

# The international scope of transnational arbitration agreements and their effect on United States corporations

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## Abstract

This note focuses on the history of arbitration to provide a general background of arbitration, in Part II, and a discussion of federal and international arbitration acts, in Part III. Subsequent to that, in Part IV, there is a discussion on the backbone of the United States' transnational arbitration policy adopted by the United States Supreme Court by looking at decisional law and analyzing the language used. Subsequent to that, the realities of transnational business will be examined in Part IV, followed by the recognition of judgments against American domiciliaries, in Part VI. Finally, this note will examine the pitfalls that this policy creates in Part VII, and alternative, more isolationist, policies will be examined to the existing policy will be examined in Part VIII.

**Keywords:** international arbitration; transnational arbitration; transnational business; recognition of judgments.

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## Introduction

The world as it is today is not as it was centuries, or even decades ago. Business transactions have progressed beyond members of villages interacting with each other. In modern society, billions upon billions of dollars of trade are transacted each and every day.<sup>2</sup> Inevitably, there will be disputes that occur in the normal course of business. As there is no uniform international law, these disputes could cripple business on a global scale, as no respectable business would contract with a party from a foreign country out of fear of breach.<sup>3</sup> Arbitration alleviates that fear.<sup>4</sup> The two opposing parties can contract for virtually every term that they can imagine, and these imagined terms can include a remedy for breach, so the party who was breached against does not suffer irreparable economic harm.<sup>5</sup>

The United States Supreme Court adopted, and has continually supported, transborder arbitration – arbitration between two parties of differing domiciles – and the Court has preferred to let the contracts, the instruments that authorize and control the arbitration, stand as written.<sup>6</sup> That is, the Court has not carefully scrutinized contract terms, preferring instead a system that favors international progress, even at the expense of the American domiciliary.<sup>7</sup>

This note focuses on the history of arbitration to provide a general background of arbitration, in Part II, and a discussion of federal and international arbitration acts, in Part III. Subsequent to that, in Part IV, there is a discussion on the backbone of the United States' transnational arbitration policy adopted by the United States Supreme Court by looking at decisional law and analyzing the language used. Subsequent to that, the realities of transnational business will be examined in Part IV, followed by the recognition of judgments against American domiciliaries, in Part VI. Finally, this note will examine the pitfalls that this policy creates in Part VII, and

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<sup>2</sup> See World Trade Organization, 2003 International Trade Statistics 23 (2003).

<sup>3</sup> Carbonneau, Thomas, *Cases and Materials on The Law and Practice of Arbitration* 2 (3d ed. 2003).

<sup>4</sup> *Id.*

<sup>5</sup> Drafting an Arbitration Agreement, available at <http://www.law-online.co.za/arbitration/arbdraft.html> (last visited October 7, 2004).

<sup>6</sup> See, e.g. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); see also, e.g. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); see also, e.g. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>7</sup> See, e.g. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); see also, e.g. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), see also, e.g. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

alternative, more isolationist, policies will be examined to the existing policy will be examined in Part VIII.

## **History and background of international arbitration**

Arbitration, in one form or another has been around for centuries.<sup>8</sup> This age-old institution is a “method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding.”<sup>9</sup> This method dates back to trade associations and merchant guilds in European countries.<sup>10</sup> The reasons for this preference by merchants and tradesmen are in many ways the same ones as those motivating multinational corporations today. The tradespeople believed that arbitration expedited the process of dispute resolution, and that the courts were not sophisticated enough to fully comprehend the nature of the agreement and the intricacies of the transaction.<sup>11</sup> Moreover, an agreement to arbitrate would open a whole new world of potential remedies to the parties, as they could contract for any possible remedy that they may dream up, where a court of law is bound by well established legal principles and remedies.<sup>12</sup>

Arbitration, however, is certainly not limited to commercial transactions across borders. There are instances of arbitration in many fields and areas of law, including environmental<sup>13</sup> and intellectual property,<sup>14</sup> to name just two. These arbitrations form a backbone for international commercial arbitration – that is, the precedent for deciding cases and conflicts across boundaries and borders. Moreover, these arbitrations form a background for understanding how parties from two nations can work together to enable a case to be decided definitively.

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<sup>8</sup> See Katherine Van Wetzel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. Rev. 931, 960 (1999).

<sup>9</sup> Black’s Law Dictionary 41 (7th ed. 1999).

<sup>10</sup> Todd Baker, Comment, *Arbitration: Arbitration in the 21st Century: Where We’ve Been, Where We’re Going*, 53 Okla. L. Rev. 653, 654 (2000).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *infra* note 14.

<sup>14</sup> See *infra* note 27.

## A. Trail Smelter Arbitration<sup>15</sup>

*Trail Smelter* was the first arbitral proceeding of its kind.<sup>16</sup> This arbitration involved the operation of a smelter located in British Columbia, Canada.<sup>17</sup> Sulfur dioxide emissions from the smelter were causing substantial damage to several farms in the state of Washington, United States.<sup>18</sup> In 1935, the governments of the United States and Canada signed a convention under which a tribunal was established in order to resolve questions concerning the nature and extent of the damage caused by the Canadian smelting plant.<sup>19</sup> This tribunal was also charged with providing remedies including indemnity and injunction, and with prescribing measures or regimes to be “adopted or maintained by the Trail Smelter.”<sup>20</sup> The compromise set forth that the arbitrators were to apply the “law and practice followed...in the United States of America as well as international law and practice.”<sup>21</sup>

The United States claimed indemnity for injury that was primarily economic in nature.<sup>22</sup> These claims included indemnity for cleared land and improvements on it, uncleared land and improvements on it, livestock, property in the town of Northport, and business enterprises.<sup>23</sup> It would be the job of the arbitrators to sort out those claims and award damages for meritorious claims under the auspices and guidelines of international law.

The arbitrators found that no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>24</sup> The tribunal held that the Dominion of Canada was responsible in international law for the conduct of Trail Smelter.<sup>25</sup> Finally, the tribunal implemented their decision by imposing a focused and

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<sup>15</sup> Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (1938 and 1941).

<sup>16</sup> It remains the only recorded air pollution dispute being resolved in accordance with international law. Phoebe Okowa, State Responsibility for Transborder Air Pollution in International Law, 50 Int'l & Comp. L.Q. 472 (April 1991).

<sup>17</sup> Trail Smelter, 3 R.I.A.A. at 1905.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Convention for Settlement of Difficulties Arising from Operations of Smelter at Trail, B.C., Apr. 15, 1935; Trail Smelter (U.S. v. Can.), 3 R.I.A.A. at 1907-08 (1938 and 1941).

<sup>22</sup> See Trail Smelter, 3 R.I.A.A. at 1907-08.

<sup>23</sup> Id. at 1920.

<sup>24</sup> See Id. at 1905.

<sup>25</sup> Id. at 1974-77.

organized regime of controls on the emission of sulfur dioxide fumes from the smelter.<sup>26</sup> Of importance from this arbitration is that the adverse countries consented to arbitral rule under the rule and custom of international law.<sup>27</sup> This consent of authority was precedent setting as it demonstrated that two countries could cooperate in the international community when there were real stakes in interest.

### *B. A WIPO Trademark Arbitration*<sup>28</sup>

Arbitral proceedings are not limited to environmental issues. WIPO, the World Intellectual Property Organization, also conducts arbitral proceedings.<sup>29</sup> One such proceeding involved a North-American software developer.<sup>30</sup> This developer registered a trademark for communication software in the United States and Canada.<sup>31</sup> A manufacturer of computer hardware based elsewhere registered an almost identical mark for computer hardware in a number of Asian countries.<sup>32</sup> Both companies had been engaged in legal proceedings in various jurisdictions concerning the registration and use of their marks.<sup>33</sup> Each company had effectively prevented the other from registering or using its mark in the jurisdictions in which it holds prior rights.<sup>34</sup> In order to facilitate the use and registration of their respective marks worldwide, the parties entered into a coexistence agreement, which contains a WIPO arbitration clause.<sup>35</sup> When the North-American company tried to register its trademark in China, the application was refused because of a risk of confusion with

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<sup>26</sup> *Id.*

<sup>27</sup> See *Id.* at 1907-08.

<sup>28</sup> Due to the World Intellectual Property Organization's (WIPO) rules on confidentiality, the facts of this case, inclusive even of party name, are removed from its summary. This is pursuant to Chapter VII, Article 73 of the WIPO Rules of Arbitration, which provide in pertinent part: "(a) Except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body, and then only: (i) by disclosing no more than what is legally required; and (ii) by furnishing to the Tribunal and to the other party, if the disclosure takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reason for it.

<sup>29</sup> See WIPO Arbitration and Mediation Center, at <http://arbiter.wipo.int/center/index.html>.

<sup>30</sup> See WIPO Arbitration Case Examples, A WIPO Trademark Arbitration, at <http://arbiter.wipo.int/arbitration/case-example.html> (last visited Apr. 6, 2004).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

the prior mark held by the other party.<sup>36</sup> The North-American company requested that the other party undertake any efforts necessary to enable it to register its mark in an Asian country and, when the other party refused, initiated arbitration proceedings.<sup>37</sup>

This is a significant example of international arbitration, as it shows that arbitration extends further than the environment and into international business, in this case, intellectual property. This arbitration reflects the growing need of arbitral institutions in a world that is becoming more globalized.<sup>38</sup>

## **Federal and international arbitration acts**

### *A. The United States Arbitration Act of 1925: History and Interpretation*

The United States Arbitration Act of 1925<sup>39</sup> (hereinafter FAA<sup>40</sup>) signified a stark legislative change from the period preceding the act.<sup>41</sup> This period before enactment of the FAA was characterized by a near impossibility for two reasonably intelligent business entities to enter into a pre-dispute agreement to arbitrate any issues arising out of their business dealings.<sup>42</sup> In the United States, there is evidence that commercial arbitration existed before the Revolutionary War.<sup>43</sup> These American cases took their lead from English cases of the same period.<sup>44</sup> The policy of anti-

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<sup>36</sup> WIPO Arbitration Case Examples, A WIPO Trademark Arbitration, at <http://arbitrator.wipo.int/arbitration/case-example.html> (last visited Apr. 6, 2004).

<sup>37</sup> *Id.*

<sup>38</sup> See *infra* Part V.

<sup>39</sup> 9 U.S.C. § 1-14.

<sup>40</sup> Abbreviated from "Federal Arbitration Act," an alternative name of the United States Arbitration Act of 1925.

<sup>41</sup> Sarah E. Larson, Comment, Current Public Law and Policy Issue: An Examination of the Broad Scope of the Federal Arbitration Act and Binding Mandatory Consumer Arbitration Agreements: Not the Answer to Racial Bias in the United States Legal System, 24 *Hamline J. Pub. L. & Pol'y* 293, 305 (2003).

<sup>42</sup> *Id.*

<sup>43</sup> See Stephen B. Goldberg et al., *Dispute Resolution: Negotiation, Mediation, and Other Processes* 199 (1992).

<sup>44</sup> Lord Coke's opinion in *Vynior's Case*, decided in 1609, formed the basis for the common law doctrine where either party involved in an arbitration may withdraw at any time before an actual award was rendered, and that an agreement to arbitrate a future dispute was against public policy, and therefore not enforceable. *Vynior's Case* (Trinity Term, 7 Jac. 1) 77 Eng. Rep. 595 (K.B. 1609); <http://www.voluntaryist.com/articles/084.php> (last visited Apr. 6, 2004). In *Vynior's Case*, the King's Bench made compulsory a bond to ensure compliance with the agreement. Tradesmen, therefore, who regularly used these bonds to ensure the performance of agreements effectively made use of this remedy. In 1697, however, Parliament passed into law the Statute of Fines and Penalties, which forbade the use of penalty bonds as a remedy for breach of contract. See Statute of Fines and

arbitration spread throughout the colonies, and ultimately the judiciaries of the colonies, which remained in place as the colonies became states.<sup>45</sup> Courts in the United States, from the 17<sup>th</sup> to the early 20<sup>th</sup> century, were very reluctant to enforce arbitration agreements, and frequently nulled clauses invoking arbitration, basing their decisions on *Vynior's Case* and the line of cases that stemmed from it.<sup>46</sup> Those judges, including Justice Story,<sup>47</sup> believed that provisions to arbitrate extended the jurisdiction of the court beyond where it was intended to stretch.<sup>48</sup>

This anti-arbitration sentiment continued after the New York State Arbitration Statute, the first modern arbitration statute, was passed in 1920.<sup>49</sup> The FAA,<sup>50</sup> in fact, was based on the New York State Arbitration Statute,<sup>51</sup> and supporters of the statute<sup>52</sup> held that this legislation drew its power from Article III of the United States Constitution, and more specifically from the power to establish procedures for the federal courts.<sup>53</sup>

The FAA serves several important functions in the recognition and valuation of arbitration. It serves to nullify lawsuits that are brought in courts, and force the parties to proceed to arbitration, when there is a valid agreement to arbitrate.<sup>54</sup> Moreover, the FAA legitimated arbitration as an adjudicatory mechanism and gave the entire arbitration process valuable systemic autonomy that was required for it to

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Penalties, 8 & 9 Will. 3, ch. 11 § 8 (1697) (Eng); 12 Sir William Holdsworth, *A History of English Law* 519-20 (2d prtg. 1966). The application of the statute resulted in English courts only awarding nominal damages for breach of arbitration agreements. *Vynior's Case* (Trinity Term, 7 Jac. 1) 77 Eng. Rep. 595 (K.B. 1609).

<sup>45</sup> <http://www.voluntaryist.com/articles/084.php> (last visited Apr. 6, 2004).

<sup>46</sup> Baker, *supra* note 9, at 655.

<sup>47</sup> Justice Story in 1845 wrote "...when [courts] are asked to...compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs." Carbonneau, *supra* note 2, at 49 (citing *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1920-21).

<sup>48</sup> See Stephen K. Huber & E. Wendy Trachte-Huber, *Arbitration: Cases and Materials* 9 (1998).

<sup>49</sup> Donald J. Kennedy, *Maritime Arbitration 1899-1999*, at [http://www.clm.com/pubs/pub-880938\\_1.html](http://www.clm.com/pubs/pub-880938_1.html) (last visited Apr. 6, 2004).

<sup>50</sup> 9 USC §2. The FAA was modified in 1970, 1988, and 1990 with supplementary provisions, but for the most part, the modern Federal Arbitration Act is almost unchanged from its original form.

<sup>51</sup> See Huber, *supra* note 47, at 5.

<sup>52</sup> The American Bar Association, working through one of its committees, created a draft statute that was approved by the ABA in 1922 with no dissent. Congress adopted this statute, with minimal change in 1925. Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*. 74 Wash. U.L.Q. 637, 645.

<sup>53</sup> See Van Wetzels Stone, *supra* note 7, at 944.

<sup>54</sup> Carbonneau, *supra* note 2, at 50.

function effectively as an alternative to litigation, and generally as a remedial process.<sup>55</sup>

The FAA provided that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>56</sup> Hashing out the purpose and policy of the FAA is important to an understanding of the Supreme Court's strong endorsement of the propriety of transborder commercial arbitrability. The FAA was originally seen as applicable to consensual transactions between two merchants of roughly equal bargaining power, and not necessarily transactions between parties with grossly unequal bargaining power, such as a large firm negotiating with a less knowledgeable consumer with comparably fewer resources.<sup>57</sup>

When the FAA was enacted, the economy of the world was different; there were fewer commercial transactions between multinational companies and simple consumers, and therefore fewer transactions would have fallen under the original scope of the FAA.<sup>58</sup> Senator Walsh, of Montana,<sup>59</sup> feared that arbitration contracts would be "offered on a take-it-or-leave-it basis to captive customers or employees," but his fears were allayed by supporters of the bill, who said that the FAA would not encompass such situations.<sup>60</sup> The FAA was signed into law in the "Roaring 20's" where business was booming and commercial transactions were frequent, and substantial.<sup>61</sup> This period of economic prosperity was followed by the hardest economic period in American history, in the form of the Great Depression.<sup>62</sup> Coupled with rising German business interests,<sup>63</sup> the increasing scale of business would

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<sup>55</sup> *Id.*

<sup>56</sup> Baker, *supra* note 9, at 656.

<sup>57</sup> Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 *Loyola L.A. L. Rev.* 473, 478 n.20 (1990).

<sup>58</sup> Sternlight, *supra* note 51, at 647 n44. In 1925, under 28 USC §1332, the amount in controversy requirement to bring a case in federal district court was \$3,000. 21 *Hofstra L. Rev.* 385, 459 (1992).

<sup>59</sup> Senator Thomas James Walsh represented the State of Montana in the United States Senate from 1913 to 1932. *Biographical Directory of the United States Congress: 1774 – Present*, <http://bioguide.congress.gov/biosearch/biosearch1.asp> (last visited Apr. 6, 2004).

<sup>60</sup> 74 *Wash. U.L.Q.* 637, 647 (citing *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (Black, J., dissenting) (citing Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67<sup>th</sup> Cong., 4<sup>th</sup> Sess. 9-11 (1923))).

<sup>61</sup> Sternlight, *supra* note 51, at 647.

<sup>62</sup> *Id.*

<sup>63</sup> The German unemployment rate fell from six million people in 1933 to 2.5 million people in 1936, to three-hundred thousand people in 1939. [http://www.historylearningsite.co.uk/nazis\\_and\\_the\\_german\\_economy.htm](http://www.historylearningsite.co.uk/nazis_and_the_german_economy.htm) (last visited Apr. 6, 2004).



create lopsided bargaining power to coerce individual consumers into signing one-sided arbitration agreements.<sup>64</sup>

As time progressed, the Supreme Court broadened the scope of application of the FAA. With state cases such as *Wilko v. Swan*,<sup>65</sup> the Supreme Court held that arbitration must be mutually consented to and must serve the public interest.<sup>66</sup> The court held this agreement permissible “if the parties [were] willing to accept less certainty of legally correct adjustment.”<sup>67</sup> The court, clearly limiting the scope of domestic arbitration, prohibited arbitration of a customer’s securities fraud action against a brokerage house, their decision being based in some part on the fact that sellers possess more business acumen and relevant information that buyers possess.<sup>68</sup>

In the late 1950’s into the 1960’s, the Supreme Court examined social policies as a rationalization to broaden the scope of the FAA.<sup>69</sup> It was in this period of broadening the scope of the FAA that the modern day arguments for arbitration in lieu of litigation arose. The rationale stated above, that was used by the tradesmen, has evolved and changed into 21<sup>st</sup> century reasons to arbitrate claims<sup>70</sup> Arbitration is generally speaking, faster and more cost-effective than a judicial adjudication.<sup>71</sup> Moreover, the parties may choose the arbitrator,<sup>72</sup> the confidentiality of the

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<sup>64</sup> Sternlight, supra note 51, at 647.

<sup>65</sup> *Wilko v. Swan*, 346 U.S. 427 (1953).

<sup>66</sup> Sternlight, supra note 51, at 648.

<sup>67</sup> *Wilko*, 346 U.S. at 438 (1953).

<sup>68</sup> Sternlight, supra note 51, at 648.

<sup>69</sup> *Id.* at 655.

<sup>70</sup> There are multiple reasons why a party in the 21<sup>st</sup> century desires to arbitrate claims instead of going through the judicial system of the country with jurisdiction.

<sup>71</sup> Joseph T. McLaughlin, *Enforcement of Arbitral Awards Under the New York Convention: Practice in U.S. Courts*, 477 *PLI/Comm* 275, 275. Small and medium sized businesses in commerce can easily go bankrupt over one multi-million dollar contract. Carbonneau, supra note 2, at 2. With the explicit costs of litigation, including depositions, lawyers fees, and the implicit costs of litigation, including the opportunity cost of not being able to do other things with the money that is tied up in litigation, a single contract that gets litigated over may cause one of these smaller firms to suffer great loss. See generally N. Gregory Mankiw, *Principles of Microeconomics* (3d ed, 2004) (discussing the economic concept of opportunity cost). With arbitration, the parties involved spend little time waiting to get before an arbitral tribunal to have their case heard, which leads to less time spent on the matter, accordingly saving money. The arbitration decision and award are final, and as a result, the only money expended after an award is rendered will be on collection of that award, and not appeal of the award. McLaughlin, supra note 70. With the “judicialization” of arbitration in the past ten to fifteen years, arbitration can endure as long as judicial adjudication, but the key benefit that remains is that the cost of arbitration will be significantly lower than the cost of litigation as there is no appeal, which would require more money to be spent on the matter. Ask the ADR Professionals, National Arbitration Forum, available at <http://www.arb-forum.com/articles/html/ADRPro-jud-07-02.asp> (last visited Apr. 6, 2004).

<sup>72</sup> See Rules of Arbitration of the International Chamber of Commerce, Articles 7-12 [hereinafter ICC Rules]; see also The London Court of International Arbitration Rules, Article 17 [hereinafter LCIA

proceeding is maintained,<sup>73</sup> and arbitration eliminates, in whole, or in part, legal uncertainty from the process by contracting for specific provisions.<sup>74</sup> Another important benefit of arbitration is that it allows neutrality, whereas litigation in state or national courts is deemed unadvisable due to the perception that the outsider's case would be treated negatively.<sup>75</sup> This neutrality evidences itself in the removal provisions in the United States Code, and by scholars.<sup>76</sup> This provision states that a

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Rules]. The fear in the time of the tradesmen was that the judges wouldn't sufficiently comprehend the core of the case as the conflict may be highly specialized. Ask the ADR Professionals, National Arbitration Forum, available at <http://www.arb-forum.com/articles/html/ADRPro-jud-07-02.asp> (last visited Apr. 6, 2004). With arbitrators, selected by the parties (or by the arbitrators already appointed), a level of expertise and specialization can be expected. *Id.* For these highly technical issues, a party's rationale may be that it is best to have an adjudicator who isn't a judge, but does have extensive experience in the field. *Id.*

<sup>73</sup> See ICC Rules, Appendix I, Article 6; see also LCIA Rules, Article 17. With arbitration, there is no rule of open court and no public trials of the nature that the common law offers. Take the Lawyers Out of the Loop -- Help Yourself and Your Patients, National Arbitration Forum, available at <http://www.arb-forum.com/articles/html/schroeder-01.asp> (last visited Apr. 6, 2004). There are several advantages to the parties involved when confidentiality is maintained. First, companies can safeguard their image by not going forward into the litigation process with their problems. Second, confidentiality facilitates the continuation of business with partners. Finally, confidentiality protects highly sensitive material, such as trade secrets or arms deals, from being disclosed to public scrutiny and review. *Id.*

<sup>74</sup> Carbonneau, *supra* note 2, at 3. When parties litigate across borders, either state or national, there are, in the natural course of business, always conflicts-of-laws problems. An advantage of an arbitration agreement is that the parties know, in advance, what the applicable law is, what the jurisdiction is, and how, and under what law, the award will be enforced. See ICC Rules; see also LCIA Rules.

<sup>75</sup> Arbitration push needs more funding: HK head, *Lawyers Weekly*, Oct. 7, 2003, available at <http://www.lawyersweekly.com.au/articles/cf/0c01a5cf.asp> (last visited Apr. 6, 2004). An example of this within the borders of the United States is found in the diversity jurisdiction provision of the United States Code. 28 U.S.C. § 1332(a). The statute confers "original jurisdiction [to federal courts] of all civil actions where the matter in controversy exceeds the sum or value of \$ 75,000, exclusive of interest and costs, and is between-- (1) Citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States." Another provision which highlights a similar point is the removal provision of the United States Code, 28 U.S.C. §1441(a), stating "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." The diversity jurisdiction provision of the United States Code states that a federal court can hear a case between citizens of two different jurisdictions. See *Id.*

<sup>76</sup> Interpretation of the language indicates that instead of trusting one state court or another to put aside possible biases, another institution, the federal court system, would step in and remove those biases. This interpretation is supported by testimony offered to the Congressional Subcommittee on the Judiciary, given by a Professor of Law at New York University stating "It is exactly this type of bias leveled at out-of-state...corporate defendants which led to the creation of diversity jurisdiction... Diversity jurisdiction was established to protect the citizens of one state from the biases that might be engendered in litigating in another state against a citizen of that state. In light of the financial stakes at issue in class actions, the motivation for local bias is even greater than in single action cases. Multinational corporations are discriminated against in some state courts which appear to be biased in favor of the local plaintiff's attorney or local class representative who may vote or even participate in the election of local judges. The Congress should step in and provide the protection which the Framers of the Constitution envisioned would be guaranteed when they created federal court removal based on diversity jurisdiction." Statement given by Sheila L. Birnbaum, Professor of Law, New York

defendant may remove the case from state court to the more impartial federal court and avoid the potential biases of the state court.<sup>77</sup> Arbitration allows the parties to feel confident that there is no local or national bias against the foreign party.<sup>78</sup> Finally, the principle of neutrality also extends to the language of the proceedings,<sup>79</sup> the procedural and substantive rules that apply,<sup>80</sup> the nationality of the arbitrators,<sup>81</sup> and the choice of representation.<sup>82</sup>

In the midst of the pro-arbitration movement in United States history, and based on the rationale described above, the community of nations met in New York City in 1958 to discuss uniform arbitration rules that would apply across nations.<sup>83</sup>

### *B. New York Convention of 1958:<sup>84</sup> General provisions and Interpretation*

The United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>85</sup> (hereinafter New York Convention) may be the most successful United Nations attempt at unifying rules of law between a diversified community of nations.<sup>86</sup> The New York Convention presently has one hundred and thirty-four ratifications,<sup>87</sup> and

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University before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary Hearing on H.R. 3789 "Class Action Jurisdiction Act of 1998", June 18, 1998. <http://www.house.gov/judiciary/42030.htm> (last visited Apr. 6, 2004).

<sup>77</sup> § 1441. This provision was also geared at removing cases from what, years ago, was perceived as a biased state court system. Congress could have left it solely to the plaintiff, as the master of its complaint, to decide whether a substantial dispute between diverse parties would be adjudicated in state or federal court. Instead, beginning with the Judiciary Act of 1789, Congress gave out-of-state defendants the right to remove such cases to federal court. See § 1441; see also *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 286-287 (1938) (discussing history of removal statute). The removal statute clearly indicates concern for the out-of-state defendant, who otherwise would have no control over the forum. *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 286-287 (1938).

<sup>78</sup> See, e.g. § 1441; see also § 1332(a)

<sup>79</sup> See ICC Rules, Article 16; see also LCIA Rules, Article 17.

<sup>80</sup> See ICC Rules, Article 15; see also LCIA Rules, Article 14.

<sup>81</sup> See ICC Rules, Article 7-12; see also LCIA Rules, Article 6.

<sup>82</sup> See ICC Rules, Article 3; see also LCIA Rules, Article 1.

<sup>83</sup> See *infra* New York Convention of 1958.

<sup>84</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 9 U.S.C §§ 201-208, available at <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>.

<sup>85</sup> Having first studied this convention at McGill University in Montreal, Quebec, Canada, this author would like to acknowledge the name of the convention in its other official language, French, as the *Conference Des Nations Unies Sur L'Arbitrage Commercial Convention Pour La Reconnaissance Et L'Execution Des Sentences Arbitrales Etrangeres*.

<sup>86</sup> Carbonneau, *supra* note 2, at 770.

<sup>87</sup> United Nations Commission on International Trade Law: Status of Conventions and Model Laws, <http://www.uncitral.org/english/status/status-e.htm> (last visited Apr. 6, 2004).

for the most part, receives favorable construction in national courts of ratifying states.<sup>88</sup>

The United States was initially hesitant to endorse, and ratify the New York Convention, expressing reluctance and skepticism about such a multilateral treaty and the adherence to non-national rules governing behavior and the relinquishment of national legal authority to an a-national system.<sup>89</sup> However, the New York Convention was ratified and codified,<sup>90</sup> by the United States in December 1970, twelve years after the New York Convention was opened for signature.<sup>91</sup> As the ratifications of the New York Convention now stand, almost all the major international trading nations are parties to the New York Convention,<sup>92</sup> and 120 nations overall.<sup>93</sup>

The United States Supreme Court stated:

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.<sup>94</sup>

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<sup>88</sup> Carbonneau, *supra* note 2, at 770.

<sup>89</sup> *Id.*

<sup>90</sup> 9 U.S.C. §§201-08 (1970).

<sup>91</sup> The New York Convention was opened for signature on June 10, 1958.

<sup>92</sup> See e.g. United States of America, France, United Kingdom, Switzerland, Sweden, Spain, China, Japan, and Germany.

<sup>93</sup> The following nations have ratified the New York Convention: Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Cambodia, Cameroon, Central African Republic, Chile, China, Columbia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Holy See, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Serbia and Montenegro, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Vietnam, Zambia, and Zimbabwe. <http://www.uncitral.org/en-index.htm> (last visited Apr. 6, 2004).

<sup>94</sup> *Scherck v. Alberto-Culver*, 417 U.S. 506, 520 (1974); see also *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, S. Exec. Doc. E, 90th Cong., 2d Sess. (1968).

The New York Convention is comprised of several general provisions. The first of these provisions are in Article I.<sup>95</sup> Article I(1) states that the New York Convention will apply to foreign arbitral awards.<sup>96</sup> Article I(2) defines “arbitral awards” as including awards made by single arbitrators, as well as permanent arbitral bodies.<sup>97</sup> Article I(3) includes the reciprocity and “commercial transactions” reservations that are contained within the New York Convention.<sup>98</sup>

The two reservations included in the New York Convention are the “reciprocity” reservation, and the “commercial transactions” reservation. The “reciprocity” reservation states that a signatory nation need only enforce awards made in another State which has ratified the New York Convention.<sup>99</sup> The “commercial transactions” reservation states that transactions may be construed as commercial under the signatory’s domestic law.<sup>100</sup>

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<sup>95</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 83, art. 1.

<sup>96</sup> *Id.* at art. 1(1). The provision specifically states: “This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.” *Id.*

<sup>97</sup> *Id.* at art I(2). The provision specifically states “The term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.” *Id.*

<sup>98</sup> *Id.* at art I(3). The provision specifically states “When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

<sup>99</sup> See *Id.* at art. 1, cl. 3. The following sixty-nine nations have made the reciprocity reservation: Algeria, Antigua and Barbuda, Argentina, Armenia, Bahrain, Barbados, Belgium, Bosnia and Herzegovina, Botswana, Brunei Darussalam, Bulgaria, Central African Republic, China, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, France, Germany, Greece, Guatemala, Holy See, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Jamaica, Japan, Kenya, Kuwait, Lebanon, Luxembourg, Madagascar, Malaysia, Malta, Monaco, Mongolia, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nigeria, Norway, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Saint Vincent and the Grenadines, Saudi Arabia, Serbia and Montenegro, Singapore, Slovenia, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Kingdom or Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Venezuela, and Vietnam. <http://www.uncitral.org/en-index.htm> (last visited April 6, 2004).

<sup>100</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 83, art. 3. The following forty-one nations have made the “commercial” under domestic law reservation: Algeria, Antigua and Barbuda, Argentina, Armenia, Bahrain, Barbados, Bosnia and Herzegovina, Botswana, Central African Republic, China, Croatia, Cuba, Cyprus, Denmark, Ecuador, Greece, Guatemala, Holy See, Hungary, India, Indonesia, Iran (Islamic Republic of), Jamaica, Madagascar, Malaysia, Monaco, Mongolia, Nepal, Nigeria, Republic of Korea, Romania, Saint Vincent and the Grenadines, Serbia and Montenegro, Slovenia, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, United States of America, Venezuela, and Vietnam. <http://www.uncitral.org/en-index.htm> (last visited April 6, 2004).

Courts have narrowly construed these reservations. The reciprocity reservation in *Corp. of India v. IDI Management, Inc.*<sup>101</sup> was an example of this narrow construction.<sup>102</sup> Fertilizer Corporation of India (hereinafter FCI), which was entirely owned by the government of India, entered into a contract with IDI Management, Inc. (hereinafter IDI), a United States corporation, to build a nitrophosphate plant near Bombay, India.<sup>103</sup> After completion of the plant, a dispute ensued and the matter was submitted to arbitration in India as per the contract terms.<sup>104</sup> As a result of the arbitration, FCI prevailed, and sought to enforce the arbitration award in the United States.<sup>105</sup> IDI challenged the award, arguing that there was a lack of reciprocity as India had “adopted various evasive devices...to avoid enforcement of awards adverse to Indian parties.”<sup>106</sup> The United States District Court held that reciprocity only required that India be a signatory to the New York Convention.<sup>107</sup> The Court further held that the meaning of reciprocity did not include the adoption or interpretation of the commercial reservation, or the mechanisms for enforcement in the Contracting State where the award was issued.<sup>108</sup>

The “commercial” reservation has also been narrowly interpreted. The enacting legislation provides in pertinent part “an arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the New York Convention.”<sup>109</sup>

In *Sumitomo Corp v. Parakopi Compania Maritima*<sup>110</sup> several Japanese corporations brought an action against Parakopi, a Panamanian corporation with its principle place of business in Greece, in United States District Court.<sup>111</sup> Parakopi challenged the jurisdiction of the United States court claiming that this was not a “commercial” transaction under United States law, as both parties were foreign to the

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<sup>101</sup> *Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981, reh’g denied, 530 F. Supp. 542 (S.D. Ohio 1982).

<sup>102</sup> See, e.g. *Id.*

<sup>103</sup> *Id.* at 950.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 952.

<sup>107</sup> *Corp. of India*, 517 F. Supp. at 952.

<sup>108</sup> McLaughlin, *supra* note 70, at 284, n45.

<sup>109</sup> 9 U.S.C. §202.

<sup>110</sup> *Sumitomo Corp. v. Parikopi Compania Martima*, 477 F. Supp 737 (S.D.N.Y. 1979), *aff’d* 620 F.2d 286 (2d Cir. 1980).

<sup>111</sup> *Id.* at 738.

United States.<sup>112</sup> The court held “[t]o hold that subject matter jurisdiction is lacking where the parties involved are all foreign entities would certainly undermine the goal of encouraging the recognition and enforcement of arbitration agreements in international contracts.”<sup>113</sup> In getting to this rationale, the court concluded that the definition of “commerce” under the FAA<sup>114</sup> could not be applied to limit the application of the New York Convention.<sup>115</sup>

Other important general provisions of the New York Convention are contained within Articles III and IV.<sup>116</sup> These articles, taken together, show both that a State may not impose “substantially more onerous conditions...on the recognition or enforcement of arbitral awards...than are imposed on the recognition of domestic arbitral awards,”<sup>117</sup> and the procedure that a party must go through to obtain enforcement of an award.<sup>118</sup>

The final general provision that is contained within the New York Convention is Article V, wherein lies the continued strength of the New York Convention.<sup>119</sup> There are only seven grounds upon which enforcement of an award can be blocked. The party seeking to block enforcement of the award bears the burden of showing that one of the grounds apply. The grounds are divided into two subsections, with five grounds stated in subsection (1), and two grounds stated in subsection (2).

The first set of grounds to bar enforcement of the award relate to procedural grounds. The first ground is that existed, at the time of the agreement, a party who

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<sup>112</sup> *Id.* at 739.

<sup>113</sup> *Id.* at 741.

<sup>114</sup> 9 U.S.C. §1; “Commerce” is defined as “commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.” *Sumitomo Corp. v. Parikopi Compania Martima*, 477 F. Supp 737.

<sup>115</sup> *Sumitomo Corp.*, 477 F. Supp at 741; see 9 U.S.C. §208 (the residual application provision)

<sup>116</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 83, art. 3. Article 3 states: “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” *Id.* Article 4 states: “1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof. *Id.* at art. 4.

<sup>117</sup> *Id.* at art. 3.

<sup>118</sup> *Id.* at art. 4.

<sup>119</sup> *McLaughlin*, *supra* note 70, at 280.

was suffering from an incapacity.<sup>120</sup> The second ground covers situations where proper notice was not given against the party who the award is invoked against,<sup>121</sup> and the third ground deals with issues outside of the submission to arbitration.<sup>122</sup> The fourth ground to bar enforcement of the award arises if the composition of the arbitral authority was against the agreement of the parties,<sup>123</sup> and the fifth ground arises if the award has not yet become binding on the parties.<sup>124</sup>

The remaining two grounds relate to substantive reasons to bar enforcement of the award. The first ground to bar enforcement is where the subject matter of the arbitration is not capable of settlement under the laws of the country where the arbitration took place.<sup>125</sup> The second ground is triggered when the public policy of the country of recognition or enforcement is contrary to the award that was issued.<sup>126</sup>

Those are the only seven grounds upon which enforcement of an award can be blocked, and the party wishing to block the enforcement of the award bears the burden of showing that one of the seven grounds exists.<sup>127</sup>

### *C. Enforcement of Awards*

The general policy of United States courts is that arbitral awards are generally enforceable.<sup>128</sup> The boundaries of this general policy extend beyond where a party

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<sup>120</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 83, art. 5(1)(a). The provision states: “The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.” *Id.*

<sup>121</sup> *Id.* at art. 5(1)(b). The provision states: “The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”

<sup>122</sup> *Id.* at art. 5(1)(c). The provision states: “The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration...” *Id.*

<sup>123</sup> *Id.* at art. 5(1)(d). The provision states: “The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.” *Id.*

<sup>124</sup> *Id.* at art. 5(1)(e). The provision states: “The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.” *Id.*

<sup>125</sup> *Id.* at art. 5(2)(a). The provision states: “The subject matter of the difference is not capable of settlement by arbitration under the law of that country.” *Id.*

<sup>126</sup> *Id.* at art. 5(2)(b). The provision states: “The recognition or enforcement of the award would be contrary to the public policy of that country.” *Id.*

<sup>127</sup> McLaughlin, *supra* note 70, at 280.

<sup>128</sup> See, e.g. *Borup v. Toluca Pacific Securities Corp.*, 1997 U.S. Dist. LEXIS 20518 (N.D. Ill. Dec. 17, 1997); see also *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11<sup>th</sup> Cir. 1993); see also *Rodriguez v. Prudential-Bache Securities, Inc.*, 882 F. Supp. 1202, 1207-08 (D.P.R. 1995).



was not effectively represented by counsel, as in *Borop v. Toluca Pacific Securities Corp.*<sup>129</sup> The District Court extended the rule of limited review of arbitral awards further when it also held that an award can only be reviewed based on the grounds listed in Sections 10 and 11 of the FAA.<sup>130</sup> In *Borop*, the investor filed for arbitration against a corporation, alleging that the corporation forced his purchase of “highly speculative stocks” through, *inter alia*, misrepresentations concerning the investments.<sup>131</sup> The arbitrator found for the investor, and subsequently sought enforcement of the award.<sup>132</sup> The court found that “an arbitration award could be vacated only where the award was obtained through fraud or other misconduct” and that “considerable deference” should be given to an arbitral award.<sup>133</sup> Furthermore, the court held that “absent fraudulent or improper conduct, defective notice could not justify an order vacating an arbitration award,”<sup>134</sup> firmly supporting the judicial doctrine of narrow review, as seen in cases like *Borop*.<sup>135</sup>

The aforementioned, almost unmitigated, support for narrow review of awards has several exceptions that allow courts to review the award. There are only seven grounds upon which a court may review an award, and the two important grounds, that are the main source of difficulty for review of arbitral awards, are the public policy exception and the exception for arbitrary and capricious awards.

The public policy exception is articulated in Article V(2)(b) of the New York Convention, which states that an award may not be recognized if the “recognition or enforcement of the award would be contrary to the public policy of [this] country.”<sup>136</sup> This exception is articulated in such cases as *Brown v. Rauscher Pierce Refsnes, Inc.*, where the court held that a court may refuse to enforce an arbitration award where enforcement would violate “some explicit public policy” that is “well defined and dominant” that is to be taken from laws and legal precedents, and not merely general considerations of public interests.<sup>137</sup>

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<sup>129</sup> *Borop v. Toluca Pacific Securities Corp.*, 1997 U.S. Dist. LEXIS 20518 (N.D. Ill. Dec. 17, 1997).

<sup>130</sup> *Id.* at \*2.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at \*4.

<sup>133</sup> *Id.* at \*6.

<sup>134</sup> *Id.* at \*9.

<sup>135</sup> See e.g., *Fine v. Bear, Stearns & Co., Inc.*, 765 F. Supp. 824, 827; see also *Elijer Mfg., Inc. v. Kowin Development Corp.*, 14 F.3d 1250, 1253-54 (7<sup>th</sup> Cir.), cert. denied, 512 U.S. 1205 (1994).

<sup>136</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 83, art. 5.

<sup>137</sup> *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11<sup>th</sup> Cir. 1993); see also *Exxon Shipping Co. v. Exxon Seamen’s Union*, 11 F.3d 1189, 1194096 (3<sup>rd</sup> Cir. 1993) (holding that an able

The public policy exception has also been articulated in *Rodriguez v. Prudential-Bache Securities, Inc.*<sup>138</sup> Prudential-Bache Securities, Inc.'s (Prudential) withdrew from the Puerto Rico market, and there was a subsequent termination from employment of several top executives assigned to the Puerto Rico office.<sup>139</sup> Jose' F. Rodriguez, former President of Prudential-Bache Capital Funding Puerto Rico, Inc. filed an action against defendant Prudential, seeking compensation for his wrongful termination, which he claimed was in violation of a contractual agreement which provided in part that plaintiff could not be terminated except for just cause.<sup>140</sup> Meanwhile, another group of executives chose to bring forth their own claims directly through arbitration.<sup>141</sup>

An arbitration panel was appointed by the New York Stock Exchange.<sup>142</sup> The panel issued its arbitration award, in which Prudential was ordered to pay the amount of \$2,881,775 to several executives, in addition to various amounts in costs and attorney's fees.<sup>143</sup> Jose Rodriguez petitioned the Court for entry of judgment on the arbitration award.<sup>144</sup> Instead of making payment in satisfaction of the award, however, Prudential filed a petition to vacate the arbitration award as against all claimants, on the several grounds, including that the award is against public policy.<sup>145</sup> The Court found that the panel did have before it evidence which tended to act against Prudential's argument that the transactions at issue were unauthorized.<sup>146</sup>

A case that highlights the United States position on the public policy exception is *W.R. Grace and Co.*<sup>147</sup> Employees of the petitioner filed suit for damages under the terms of a collective bargaining agreement between the employer and the respondent union.<sup>148</sup> During a strike, the employer hired women as strike replacements.<sup>149</sup> After the employer and the union signed a new collective bargaining

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bodied seaman was not discharged for good cause when a breathalyzer test revealed that he had a blood alcohol content that was three times the maximum permitted by the Coast Guard regulations because the shipping company's policy did not require that result.)

<sup>138</sup> *Rodriguez v. Prudential-Bache Securities, Inc.*, 882 F. Supp. 1202, 1207-08 (D.P.R. 1995).

<sup>139</sup> *Id.* at 1205.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Rodriguez*, 882 F.Supp. at 1205.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1208-09.

<sup>147</sup> *W.R. Grace and Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757 (1983).

<sup>148</sup> *Id.* at 759.

<sup>149</sup> *Id.* at 759-60.

agreement continuing the seniority system, the employer kept the female strike workers preventing men from exercising seniority.<sup>150</sup> The employer also signed a conciliation agreement with the Equal Employment Opportunity Commission providing that in the event of layoffs the employer would maintain the existing proportion of women.<sup>151</sup> The men who would have been protected under seniority provisions of the bargaining agreement filed grievances against the employer pursuant to the collective bargaining agreement.<sup>152</sup> The Court affirmed enforcement of the arbitration award, which was rendered in favor of the male employees.<sup>153</sup> The Court held that because the employer voluntarily assumed the obligations under the collective bargaining agreement, it was bound by those terms and could not cure its breach by relying on an erroneous lower court's finding that the conciliation agreement alone was binding.<sup>154</sup>

If the contract as interpreted violates some explicit public policy, the courts are obliged to refrain from enforcing it.<sup>155</sup> Such a public policy, however, must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.<sup>156</sup> In this case, the Company actually complied with the District Court's order, and nothing in the Record led the Court to believe that it would disobey the order if presented with the same dilemma in the future.<sup>157</sup> In addition to possible contempt sanctions, the Company faced possible Title VII liability if it departed from the conciliation agreement in conducting its layoffs.<sup>158</sup> The Company was cornered by its own actions, and the Court held that it cannot argue that liability under the collective-bargaining agreement violated public policy.<sup>159</sup>

The exception that prevents arbitrary or capricious awards applies when the award exhibits a “wholesale departure from the law” or when the award is not “grounded in the contract which provides for the arbitration.”<sup>160</sup> As the Court in *Ainsworth v. Skurnick* held, “that although great deference is normally accorded an

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<sup>150</sup> Id. at 760.

<sup>151</sup> Id. at 761.

<sup>152</sup> Id.

<sup>153</sup> W.R. Grace and Co., 461 U.S. at 761-62.

<sup>154</sup> See Id.

<sup>155</sup> Id. at 766.

<sup>156</sup> Id.

<sup>157</sup> W.R. Grace and Co., 461 U.S. at 769.

<sup>158</sup> Id. at 769-70.

<sup>159</sup> Id. at 770.

<sup>160</sup> Brown, 994 F.2d at 781.

arbitration award, an award that is arbitrary or capricious is not required to be enforced.”<sup>161</sup> This high standard is met only if the arbitrator’s decision can not be inferred from the facts of the case.<sup>162</sup>

As the *Skurnick* court correctly stated, great deference is usually given to an arbitral award.<sup>163</sup> While United States courts have a mechanism to review arbitral awards, the public policy exception and the exception for arbitrary or capricious awards are narrow exceptions, and difficult to meet. In the United States, however, there are some arbitral awards that are vacated due to the decisions falling within the scope of these exceptions.<sup>164</sup> This point will be examined later in the work with more significant analysis.<sup>165</sup>

### **Backbone of US transnational arbitration policy**<sup>166</sup>

Relying on both domestic and international law, the United States Supreme Court has cultivated international arbitration policy through its case law and basic principles. The principle of contract law in the United States weighs heavily in this discussion, as do three major cases that developed the domestic law of, and the Supreme Court’s policy on, international arbitration. The basic contract principles of the United States enter into this discussion as arbitration is largely based upon a contract drafted by the two parties that are engaging in the arbitration. Understanding these principles provide great insight in examining the holdings of the United States Supreme Court with regard to transnational arbitration cases. The cases that apply contract principles and set precedent for future discussion and interpretation are: *The Bremen v. Zapata Off-Shore Co.*,<sup>167</sup> *Scherk v. Alberto-Culver*,<sup>168</sup> and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>169</sup>

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<sup>161</sup> Ainsworth v. Skurnick, 960 F.2d 939, 941 (11<sup>th</sup> Cir. 1992), cert. denied, 507 U.S. 915 (1993).

<sup>162</sup> Id.

<sup>163</sup> Id.

<sup>164</sup> See e.g., *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987).

<sup>165</sup> See *infra* Parts VI and VII.

<sup>166</sup> The author wishes to express that much more extensive summaries of the following cases are available elsewhere. The point in mentioning these cases is not to summarize them wholly, but rather to afford the reader a sense of the transnational arbitration policy of the United States in action.

<sup>167</sup> See *infra* note 180.

<sup>168</sup> See *infra* note 193.

<sup>169</sup> See *infra* note 211.

## A. United States Contract Principles

Within the realm of arbitration, both domestically, and internationally, the United States Supreme Court affords much leeway.<sup>170</sup> So much leeway is given, in fact, that the parties can contract to alter the federalization of arbitration accomplished by the FAA. In *First Options of Chicago, Inc. v. Kaplan*, the parties modified the provisions of the FAA itself through a written stipulation.<sup>171</sup> First Options of Chicago, Inc. (First Options) cleared stock trades for the investment company, which incurred substantial losses in its trading account.<sup>172</sup> First Options and the investment company entered into an agreement for repayment of the debt.<sup>173</sup> When the investment company lost additional money, First Options demanded immediate repayment and insisted that the stock trader and his wife personally pay any deficiency.<sup>174</sup> First Options sought arbitration under the Arbitration Act, 9 U.S.C. § 1 et seq.<sup>175</sup> Neither the stock trader nor his wife had personally signed the repayment agreement, and they argued the arbitrability of the dispute with First Options.<sup>176</sup> Ultimately, the Court unanimously found that the contract of arbitration was the true source of final authority on the question of arbitrability, strengthening the idea of liberty of contract in issues involving arbitration.<sup>177</sup>

Generally speaking, the modern Court affords great protection to contracts involving international transactions, due in large part to the realities of the globalized

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<sup>170</sup> State, and not federal, law typically governs enforcement of foreign judgments. *McCord v. Jet Spray Int'l Corp.*, 874 F.Supp. 436, 438 (D. Mass. 1994) (concluding a majority of cases regarding enforcement of foreign judgments have applied state law, when a federal court's diversity jurisdiction is invoked). See also Restatement, 2d, Conflict of Laws § 98 cmt. c (1989). *McCord* did not pertain to enforcement of an arbitral award. *McCord*, 874 F.Supp. 436. However, state law generally governs contract validity, unless the contract allegedly violates a federal statute or treaty. Presumably, a party could invoke federal question jurisdiction by requesting a declaratory judgment pertaining to the New York Convention. If the amount in controversy is not met, a party opposing the enforcement of an arbitration clause and seeking a declaratory judgment would have to sue in state court and the foreign party could not remove the case to federal court by raising a federal question defense. Thus, results might depend on who initiates litigation.

<sup>171</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

<sup>172</sup> *Id.* at 940.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 941.

<sup>177</sup> See generally *First Options of Chicago, Inc.*, 514 U.S. 938 (holding that the Court of Appeals correctly held the arbitrability of the dispute between the clearinghouse and the stock trader and his wife was subject to independent review by the courts).

community that the United States is a member of.<sup>178</sup> The Supreme Court, for instance, has affirmed and deferred to forum selection clauses, and clauses in international contracts, generally, when the Court finds that the transaction was made at arms length.<sup>179</sup>

*B. The Bremen v. Zapata Off-Shore Co.*<sup>180</sup>

The ability to write a forum selection clause into an arbitration clause of a contract is one of the cornerstones international arbitration.<sup>181</sup> Uncertainty, as well as great inconvenience could arise if a lawsuit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where personal jurisdiction might be established.<sup>182</sup> The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.<sup>183</sup>

Petitioner Unterweser made an agreement to tow respondent's drilling rig from Louisiana to Italy.<sup>184</sup> The contract contained a forum-selection clause providing for the litigation of any dispute in the High Court of Justice in London.<sup>185</sup> When the rig under tow was damaged in a storm, respondent instructed Unterweser to tow the rig to Tampa, the nearest port of refuge.<sup>186</sup> There, respondent brought suit in admiralty against petitioners.<sup>187</sup> Unterweser invoked the forum clause in moving for dismissal for want of jurisdiction and brought suit in the English court, which ruled that it had jurisdiction under the contractual forum provision.<sup>188</sup> The District Court, relying on

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<sup>178</sup> See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); see also *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>179</sup> See e.g. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); see also *Southland Corp. v. Keaton*, 465 U.S. 1 (1984); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

<sup>180</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

<sup>181</sup> See e.g. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); see also *Southland Corp. v. Keaton*, 465 U.S. 1 (1984); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

<sup>182</sup> See *Carbonneau*, supra note 2 (discussing jurisdiction as well as uncertainty in arbitration proceedings).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 2.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 3.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 4.

*Carbon Black Export, Inc. v. The Monrosa*,<sup>189</sup> held the forum-selection clause unenforceable, and refused to decline jurisdiction on the basis of *forum non conveniens*.<sup>190</sup> The Court of Appeals affirmed.<sup>191</sup>

The United States Supreme Court held that the forum-selection clause, which was a vital part of the towing contract, is binding on the parties unless respondent can meet the heavy burden of showing that its enforcement would be unreasonable, unfair, or unjust.<sup>192</sup>

### *C. Scherk v. Alberto-Culver*<sup>193</sup>

The idea of enforcing a forum selection clause is not an isolated one, and in fact, the Supreme Court has consistently upheld this idea.<sup>194</sup> Another such example is found in *Scherk v. Alberto-Culver*.<sup>195</sup> Respondent, an American manufacturer based in Illinois, in order to expand its overseas operations, purchased from petitioner, a German citizen, three enterprises owned by him and organized under the laws of Germany and Liechtenstein, together with all trademark rights of these enterprises.<sup>196</sup> The sales contract, which was negotiated in the United States, England, and Germany, signed in Austria, and closed in Switzerland, contained express warranties by petitioner that the trademarks were unencumbered.<sup>197</sup> Moreover, the sales contract contained a clause providing that "any controversy or claim [that] shall arise out of this agreement or the breach thereof" would be referred to arbitration before the International Chamber of Commerce in Paris, France, and that Illinois laws would govern the agreement and its interpretation and performance.<sup>198</sup> After allegedly discovering that the trademarks were subject to substantial encumbrances, the Respondent offered to rescind the contract, but the petitioner refused. The Respondent brought suit in District Court for damages,

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<sup>189</sup> *Carbon Black Export, Inc. v. The Monrosa*, 254 F.2d 297 (1958) (declining jurisdiction because the exclusionary clause in the bills of lading was not applicable to exporter's in rem proceeding against respondent ship).

<sup>190</sup> *The Bremen*, 407 U.S. at 4.

<sup>191</sup> *Id.* at 7.

<sup>192</sup> See generally *Id.* at 8-20.

<sup>193</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

<sup>194</sup> See, e.g. *The Bremen*, 407 U.S. 1 (1972).

<sup>195</sup> See *Scherk*, 417 U.S. 506.

<sup>196</sup> *Id.* at 508.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

alleging that Petitioner's fraudulent representations concerning the trademark rights violated the Securities Exchange Act of 1934.<sup>199</sup> Petitioner moved to dismiss the action or alternatively to stay the action pending arbitration, but the District Court denied the motion to dismiss and preliminarily enjoined petitioner from proceeding with arbitration, holding, in reliance on *Wilko v. Swan*,<sup>200</sup> that the arbitration clause was unenforceable.<sup>201</sup> The Court of Appeals affirmed the District Court's ruling.<sup>202</sup>

The United States Supreme Court, however, held that the arbitration clause is to be respected and enforced by federal courts in accord with the explicit provisions of the United States Arbitration Act.<sup>203</sup> An arbitration agreement, such as is here involved, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>204</sup>

The Supreme Court further held that since uncertainty will almost inevitably exist with respect to any contract, such as the one in question here, with substantial contacts in two or more countries, each with its own substantive laws and conflict-of-laws rules, a special clause is needed.<sup>205</sup> This clause is a contractual provision specifying in advance the forum for litigating disputes and the law to be applied is an almost indispensable precondition to achieving the orderliness and predictability essential to any international business transaction. Such a provision obviates the danger that a contract dispute might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.<sup>206</sup> Moreover, in the context of an international contract, the advantages that a security buyer may possess in having a wide choice of American courts and venue in which to litigate his claims of violations of the securities laws.<sup>207</sup> This is unrealistic as an opposing party may, by speedy resort to a foreign court, block or hinder access to the American court of the buyer's choice.<sup>208</sup> Lastly, the Supreme Court held that an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that considers the venue of the lawsuit, but also the procedure to be used in

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<sup>199</sup> 15 U.S.C. § 78j. Specifically, the Petitioners allege that the Respondent's practices violated § 10(b) of the Securities and Exchange Act. *Id.*

<sup>200</sup> *Wilko*, 346 U.S. 427.

<sup>201</sup> *Scherk*, 417 U.S. at 509.

<sup>202</sup> *Id.* at 510.

<sup>203</sup> *See Id.*

<sup>204</sup> *Scherk*, 417 U.S. at 510-20 (discussing 9 U.S.C. §§ 1, 2 and *Wilko v. Swan*, 346 U.S. 427 (1953)).

<sup>205</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. at 515-17.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 517-18.

<sup>208</sup> *Id.*



resolving the dispute.<sup>209</sup> The invalidation of the arbitration clause in this case would not only allow respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts."<sup>210</sup>

*D. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>211</sup>

Another case that applies the broad contract principles that apply in international matters is *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*<sup>212</sup> Mitsubishi Motors Corp, a Japanese corporation, is the result of a joint venture with the goal of distributing automobiles aimed at distributing automobiles through Chrysler dealers outside of the continental United States.<sup>213</sup> Respondent, a Puerto Rico corporation, entered into distribution and sales agreements with Chrysler International, S.A., a company that joined together with other companies to comprise Mitsubishi. The sales agreement between the Petitioner and Respondent contained an arbitration clause where the Japan Commercial Arbitration Association would arbitrate any disputes arising out of the agreement (or for the breach thereof).<sup>214</sup> After attempts to resolve disputes concerning a declining sale of new cars failed, the Petitioner withheld shipment of automobiles to Respondent.<sup>215</sup> The Respondent did not claim responsibility for the withheld automobiles.<sup>216</sup> Following Respondent's disclaimer, Petitioner brought a lawsuit under the FAA and the New York Convention, seeking an order "to compel arbitration of the disputes in accordance with the arbitration clause."<sup>217</sup> Respondent asserted, *inter alia*, causes of action under the Sherman Act and other statutes.<sup>218</sup>

The District Court ordered arbitration of most of the issues raised in the complaint and counterclaims, including the federal antitrust issues.<sup>219</sup> Despite the

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<sup>209</sup> Id. at 519.

<sup>210</sup> The Bremen, 407 U.S. at 9.

<sup>211</sup> Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc, 473 U.S. 614 (1985).

<sup>212</sup> See Id.

<sup>213</sup> Id. at 616.

<sup>214</sup> Id. at 617.

<sup>215</sup> Id. at 618.

<sup>216</sup> Id.

<sup>217</sup> Id.

<sup>218</sup> Id. at 620.

<sup>219</sup> Mitsubishi Motors Corp., 473 U.S. at 620-21.

doctrine established by *American Safety Equipment Corp. v. J. P. Maguire & Co.*,<sup>220</sup> and uniformly followed by the Courts of Appeals, that rights conferred by the antitrust laws are inappropriate for enforcement by arbitration. The District Court in , relying on *Scherk v. Alberto-Culver Co.*,<sup>221</sup> held that the international character of the undertaking in question required enforcement of the arbitration clause even as to the antitrust claims.<sup>222</sup> The Court of Appeals reversed insofar as the District Court ordered submission of the antitrust claims to arbitration.<sup>223</sup>

The Supreme Court held that there is no merit to respondent's contention that because it falls within the class for whose benefit the statutes specified in the counterclaims were passed, but the arbitration clause at issue does not mention these statutes or statutes in general, the clause cannot be properly read to contemplate arbitration of these statutory claims.<sup>224</sup> Moreover, the Supreme Court held that there is no reason to depart from the federal policy favoring arbitration where a party bound by an arbitration agreement raises claims founded on statutory rights.<sup>225</sup>

The Supreme Court also held that respondent's antitrust claims are arbitrable pursuant to the Arbitration Act.<sup>226</sup> Concerns of international comity, respect for the capacities and limitations of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause in question, even assuming that a contrary result would be forthcoming in a domestic context.<sup>227</sup> The strong presumption in favor of freely negotiated contractual choice-of-forum provisions is reinforced here by the federal policy in favor of arbitral dispute resolution, a policy that applies with special force in the field of international commerce.<sup>228</sup> The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted.<sup>229</sup> In addition, the potential complexity of antitrust matters does not suffice to ward off

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<sup>220</sup> *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2<sup>nd</sup> Cir. 1968).

<sup>221</sup> *Scherk*, 417 U.S. 505 (1974).

<sup>222</sup> *Mitsubishi Motors Corp.*, 473 U.S. at 621.

<sup>223</sup> *Id.*

<sup>224</sup> See e.g. *Mitsubishi Motors Corp.*, 473 U.S. at 624-28.

<sup>225</sup> See e.g. *Id.*

<sup>226</sup> See *Scherk*, 417 U.S. 505 (1974).

<sup>227</sup> See e.g. *Id.*

<sup>228</sup> See e.g. *Id.*

<sup>229</sup> See e.g. *Mitsubishi Motors Corp.*, 473 U.S. at 628-40.

arbitration; nor does an arbitration panel pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes.<sup>230</sup> Moreover, the importance of the private damages remedy in enforcing the regime of antitrust laws does not compel the conclusion that such remedy may not be sought outside an American court.<sup>231</sup>

## **Realities of transnational business**

The world as it is now is far different than the world that was just decades ago, much less centuries ago. In the last few decades, there have been rapid innovations in computers and banking technology that allows funds to be transferred from anywhere in the world to almost anywhere else in the world. In addition, innovations in information science allow people to conduct business across hemispheres and continents at the push of a button, enhancing the interconnectedness of the world, making the Earth one large, global marketplace.

World Trade Organization statistics provide a mechanism to offer an idea of the quantity and volume of business that is done worldwide, on an annual basis. In the area of commercial services, the United States is both the largest exporter and importer, with value of 272.6 billion dollars, and 205.6 billion dollars, respectively, in 2002.<sup>232</sup> The United Kingdom followed closely behind, with 123.1 billion dollars of exports of commercial services, and 101.4 billion dollars of imports of commercial services.<sup>233</sup> Germany also placed high on the list, with 99.6 billion dollars of exports, and 149.1 billion dollars of imports in 2002.<sup>234</sup> Overall, in 2002, the top five nations had 646.1 billion dollars of commercial services exports and 630.9 billion dollars of commercial services imports.<sup>235</sup> Western Europe, a growing hotspot of international arbitration, had a total of 3.336 trillion dollars of commercial service exports and

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<sup>230</sup> See e.g. *Id.*

<sup>231</sup> See e.g. *Id.*

<sup>232</sup> World Trade Organization, *supra* note 3, at 23.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* The top five importing and exporting nations are the United States, the United Kingdom, Germany, France, and Japan. *Id.*

goods in 2002 and 3.147 trillion dollars of commercial services imports and goods in 2002.<sup>236</sup>

Without any means of comparison, a trade statistic is merely a number. The World Trade Organization also publishes trade data from 1950 until the present. This information reveals that since 1995, world gross domestic product has grown by 20%;<sup>237</sup> since 1980, this figure has grown by 176%;<sup>238</sup> and since 1950, that figure has grown by 706%.<sup>239</sup> The realities of the world today, as evidenced from data collected on world trade and gross domestic product are that the world today is as connected and globalized. There is more trade and business occurring now than ever before, and this creates a whole new set of challenges, especially in international arbitration, for the new, transnational world.

It is this staggering amount of business that is done on a daily, weekly, and yearly basis that makes different interpretations of treaties like the New York Convention troublesome. The interpretation that the United States offers is not the same as other countries around the world, which can expose businesses with assets in foreign countries, an ever-increasing number in today's globalized world, to unfavorable judgments and awards rendered against them.

## **Recognition of judgments against United States domiciliaries**

### *A. Recognition versus enforcement*

Courts as well as litigants often confuse “recognition” of judgments with “enforcement” of those same judgments, though recognition does not guarantee enforcement.<sup>240</sup> Recognition of a foreign judgment is a prerequisite to enforcement and this occurs when a United States court finds that a matter has been adequately decided by a foreign court and does not need to be further litigated in a United States court.<sup>241</sup> Enforcement is present when a United States court grants the relief ordered

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<sup>236</sup> Id. at 24. Another growing area of international commercial arbitration is the Asia/Pacific region. In 2002, the Asia/Pacific region had 2.097 trillion dollars of commercial services exports and goods, and 1.913 trillion dollars of commercial services imports and goods. Id.

<sup>237</sup> Id. at 167.

<sup>238</sup> Id.

<sup>239</sup> Id.

<sup>240</sup> Jonathan H. Pittman, Comment, The Public Policy Exception to the Recognition of Foreign Judgments, 22 Vand. J. Transnat'l L. 969, 970 (1989).

<sup>241</sup> Id.

by the foreign judgment.<sup>242</sup> For the most part, \*\*INSERT\*\* validation of the foreign judgment, and not enforcement, is sought by the moving party.<sup>243</sup>

### *B. Why recognize foreign judgments?*

The precedent for recognition and enforcement in the United States is *Hilton v. Guyot*.<sup>244</sup> In *Hilton*, Plaintiffs sued defendants in a French court under a contract claim. Defendants alleged fraud on the part of plaintiffs, and sought an injunction from bringing suit, but the court would not admit evidence and entered a directed verdict for plaintiff.<sup>245</sup> The judgment was affirmed in a French appeals court. Defendant then sought review in the United States.<sup>246</sup> The Court found that comity was reciprocal. Because France did not recognize final judgments of the United States, and would try such judgments anew, French judgments would be given the same treatment.<sup>247</sup> Thus, the comity of the United States did not require the Court to give conclusive effect to the judgments of the courts of France,<sup>248</sup> and the defendants could receive a new trial.<sup>249</sup>

While comity is one theory as to why recognition of judgments in United States courts is permitted, a similar concept in enforcement of international judgments is reciprocity. The Court in *Sangiovanni Hernandez* wrote that recognition of foreign state judgments may be “motivated by a desire for reciprocal treatment of American judgments abroad.”<sup>250</sup> Finally, reliance on consistent dispute resolution method is a critical element for the promulgation of international transactions, especially when banking and finance goes across borders.

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.* (A moving defendant may seek recognition of a foreign judgment against a plaintiff as antecedent to filing a motion to dismiss claim on res judicata grounds. Similarly, a plaintiff may seek recognition of a foreign judgment against a defendant as offensive collateral estoppel).

<sup>244</sup> *Hilton v. Guyot*, 159 U.S.113 (1895).

<sup>245</sup> *Id.* at 227.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 228.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 229.

<sup>250</sup> *Sangiovanni Hernandez v. Dominicana de Aviacion, C. por A.*, 556 F.2d 611, 614 (1<sup>st</sup> Cir. 1977). The Hilton reciprocity requirement was removed as an element in the enforcement of foreign judgments under federal law. See *Tahan v. Hodgson*, 662 F.2d 862, 867 & n.21 (D.C. Cir. 1981). In addition, there is no federal legislation mandating reciprocity. See *Id.* Finally, the New York Convention uses the word “may” in the reciprocity reservation, indicating that applicability of the reciprocity doctrine is discretionary. See New York Convention.

### C. *In-tandem*<sup>251</sup> and *second-look*<sup>252</sup> arguments

In the majority opinion of *Mitsubishi*, there are two arguments that are advanced that suggest that the policy of United States courts may not be as affording to recognition of judgments as previously suggested by the comity and reciprocity arguments advanced earlier. The pertinent portion of footnote 19 of *Mitsubishi* states “[w]e merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”<sup>253</sup>

The second-look doctrine states that “the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.”<sup>254</sup>

These doctrines operate to alleviate and allay fears that complete and total legal authority in matters of international business were not forfeited to international arbitrators. However, this attempt at calming fear that arbitrators have power over United States courts was counteracted by the same *Mitsubishi* court in a later footnote. The Court stated “the utility of the New York Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own.”<sup>255</sup> The door that was seemingly opened by the “in tandem” footnote was closed and the argument that it represented, eviscerated by this language. The short sum of this statement is that the strong preference for international comity and reciprocation is still in force, and while there is a mechanism for review of judgments, that it will likely only be used in the most extreme of cases.

### **Peril of loose international policy in a globalized world**

It goes without saying that every country in the world does not have the same laws and policy as does the United States. However, the very existence of the New

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<sup>251</sup> See *Mitsubishi Motors Corp.*, 473 U.S. at 637, n. 19.

<sup>252</sup> See *Id.* at 632.

<sup>253</sup> *Id.* at 637, n. 19.

<sup>254</sup> *Id.* at 632.

<sup>255</sup> *Id.* at 639 n.21.

York Convention supports that statement. With no real uniform law across nations, and widely varying interpretation of policy applicable to enforcement of arbitrations, it can be expected that the enforcement of awards will not be uniform across those same nations. Two notable deviations from the United States' interpretation of the New York Convention are Germany and Belgium.

#### *A. Germany*

If a party sought to have a foreign arbitral award enforced in West Germany,<sup>256</sup> both the German Code of Civil Procedure (ZPO) and any applicable treaties or conventions must be considered.<sup>257</sup> Section 723(1) of the ZPO was the basic West German Code provision concerning enforcement of foreign judgments.<sup>258</sup> That section states that West German courts would enforce foreign court judgments without examining the merits of the dispute that they are enforcing.<sup>259</sup> This provision allowed German courts to differ substantially from courts in the United States. West German courts did not, generally speaking, examine the legal standards of the judgment rendering forum in making a determination of its enforceability.<sup>260</sup>

While the standards set forth by the West German ZPO were more lax than United States rules, there were provisions that set forth exceptions to section 723(1).<sup>261</sup> 723(2) and 328 of the ZPO articulated six exceptions to the requirement of general enforcement set forth in section 723(1).<sup>262</sup> First, the foreign judgment must be final before enforcement was offered.<sup>263</sup> Second, the foreign judgment could not be contrary to the public policy of West Germany.<sup>264</sup> Third, the court that decided the foreign judgment must have personal jurisdiction over the case.<sup>265</sup> Fourth, the ZPO required that the judgment debtor must have been served in the foreign action by one

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<sup>256</sup> Information on West Germany was obtained from an article written in the *Law and Policy in International Business Journal*, published in 1987, prior to unification of East and West Germany.

<sup>257</sup> David Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England*, 19 *Law & Pol'y Int'l Bus.* 325, 339 (1987).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> Westin, *supra* note 256.

<sup>264</sup> *Id.* at 340.

<sup>265</sup> *Id.*

of the means specified under West German law.<sup>266</sup> Fifth, the ZPO provided that a foreign judgment cannot be enforced in West Germany “if reciprocity is not warranted.”<sup>267</sup> The final exception provided by the ZPO was that judgments contrary to West German public policy for matrimonial and family law actions did not have to be enforced.<sup>268</sup>

Germany rules for enforcement of a foreign judgment are certainly more lax than those of the United States. Both procedurally and substantively, the German rules cause German courts to dig less deep than courts of the United States. While these rules allow for a more lax system than the United States, there are systems that are much more lax in looking at the merits of the arbitration than West Germany.

## *B. Belgium*

In 1985, Belgians amended their Code judiciaire to provide that if all parties are non-Belgian, an award rendered in Belgium is not subject to an action for annulment. Article 17 of the Belgian code judiciaire provides:

“Courts of Belgium may hear a request for annulment only if at least one of the parties to the dispute decided by the award is either a physical person having nationality or residence or a legal entity created in Belgium or having a Belgian branch or other seat of operation.”<sup>269</sup>

The Belgian statutory language is mandatory and offers no possibility for foreigners to choose Belgian judicial review.<sup>270</sup> This “totally unbound” arbitration has been favorably received by some international businessmen. Domestic Belgian courts may intervene at pre-award stages. These interventions would be to aid the

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<sup>266</sup> Id. at 340-41.

<sup>267</sup> Zivilprozessordnung [ZPO] § 328(1)5; see Westin, *supra* note 256, at 341.

<sup>268</sup> Id.

<sup>269</sup> The French text of the Code Judiciaire from the enacting law of March 27, 1985 read: « Les tribunaux belges ne peuvent connaitre d'une demande en annulation que lorsqu'au moins une partie au differend tranche par la sentence arbitrale est soit une personne physique ayant la nationalite belge ou une residence en Belgique, soit une personne morale constituee en Belgique ou y ayant une succursale ou un siege quelconque d'operation. The Code was later amended to take the harsh surprise out of litigating in Belgian courts”. The new text reads: “The parties may, by an express statement in the arbitration agreement or by a subsequent agreement, exclude any application to set aside the arbitral award where none of the parties is either an individual of Belgian nationality or residing in Belgium, or a legal person having its head office or a branch there.” This new text is drastically different than the original text, but clearly highlights the potential perils of having foreign judgments litigated in other, still foreign countries.

<sup>270</sup> William W. Park, National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration, 63 Tul. L. Rev. 647, 694 (1989).



arbitration by nominating arbitrators, gathering evidence and provisional measures to preserve property.<sup>271</sup> As Belgium is a signatory to the New York Convention, discussed *supra*, awards made under Belgian law will be recognized and given full force and effect.<sup>272</sup> The winner of such an arbitration, where there can be no judicial review, would then take the award to a country where the loser has assets. The loser will obviously contest this proceeding, saying that the arbitration was unfair, or improper in some way, and the court of enforcement will be handcuffed by the language of the New York Convention to enforce the award at the expense of the loser because that is what the loser contracted for when they signed the agreement to arbitrate.<sup>273</sup>

The agreement to arbitrate internationally is a sacred contract of sorts. As the *Mitsubishi* court stated in footnote 21, “the utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own.”<sup>274</sup> This willingness to forgo domestic contract safeties in lieu of transnational policies of comity, reciprocity, and party autonomy encourages this system by where a party can agree to arbitrate in Belgium, or in Japan, have a procedurally weak arbitration where their rights are lessened, have the award be given to their opponent, have that award enforced against them without judicial review because of international policies that were meant to promote and induce trade and international business like what they partook in. This is a never ending, vicious cycle. The policy of the nations will harm its citizens, which in effect harms the economic interests of that nation when their national loses. However, the policy stays intact, due in large part to the globalized world, and the interest of international comity and reciprocity. While West Germany (infra footnote) and Belgium (infra footnote) have lost some present relevance, their lessons should not be lost. A cautionary tale is the lesson learned by unfortunate defendants who were subject to enforcement of foreign arbitral awards. All nations have not changed their code, as Belgium has, and good business practice would seem to include exploring the law of countries where corporations have assets, to guard against foreign law enforcing ill-gotten judgments.

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<sup>271</sup> Id.

<sup>272</sup> See New York Convention, *supra* note.

<sup>273</sup> Id.

<sup>274</sup> *Mitsubishi*, 473 U.S. at 639, n. 21.

## Policy alternatives

There is no doubt that the present, cyclic system is problematic to parties with less bargaining power, and parties in general, as the award will likely be enforced against them without domestic review in countries where they have assets that are seizable. The question remains then, as to whether there is a better system to replace the current one, or if this is the best system possible.

The realm of possible alternatives includes an isolationist policy, where there was a transnational policy; restricted comity and expectations of reciprocity, where there was nearly unfettered comity and reciprocity. In this section, a policy alternative will be examined for its benefits and drawbacks, using policy methodology.<sup>275</sup>

Examining the problem from the perspective that American businesses are losing assets that are being seized by opposing parties in foreign countries without review of arbitral awards to ensure substantive and procedural fairness, the problem is easily defined. The next step is to assemble evidence. As the Belgian code judiciaire flatly states, mechanisms are in place for the peril of no review to occur in countries foreign to the United States. This peril is more than proposed or threatened. As the case law, discussed earlier, indicates, American domiciliaries are threatened by foreign policies like the Belgians have statutorily enacted.

What is the alternative to this transnational policy that the Supreme Court has adopted and used over the past five decades? The simple answer is an isolationist policy. That is to refuse to enforce awards based on comity and actively give them a second look. This includes not playing the game of reciprocity with foreign nations, but to act independently of them and to review the merits of the award with force and vigor.

The tradeoffs of this policy are numerous and frightening. With the world being so globalized, a major superpower like the United States to back off support of the international community would devastate confidence in transnational business. The effects of this chill in international business would be felt by sellers and buyers domestically, and abroad, and would certainly range across borders. With less

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<sup>275</sup> The alternative policy will be examined using the Eightfold path, written on by Eugene Bardach. See Bardach, Eugene, *A Practical Guide to Policy Analysis: The Eightfold Path to More Effective Problem Solving* (2000).

confidence in the international market, there would be less business done, and the market would shift from international to domestic, allowing buyers and sellers the certainty of their home law. This lack in international business would cripple the international economy and pull apart international community interests. This lack of trust in the international market would be wholly destructive to the global market economy.

Faced with such a destructive outcome, the clear choice is clear. Winston Churchill once stated “It has been said that democracy is the worst form of government except all the others that have been tried.”<sup>276</sup> While there are flaws with the present system that expose American domiciliaries to danger, the benefits enjoyed by all would be wholly destroyed should an isolationist policy that protects those same domiciliaries be enacted.

## **Conclusion**

International commercial arbitration is more than a reality in modern society; it is a necessity. With the billions upon billions of commerce and trade done daily, arbitration must exist to ensure order in a chaotic business community with few hard and fast legal rules and almost no uniformity.

Beginning with the FAA, domestically, and the New York Convention, globally, the United States has been moving to a society which accepts and promotes arbitration as a remedy to the already backlogged judicial system. Support for this practice has been evidenced domestically by decisional case law such as *The Bremen* and *Mitsubishi*, and internationally by examples such as the *Trail Smelter Arbitration*.

While there are tradeoffs with the present system under the New York Convention and such national laws as the Belgian code judiciaire, those downsides dwarf the potential for chaos and disorder that would be caused by the United States Supreme Court not being such an adamant proponent of international arbitration.

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<sup>276</sup>Attributed to Sir Winston Churchill, British politician, (1874-1965), available at <http://www.quotegarden.com/government.html>.