for setting aside an arbitral award under U.S. law.²⁰² The court concluded that the grounds set forth in Article V were the exclusive ones provided by the Convention.²⁰³ The FAA may supplement the Convention, but only “to the extent that they do not conflict.”²⁰⁴ Thus, only non-conflicting overlap is possible.²⁰⁵ The court acknowledged the existence of well-settled law on this issue, recognizing “[t]here is now considerable caselaw holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award.”²⁰⁶ But this non-conflicting rule applies

199. See *Toys “R” Us*, 126 F.3d at 18.

200. *Id.* at 19 (quoting 9 U.S.C. § 202 (1994)).

201. *Id.*; see also *Bergesen*, 710 F.2d at 932 (adopting “the view that awards not 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 . . .”).

202. See *Toys “R” Us*, 126 F.3d at 19–23.

203. See *id.* at 19; see also *supra* text accompanying note 104 (listing the grounds for refusing to recognize an arbitral award under Article V of the Convention).

204. *Toys “R” Us*, 126 F.3d at 20.

205. See *id.* (noting cases where the FAA may supplement the Convention only if there was no conflicting overlap).

206. *Id.*; see also *Parson & Whittmore Overseas Co. v. Societe Generate de L’Industrie du Papier*, 508 F.2d 969, 977 (2nd Cir. 1974) (“[T]he legislative history of Article V . . . and the statute enacted to implement the United States’ accession to the Convention are strong authority for treating as exclusive the bases set forth in the Convention for vacating an award.”); *Bergesen*, 710 F.2d

only to Convention awards rendered abroad.²⁰⁷ However, when Convention awards are rendered in the United States, the FAA is applicable, regardless of any conflict.²⁰⁸

The arbitration award in *Toys “R” Us* was rendered in New York.²⁰⁹ Therefore, the non-domestic award triggered the application of Article V(1)(e) of the Convention.²¹⁰ Under that Article, a Convention award can be “set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”²¹¹ Thus, the FAA could be used to vacate the arbitral award.²¹² In support of its reasoning, the court cited to *Chromalloy*,²¹³ a case that, on its face, stands opposed to the reasoning of *Toys “R” Us*.²¹⁴ Indeed, the court itself seemed to be aware of the dangers of its rationale, warning that “[t]his might undermine the limitative character of the grounds for refusal listed in Article V . . . and thus decrease the degree of uniformity existing under the Convention.”²¹⁵ In other words, Article V(1)(e) serves as an encroachment into the international rule for the enforcement of transborder arbitral awards, for example, by allowing a disappointed party to forum-shop and to postpone by accessing the local law of the place of rendition.

Amazingly, after setting forth its reasoning, the court nonetheless affirmed the award.²¹⁶ The court noted that the “[i]nterpretation of these contract terms is within the province of the arbitrator and will not be overruled simply because we disagree with the interpretation.”²¹⁷ Further, the court maintained that the district court had properly concluded

at 928 (holding that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards should be interpreted broadly to effectuate its recognition and enforcement purposes).

207. See *Toys “R” Us*, 126 F.3d at 20.

208. See *id.* at 20–23.

209. See *id.* at 23–24.

210. See *id.* at 20–21.

211. *Id.* at 20. (quoting art V).

212. See *id.* at 21.

213. See *id.* The U.S. District Court found that “in an arbitration conducted in Egypt and under Egyptian law, nullification of the award by the Egyptian courts falls within Article V(1)(e).” *Id.*

214. See *Chromalloy*, 939 F. Supp. at 909 (holding that one state can enforce an award even if the award has been nullified under the national law of the place of rendition).

215. *Toys “R” Us*, 126 F.3d at 21 (quoting VAN DEN BERG, CONVENTION, *supra* note 48, at 355).

216. See *id.* at 25.

217. *Id.*

that none of the grounds for vacating or setting aside an arbitral award under the FAA existed in the present case.²¹⁸

IV. CONCLUSION

The primary incentive for international arbitration is its uniformity, economy, and speed. The advantages of being able to control the proceedings in international arbitration by being able to, for example, contribute to the choice of an arbitrator(s) without worrying about the sympathies of that person clearly make arbitration preferable over having to litigate in a foreign state. These advantages, however, require the assistance of two countervailing forces. First, to achieve efficiency and economy, international arbitration must avoid systems of control that would come to resemble domestic courts, with their backed-up dockets and their protracted proceedings. Second, without a mechanism to insure uniformity, to avoid the pitfalls of localization of rulings, a system is required to insure not only appeals, but to ultimately gain the trust of the international commercial community. The success of the Convention has achieved the level needed to address the second concern noted above. As to the first concern, the various arbitral institutions, such as the ICC and the AAA, have exhibited their ability to create neutral rules that can gain the trust of the international community. Yet problems remain.

Gaining an award is not the final step in the arbitral process. The assistance of national courts is needed for enforcement of arbitral awards. Without their assistance in either enforcing an award against a party or offering their protection against the potential compromise of rights and abuse, the arbitral process would present far less assurance to the international commercial community. The two recent cases discussed in this Comment illustrate these points, while also pointing out some of the potential problems with the present judicial interpretation of the Convention. Without attempting to reconcile *Chromalloy* and *Toys "R" Us*, the two cases show that by allowing the domestic law of each signatory state to supplement the defenses articulated in

218. *See id.* at 15 (noting that the district court held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards applied to confirm the arbitration award; the district court had authority to apply Federal Arbitration Act's implied ground for setting aside awards, the arbitrator did not manifestly disregard law of lost profits, and the award would not be set aside on grounds Court of Appeals disagreed with arbitrator's interpretation of underlying licensing agreements).

Article V of the Convention, the courts deprive the Convention of its ultimate purpose, to create uniformity. In particular, the court in *Toys “R” Us* had the opportunity to forego the pronouncement of Article V(1)(e)—the setting aside of an arbitral award using the domestic law of the rendering state—and instead to keep within the exclusive grounds listed in the remainder of that Article. Ultimately, both of these decisions reflect a desire to seek uniformity while allowing individual states to maintain the autonomy of their domestic courts. Though the *Alghanim* Court does not say so explicitly, a possible reading of its decision may be that it is best to allow the signatories to the Convention to amend the articles to reflect the current state of arbitration, rather than to have expected the Second Circuit to amend on its own such a widely successful treaty.

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