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The Enforcement of Arbitration in International Commercial Disputes: *I.T.A.D. Associates, Inc. v. Podar Brothers*

In *I.T.A.D. Associates, Inc. v. Podar Brothers*,[1] the United States Court of Appeals for the Fourth Circuit engaged in its first review of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[2] as applied to a commercial contract between an American company and a foreign partnership. Its decision reinforces a strong judicial trend toward recognition of the greater importance of arbitration in international commerce than in domestic commerce.[3] The court's opinion protects the enforcement of international arbitral agreements and awards under United States law, thereby encouraging American involvement in international commerce.

The *I.T.A.D.* dispute presented the court with three issues: (1) at what point, if ever, might a party be deemed to have waived the right to arbitration where there exists an international arbitration agreement; (2) whether the federal courts have the discretion, rather than the duty, to mandate arbitration where such an agreement exists; and (3) whether the federal courts may uphold a prejudgment attachment on the assets of one of the parties or on a superseding bond which releases those assets, pending arbitration on an international commercial contract that calls for arbitration.

The Fourth Circuit relied on the Convention, which the United States had ratified in 1970, and on the accompanying Foreign Arbitration Act,[4] which was added as a separate chapter to the Arbitration Act of 1925 to establish the statutory authority for enforcement of the Convention in the federal courts. The Fourth Circuit construed the Conven-

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[1] 636 F.2d 75 (4th Cir. 1981).

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 [hereinafter cited as the Convention]. The Convention was ratified by the United States, effective December 29, 1970.

[3] Two Supreme Court decisions establishing the special status of arbitration in international commerce have been augmented by several lower court decisions. See Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). Illustrative cases in the lower courts include: Fotochrome, Inc. v. Copal Co., 517 F.2d 512 (2d Cir. 1975); McCreary Tire and Rubber Co. v. CEAT S.p.A., 501 F.2d 1032 (3d Cir. 1974); Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974); Ferrara S.p.A. v. United States Grain Growers, 441 F. Supp. 778 (S.D.N.Y. 1977), aff'd mem., 580 F.2d 1044 (2d Cir. 1977).

[4] Act of July 31, 1970, Pub. L. 91-368, 84 Stat. 692 (codified at 9 U.S.C. §§ 201-08 (1976)) [hereinafter cited as the Foreign Arbitration Act].

tion and the Act to conclude first, that a party's conduct could constitute a waiver of the right to arbitration but that the facts were insufficient for such a waiver in this case. Second, the court held that once it is established no waiver has occurred, the federal courts are obligated to refer the parties to arbitration and do not have the discretion to retain jurisdiction when the arbitration agreement is covered by the Convention. The only discretion resting in the federal courts is to designate the place for arbitration and to appoint arbitrators. Third, the prejudgment attachment and subsequent bond posted in this case were held to be inconsistent with the arbitration agreement and with the Convention.

I.T.A.D., a New York-based textile marketing corporation, had originally sued Podar, an Indian textile marketing partnership, in a South Carolina court in July 1976.[5] This breach of contract action was based on two agreements which I.T.A.D. had made with Podar in December 1975 and January 1976 for the purchase of textiles. Both agreements provided for the arbitration of all disputes between the parties, but with one discrepancy: I.T.A.D.'s purchase orders for the two agreements identified New York as the situs for arbitration, whereas Podar's contract forms identified Bombay as the situs.[6] Podar subsequently failed to deliver the textiles, allegedly because of quota restrictions imposed by the Government of India.[7] Instead of submitting the matter to arbitration pursuant to their contracts, I.T.A.D. decided to sue Podar in South Carolina.[8] The state court granted I.T.A.D.'s request for the attachment of another Podar shipment which happened to be in the port of Charleston at the time.[9]

Podar's initial response was to file a pro se reply affidavit which included an objection to the action on the grounds that it was barred by the arbitration agreement. Apparently the South Carolina court made no ruling on this point and simply set a trial date, which was postponed several times at Podar's request. Meanwhile, Podar posted a $50,000 bond to release the attachment in June 1978.[10] Finally, on September 11, 1979, one day before the final trial date in the South Carolina court, the court granted Podar's motion to remove the case to federal district court, which it was required to do at the request of the defendant under the Foreign Arbitration Act.[11]

In the federal district court, Podar's motion of January 2, 1980, to compel arbitration pursuant to the Act was denied.[12] That court ruled that Podar had waived its right to compel arbitration by virtue of its

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[5] 636 F.2d at 76.
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] Id.
[11] Id. 9 U.S.C. § 205 (1976) was the authority for removal.
[12] 636 F.2d at 76.

waiting so long to make the motion and that the federal court retained discretionary authority to compel or deny arbitration.[13] Podar appealed this order to the Fourth Circuit, which reversed the lower court on both the waiver and the court's discretionary authority holdings, remanded the case to resolve the conflict over the situs of arbitration, and ordered the lower court to release the bond.

The Fourth Circuit addressed the issues of waiver and discretionary authority in some detail, while its order for releasing the bond only cited one precedent.[14] In general, the opinion emphasized that American adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards reflected a strong commitment by the government to encourage international arbitration. The court found that, although Article II(3) of the Convention could be interpreted to allow waivers,[15] Podar's delay in moving for arbitration did not fit the waiver provisions of the Article, especially since Podar had raised the issue of arbitration in its initial response to I.T.A.D.'s complaint.[16] Although three years had elapsed since I.T.A.D. brought the action against Podar, the court further noted that section 205 of the Foreign Arbitration Act allows a defendant to remove an action or proceeding pending in a state court to a federal district court "at any time before the trial thereof."[17] Thus, as long as a trial has not begun in a state court, a defendant's right to remove the case to a federal district court and to have that court order arbitration must necessarily be preserved. The court also ruled that the district court could not deny a request for an order to arbitrate, even though the language of section 206 of the Act[18] seems to allow such an order to be discretionary.[19] The court pointed out that Article II(3) of the Convention does make such a referral mandatory in the absence of stated exceptions.[20] Therefore, because the Act implemented the Convention, the two must be considered together, and the court found the combination to require mandatory referral to arbitration.[21]

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[13] Id.

[14] McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032 (3d Cir. 1974).

[15] The pertinent language of Article II(3) requires arbitration "unless . . . the said agreement is null and void, inoperative or incapable of being performed." The Convention, supra note 2, art. II(3).

[16] 636 F.2d at 77.

[17] Id. at 76 n.1, citing 9 U.S.C. § 205 (1976).

[18] Section 206 of the Foreign Arbitration Act reads, "A court having jurisdiction under this chapter *may* direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such Court *may* also appoint arbitrators in accordance with the provisions of the agreement." 9 U.S.C. § 206 (1976) (emphasis added).

[19] 636 F.2d at 77.

[20] Article II(3) of the Convention reads in part: "The court of the Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, *shall* at the request of one of the parties, refer the parties to arbitration." The Convention, note 2, art. II(3) (emphasis added). See infra notes 82-90 and accompanying text.

[21] 636 F.2d at 77.

The court's decision in respect to the three issues of waiver, discretionary referral, and prejudgment attachment reflects the special status that international arbitration has attained in U.S. courts in recent years. The special status is notable, not only because U.S. courts have been slow to recognize arbitration in general, but also because the United States delayed ratification of the Arbitration Convention for well over ten years after it had gone into effect for other signatories who had ratified it. The significance of the court's decision in this case, therefore, must be evaluated in the context of past judicial reluctance to endorse arbitration as an alternative to adjudication and the government's recognition of this reluctance. Each of the three issues the court faced will be evaluated following a brief review of the history of American judicial treatment of international arbitration.

The traditional hostility of U.S. courts toward arbitration seems to be part of the Anglo-American heritage and its preference for elaborate legal procedures based on precedent as well as flexibility in the evolution of a common law.[22] Because arbitration is intended to be a more efficient alternative to adjudication, its basic rules emphasize speed, informality, privacy, technical expertise, and finality.[23] Thus, judicial review of arbitral awards is limited to such matters as fairness of the proceeding and the jurisdictional scope of the arbitration agreement and does not address the correctness of the findings of law or fact.[24] This constraint on judicial review goes against the grain of the common law fabric, and until the 1920's, the court often applied the "ouster" doctrine to strike down arbitration agreements.[25]

The pressure to legitimize arbitration first prevailed in New York, where an arbitration act was passed in 1921.[26] Ultimately twenty-two states enacted arbitration statutes,[27] while at the federal level, Congress adopted the United States Arbitration Act in 1925.[28] Although the Federal Arbitration Act was written to have general effect, judicial reluctance to recognize it as an alternative to adjudication resulted in the

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[22] This "judicial hostility" is well documented in Mirabito, The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years, 5 Ga. J. Int'l & Comp. L. 471 (1975).

[23] The advantages and disadvantages of arbitration are well presented in Evans & Ellis, International Commercial Arbitration: A Comparison of Legal Regimes, 8 Tex. Int'l L.J. 17 (1973); McClelland, International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of International Commercial Disputes, 12 Int'l L. 83 (1978); Sanders, A Twenty Year's Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 13 Int'l L. 269 (1979).

[24] Friedman, Correcting Arbitral Error: The Limited Scope of Judicial Review, 33 Arb. J. 9 (1978); Yarowsky, Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality, 23 U.C.L.A. L. Rev. 936 (1976).

[25] 5 Ga. J. Int'l & Comp. L. 257, 258 (1975).

[26] Arbitration Law of 1920, ch. 275, 1920 N.Y. Laws (current version at N.Y. Civ. Prac. law §§ 7501-7514 (McKinney 1980)).

[27] Mirabito, supra note 22, at 472.

[28] Pub. L. No. 68-401, 43 Stat. 883 (1925) (substantially similar current version at 9 U.S.C. §§ 1-14 (1976)).

carving out of several exceptions, involving, for example, disputes affecting securities,[29] antitrust,[30] and patents,[31] where public policy interests were deemed to require adjudication rather than arbitration.

Internationally, the League of Nations recognized arbitration as an appropriate method for resolving disputes among private parties in transnational settings. The 1923 Geneva Protocol on Arbitration Clauses[32] and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards[33] were promulgated to stimulate the recognition by nations of each other's arbitral awards. The United States never ratified the Protocol or the Convention, largely because Congress considered them to be in conflict with existing state laws.[34]

In the 1950's, the United Nations sponsored a revision of the Geneva Protocol and Convention, which resulted in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention.[35] The work was done by the Private International Law Committee and focused on arbitral awards, but was subsequently redrafted to provide for the recognition and enforcement of arbitration agreements as well, even though the title of the Convention continued to refer only to awards.[36] The United States was a reluctant participant in the deliberations[37] and decided initially to oppose the Convention, again largely because of the conflict with many state arbitration laws.[38]

The American refusal to adopt the Convention made it difficult for U.S. businesses to persuade foreign courts to enforce American arbitral awards.[39] Groups like the American Bar Association, the American Arbitration Association, the United States Branch of the International Chamber of Commerce, and the Inter-American Commercial Arbitration Commission urged the President and Congress to change the U.S. position.[40] Finally, in 1968, President Johnson recommended the ratifi-

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[29] A significant Supreme Court case requiring adjudication of a securities dispute in spite of an international arbitration agreement is Wilko v. Swan, 346 U.S. 427 (1953).

[30] See, e.g., Am. Safety Equipment Corp. v. J.P. Macquire & Co., 391 F.2d 821 (2d Cir. 1968).

[31] See, e.g., Beckman Instruments, Inc. v. Technical Development Corp., 433 F.2d 55 (7th Cir. 1970).

[32] Adopted Sept. 24, 1923, 27 L.N.T.S. 157.

[33] Adopted Sept. 26, 1927, 92 L.N.T.S. 301.

[34] Contini, International Commercial Arbitration, 8 Am. J. Comp. L. 283, 287-90 (1959).

[35] The Convention, supra note 2.

[36] Comment, United Nations Foreign Arbitral Awards Convention: United States Accession, 2 Calif. W. Int'l L.J. 67, 70 (1971).

[37] Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1074-75 (1961).

[38] Official Report of the United States Delegation to the United Nations Conference on International Commercial Arbitration, No. 22 (Aug. 11, 1958).

[39] Domke, American Arbitral Awards: Enforcement in Foreign Countries, 1965 U. Ill. L.F. 399, 400 (1965).

[40] H.R. Rep. No. 1181, 91st Cong. 2d Sess., reprinted in [1970] U.S. Code Cong. & Ad. News 3601.

cation of the New York Convention, and Congress approved the proposal on October 4, 1968.[41] Proposed legislation to implement the Convention was drafted as a series of amendments to the Federal Arbitration Act.[42] Congress did not adopt these amendments, however, for fear of disrupting accepted judicial interpretations of the Act's wording in domestic arbitration cases. Instead, Congress finally enacted a revised version which set up a separate chapter to the Act for implementation of the Convention,[43] which established a 1970 effective date.

A turning point on the way to American ratification was the 1967 Supreme Court decision in *Prima Paint Corp. v. Flood and Conklin Manufacturing Co.*[44] Until that time, lower courts had sometimes refused to recognize that the Federal Arbitration Act made arbitration the subject of federal substantive law in diversity cases. In *Prima Paint* the Supreme Court held that it was appropriate to apply federal substantive law on arbitration where jurisdiction was based solely on diversity.[45] American reluctance to ratify the Arbitration Convention had been based on problems of implementation if the courts had to rely on state law to interpret international arbitration agreements. The Supreme Court's ruling in *Prima Paint* removed a major barrier to *federal* implementation of the Convention by making it possible for international arbitration to operate as a federal question, preempting state law,[46] and it facilitated President Johnson's recommendation to ratify the Convention in 1968.

The Supreme Court also proved to be receptive to the unique role of international commercial agreements, even independent of the Foreign Arbitration Act of 1970. For example, in a 1972 case which was not covered by the Convention,[47] the Supreme Court upheld the validity of a choice of forum clause in a transnational contract[48] even though such clauses in domestic contracts had generally been denied legal effect as an arbitrary limitation on the jurisdiction of the courts.[49] Then, in 1974,

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[41] See Comment, supra note 36, at 73.

[42] This legislation was prepared by the American Bar Association but was never introduced. Id.

[43] See Foreign Arbitration Act, supra note 4.

[44] 388 U.S. 395 (1967)

[45] Id. at 405. Justice Fortas argued that the statute "is based upon and confined to the incontestable federal foundations of" the interstate commerce power and the admiralty power of Congress. Id. Justice Black (joined by Justices Douglas and Stewart) wrote a strong dissent in which he pointed out:

> [the court] is not content to hold that the Act does all it was intended to do: make arbitration agreements enforceable in federal courts if they are valid and legally existent under state law. The Court holds that the Act gives federal courts the right to fashion federal law, inconsistent with state law, to determine whether an arbitration agreement was made and what it means.

Id. at 422. An excellent analysis of the jurisdictional problems between state and federal arbitration law is found in McMahon, Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States, 26 Arb. J. 65, 74 (1971).

[46] Mirabito, supra note 22, at 473.

[47] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

[48] Id. at 9.

[49] Id. at 13-15.

the Supreme Court decided the landmark case of *Scherk v. Alberto-Culver Co.*,[50] which authorized arbitration for an international dispute over securities because the contract between the parties contained an international arbitration agreement.[51] This opinion came as a surprise[52] in light of the Supreme Court's 1953 ruling in *Wilko v. Swan*[53] that a securities dispute was nonarbitrable in spite of the fact that the parties had an arbitration agreement to cover securities disputes.[54]

Justice Stewart, writing for the majority in *Scherk*, distinguished *Wilko* by calling the *Scherk* contract "a truly international agreement."[55] Justice Stewart pointed out that "[s]uch a contract involves considerations and policies significantly different from those found controlling in *Wilko*."[56] For example, uncertainty as to which country's laws might be applicable and the dangers of a forum hostile to one of the parties in a dispute made it "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction" to have an advance agreement on how disputes are to be resolved.[57] Finally, Justice Stewart argued, "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."[58]

Scherk was decided under the United States Arbitration Act. Justice Stewart recognized, however, the special significance of the Convention and the Foreign Arbitration Act in the following statement, which was quoted by the *I.T.A.D.* court:

> 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 arbitration awards are enforced in the signatory countries.[59]

This very strong language in support of the Convention recognizes a special status for arbitration agreements and awards covered by it, regardless of how the courts might restrict the operation of domestic arbitration agreements.[60] Subsequent lower court cases have reflected this higher

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[50] 417 U.S. 506 (1974).

[51] Id. at 515-17.

[52] Nissen, Antitrust and Arbitration in International Commerce, 17 Harv. Int'l L.J. 110 (1976); Note, Extraterritorial Application of United States Securities Law Denied: Arbitration Clause in Investment Contract Enforced, 16 Harv. Int'l L.J. 705 (1975); Note, Greater Certainty in International Transactions through Choices of Forum?, 69 Am. J. Int'l L. 366 (1975).

[53] Wilko v. Swan, 346 U.S. 427 (1953).

[54] Id. at 434-35, 438.

[55] 417 U.S. at 515 (1974).

[56] Id.

[57] Id. at 516.

[58] Id. at 516-17.

[59] Id. at 520 n.15.

[60] One should note that *Scherk* involved an action under § 10-b and rule 10(b)(5) of the

regard for international arbitration agreements, often narrowly defining public policy interests which might otherwise supersede such agreements.[61]

The Convention currently has fifty-six contracting members, including the United States and India, the home countries of the *I.T.A.D.* parties.[62] Both the United States and India took advantage of two available reservations to the Convention, one limiting the Convention to arbitration involving commercial transactions, and the other limiting it on the basis of reciprocity.[63] Thus, the parties in *I.T.A.D.* are in similar positions in relation to the Convention.

The Fourth Circuit in *I.T.A.D.* was clearly sympathetic to the promotion and protection of international arbitration agreements. Despite the informality of the agreement to arbitrate found in the contracts between I.T.A.D. and Podar, the court still accorded it full recognition.[64] At no time was the agreement itself challenged, and the issues in the case encompassed events which happened after the agreement had been made.[65]

The first of the three issues before the court was whether Podar had waived the right to arbitrate through its failure to make a motion to compel arbitration before January 1980. The Fourth Circuit relied on Article II(3) of the Convention and Section 206 of the Act[66] to find that no waiver had occurred. The court emphasized the need for uniform standards for determining when a waiver has occurred in international agreements. The court was rather vague, however, on what those standards might be and referred only to its discussion in a prior case[67] "of circumstances which indicate a waiver of an arbitration agreement."[68]

Securities Exchange Act of 1934, which has no private remedy provision, in contrast to *Wilko* which involved § 12(2) of the Securities Act of 1933. Id. at 513. However, absent an international arbitration agreement, Rule 10(b)(5) disputes are still being ruled non-arbitrable. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823 (10th Cir. 1978); Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831 (7th Cir. 1977).

[61] See supra note 3; McClelland supra note 23; Ehrenhaft, Effective International Commercial Arbitration, 9 Law & Pol'y Int'l Bus. 1191 (1977); Smedresman, Conflict of Laws in International Commercial Arbitration: A Survey of Recent Developments, 7 Calif. W. Int'l L.J. 263 (1977).

[62] U.S. Dep't of State, Treaties in Force 252 (1981).

[63] The Convention, supra note 2, art. I(3).

[64] 636 F.2d at 76, 77. Both parties apparently had a provision for arbitration in their standard commercial forms, but they either neglected to scrutinize each other's forms or chose to leave the discrepancy on situs of arbitration unresolved. Arbitration is a common industrial practice in the textile trade. See Lowenfeld, Book Review (International Commercial Arbitration by Giorgio Gaja) 3 Arb. J. 38 (1979). It may well be that I.T.A.D. and Podar took an agreement to arbitrate for granted.

[65] 636 F.2d at 76, 77.

[66] The Convention, supra note 2, art. II(3); 9 U.S.C. § 206 (1976).

[67] City of Parkersburg v. Turner Constr. Co., 612 F.2d 155 (4th Cir. 1980). For further discussion of circumstances indicating a waiver of an arbitration agreement, see E.I. du Pont de Nemours & Co. v. Lyles & Lang Constr. Co., 219 F.2d 328 (4th Cir. 1955); Radiator Specialty Co. v. Cannon Mills, 97 F.2d 318, 319 (4th Cir. 1938).

[68] 636 F.2d at 77.

In this prior domestic case the Fourth Circuit held that a time limit in the arbitration agreement for initiating arbitration would be applied only "if practicable" and only for minor issues.[69] "An honest misappraisal of the appropriate remedy" in a dispute over a major issue did not, the court argued, justify using the lapse of the time limit as an excuse not to arbitrate.[70]

Thus, the Fourth Circuit seemed to consider delays in requesting arbitration to constitute a waiver of the right to arbitrate only where the issue is minor, quick action is "practicable" to invoke the request, and the failure to ask for arbitration is not based on an honest misunderstanding of how to proceed. Because the case cited by the court involved two domestic parties, the court's reference to it implied that the standards for waiver were the same in either a domestic or international contract setting, even though the court also recognized "the strong policy favoring [international] arbitration . . . ."[71] Thus, the court left unclear just how "standards which can be uniformly applied on an international scale" might differ from domestic standards.[72]

Two factors not brought out in the opinion but which reinforce the ruling are the strong federal policy in general to minimize waivers of arbitration agreements and the greater willingness to minimize them in international commercial settings.[73] On arbitration generally, the federal statute provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[74] These grounds usually have involved fraud in obtaining the arbitration clause or lack of consideration or capacity to contract.[75] Only an extensive delay before demanding arbitration has been held to operate as a waiver.[76]

Under the Foreign Arbitration Act, even an extensive delay might not constitute a wavier if the proceeding were in a state court, because section 205 allows the defendant to request a transfer of the proceeding to a federal district court at any time before a trial.[77] Excessive delay could operate as a waiver only after the initiation of proceedings in a

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[69] City of Parkersburg v. Turner Constr. Co., 612 F.2d at 156.

[70] Id.

[71] 636 F.2d at 77.

[72] Id. at 77.

[73] Ferro S.p.A. v. United States Grain Growers, 441 F. Supp. 778, 780 n.2 (S.D.N.Y. 1977), aff'd mem., 580 F.2d 1044 (2d Cir. 1978).

[74] 9 U.S.C. § 2 (1976).

[75] See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[76] United States v. S.T.C. Constr. Co., 472 F. Supp. 1023 (E.D. Pa. 1979). Here the demand for arbitration came long after the suit was commenced and extensive discovery had been conducted. See also Radiator Speciality Co. v. Cannon Mills, 97 F.2d 318 (4th Cir. 1938); La Nacional Platanera, S.C.L. v. North Am. Fruit & S.S. Corp., 84 F.2d 881 (5th Cir. 1936); Batson Yarn & Fabrics Mach. Group, Inc. v. Saurer-Allma Gmb H-Allgauer Maschinenbau, 311 F. Supp. 68 (D.S.C. 1970); Gulf Cent. Pipeline Co. v. Motor Vessel Lake Placid, 315 F. Supp. 974 (E.D. La. 1970).

[77] 9 U.S.C. § 205 (1976), applied in Dale Metal Corp. v. Kiwa Chemical Indus. Co., 442 F. Supp. 78 (S.D.N.Y. 1977).

federal court, if this section is to have full effect. The Fourth Circuit's ruling could be read to mean that only upon the involvement of a federal forum would "standards which can be uniformly applied on an international scale"[78] be applied on the issue of a waiver. Furthermore, the language in the Convention requires referral to arbitration unless the court finds the arbitration agreement to be "null and void, inoperative or incapable of being performed."[79] This language differs from the language in the first chapter of the United States Arbitration Act and appears to provide quite a different basis for limiting the grounds for denying the right to arbitrate under an international agreement than exists under the federal statute for domestic arbitration.[80]

In addition to deciding whether Podar had waived its arbitration rights, the Fourth Circuit considered whether federal courts possessed discretionary power in ordering arbitration. The Fourth Circuit correctly pointed out that the Convention does make referral mandatory and that the apparently discretionary language in section 206 of the Act "relates only to the designation of a place for arbitration and the appointment of arbitrators."[81] No documentation is offered by the court on this point, and the statute's language—"A court . . . *may* direct that arbitration be held . . ."[82]—does appear to be discretionary.

In fact, however, the provision was not intended to be discretionary.[83] The purpose of the language was not to authorize a public policy balancing test between adjudication and arbitration, as one commentator has argued.[84] Rather, Congress used the word "may" because the Office of the Legal Advisor for the State Department requested inclusion of the section so that federal courts would be authorized to order arbitration "at *any* place" provided for in the applicable agreement, "whether that place is within or without the United States."[85] According to Richard D. Kearny of the Office of the State Department's Legal Adviser at the time the bill was before Congress, there was concern that district courts would not order arbitration outside the United States without this authorization because, under the existing arbitration statute, "the case law is not clear whether the district court will order an arbitration to be

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[78] 636 F.2d at 77.

[79] The Convention, supra note 2, art. II(3).

[80] See supra note 74 and accompanying text. Although this language has the potential for broad interpretation, it is different from the pre-existing language in Chapter One and therefore must be interpreted according to its own language rather than the case law under Chapter One.

[81] 636 F.2d at 77.

[82] 9 U.S.C. § 206 (1976) (emphasis added).

[83] The confusion is enhanced by the fact that the original United States Arbitration Act mandates a *stay* of the proceedings if the dispute is arbitrable under a written agreement. 9 U.S.C. § 3 (1976).

[84] Note, Extraterritorial Application of United States Securities Law Denied: Arbitration Clause in Investment Contract Enforced, 16 Harv. Int'l L.J. 705, 718 (1975).

[85] The circumstances of the request are discussed in Comment, supra note 36, at 79; McMahon, supra note 45, at 80.

held outside the United States."[86] The section was needed to clarify this issue. Thus, the use of the word "may" was intended to give the courts discretion regarding the place of arbitration, but not discretion on whether arbitration should occur. Furthermore, the Convention already contained language making it clear that courts are *required* to "refer the parties to arbitration" where an arbitration agreement exists.[87] Taken together, the Convention mandates referral and section 206 of the statute makes it possible for federal courts to order the arbitration wherever the parties have agreed that it should take place. The section further authorizes the federal courts to "appoint arbitrators in accordance with the provisions of the agreement,"[88] which is also enabling language and not a grant of power to decide whether to order arbitration.

Thus, the enabling provision was not a shift to discretionary referral, but was intended to be discretionary only with regard to the location and the appointment of arbitrators. This interpretation has since been recognized by several decisions,[89] and it was appropriate for the Fourth Circuit to remand this case for the very function of resolving the location of arbitration.[90]

The third issue considered by the Fourth Circuit was the district court's power to order the attachment of Podar's goods and the superseding bond. The lower court was instructed to release and refund the bond to Podar,[91] with the Fourth Circuit basing its instruction on *McCreary Tire & Rubber Co. v. CEAT S.p.A.*[92] In *McCreary*, the Third Circuit had ordered a similar release of an attachment by a Pennsylvania court because

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[86] S. Rep. No. 702, 91st Cong., 2d Sess. 8 (1970). There is some confusion on this point because the Acting Secretary of State for Congressional Relations stated a misleadingly contrary purpose in a letter to Speaker John McCormack, as follows: "Since there may be circumstances in which it would be highly desirable to direct arbitration within the district in which the action is brought and inappropriate to direct arbitration abroad, Section 206 is permissive rather than mandatory." Letter to Speaker John W. McCormack from H.G. Torbert, Jr., Acting Assistant Secretary for Congressional Relations, Department of State, in H.R. Rep. No. 118, 91st Cong., 2d Sess. 4, reprinted in [1970] U.S. Code Cong. & Ad. News 3601, 3604.

[87] The Convention, supra note 2, art. II(3).

[88] 9 U.S.C. § 206 (1976).

[89] McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1037 (3d Cir. 1974); Sumitomo Corp. v. Parakopi Compania Maritima S.A., 477 F. Supp. 737 (S.D.N.Y. 1979); Siderius v. Compania de Acero del Pacifico S.A., 453 F. Supp. 22, 24-25 (S.D.N.Y. 1978); Antco Shipping Co., Ltd. v. Siderman S.p.A., 417 F. Supp. 207, 215 (S.D.N.Y 1976).

[90] On remand, the district court ordered that the arbitration take place in New York City. I.T.A.D. Associates, Inc. v. Podar Brothers, No. 79-1819 (D.S.C. June 25, 1981). Judge Hawkins supported this choice over Bombay because "the body which was designated in Podar's arbitration clause as the arbitration tribunal in Bombay is the same entity being relied upon by Podar to support its allegation of a legal excuse for failure to perform its contracts, . . . [making] a fair and impartial hearing" very unlikely, and because I.T.A.D. and a third party affected by the alleged breach both have their principal offices in New York City, and Podar apparently has "a representative located there." Id. at 3. It is interesting to note that Judge Hawkins also ordered that the "arbitration be conducted in accordance with the laws of the State of New York and the rules then obtaining of the General Arbitration Council of the Textile Industry." Id.

[91] 636 F.2d at 77.

[92] 501 F.2d 1032 (3d Cir. 1974).

it was deemed to conflict with the Convention's requirement to arbitrate.[93] Because the Convention mandates referral to arbitration, and because there is no provision in the Foreign Arbitration Act for a stay of the judicial proceeding pending arbitration, as there is in the statute for domestic arbitration,[94] the *McCreary* court concluded that its jurisdiction was limited to ordering referral. This is in contrast to the procedure under the domestic arbitration statute, wherein a court may order a stay of judicial proceedings pending arbitration, and thereby maintain a prejudgment attachment.[95]

This appears to be a reasonable position calculated to encourage international arbitration. The Federal District Court for the Southern District of New York has since taken the same position.[96] In both cases, the absence of any reference to prejudgment attachments in the Convention was deemed to mean they were not authorized.[97]

Except in maritime cases,[98] only one court has taken a contrary position on prejudgment attachments. In *Carolina Power & Light Co. v. Uranex*,[99] a federal district court in California justified a temporary attachment of assets as an inducement for Uranex to arbitrate.[100] This decision was criticized in a recent law review note on jurisdictional grounds.[101] The attachment was the only facet of the dispute between the parties in the jurisdiction of that court, with arbitration already proceeding in New York City.[102] The court argued that the Convention and implementing statute did not specifically prohibit prejudgment at-

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[93] Id. at 1038.

[94] 9 U.S.C. § 3 (1976).

[95] 501 F.2d at 1037-38.

[96] Metropolitan World Tanker Corp. v. P.N. Pertambangan Minijakdangas Bumi Nasional, 427 F. Supp. 2 (S.D.N.Y. 1975).

[97] Id. at 4-5; 501 F.2d at 1038.

[98] Prejudgment attachment in admiralty cases is specifically authorized by the United States Arbitration Act. 9 U.S.C. § 8 (1976). The Foreign Arbitration Act, supra note 4, stipulates that Chapter 1 of the Federal Arbitration Act is applicable where it "is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208 (1976). Relying on these two sections, courts have generally upheld prejudgment attachments in admiralty cases even though the arbitration agreements in such cases are covered by the Convention. Drys Shipping Corp. v. Freights, 558 F.2d 1050 (2d Cir. 1977); Paramount Carriers Corp. v. Cook Indus., Inc., 465 F. Supp. 599 (S.D.N.Y. 1979); Atlas Chartering Serv., Inc. v. World Trade Group, Inc., 453 F. Supp. 861 (S.D.N.Y. 1978); Andros Compania Maratima S.A. v. Andre & Cie S.A., 430 F. Supp. 88 (S.D.N.Y. 1977). But see Sanko S.S. Co. v. Newfoundland Ref. Co., 411 F. Supp. 285 (S.D.N.Y.), aff'd, 538 F.2d 313 (2d Cir.), cert. denied, 429 U.S. 858 (1976); Metropolitan World Tanker Corp. v. P.N. Pertambangan Minijakdangas Bumi Nasional, 427 F. Supp. 2 (S.D.N.Y. 1975). The court in this last case pointed out that attachments in maritime cases are usually intended to provide jurisdiction in rem or by foreign attachment. Id. at 4.

[99] Carolina Power & Light Co v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977).

[100] Id. at 1051. The attachment was authorized for a 30-day period only.

[101] Note, *Carolina Power and Light Co. v. Uranex:* Quasi in Rem Jurisdiction to Secure a Potential Arbitral Award: An Exception to *Shaffer v. Heitner*'s Minimum Contacts Requirement, 5 N.C.J. Int'l L. & Com. Reg. 247 (1980). But see Note, Pre-Arbitration Attachment: Is It Available in International Disputes?, 1 Rev. Litig. 211 (1981).

[102] 451 F. Supp. at 1045. The court even recognized the jurisdictional dilemma posed by the Supreme Court's ruling in Shaffer v. Heitner, 433 U.S. 186 (1977). The temporary nature of its order was to allow the plaintiff time to bring another suit where it could assert personal

tachments and that the accepted practice of allowing such attachments to protect a future arbitration award in domestic arbitration was not barred in this case.[103] The *Uranex* rationale contradicts the whole point of the consolidated handling of disputes through arbitration. The Fourth Circuit correctly chose to ignore the decision and instead to add its weight to the emerging trend not to favor prejudgment attachments pending international arbitration.[104]

The Fourth Circuit's resolution of the three issues of waiver, mandatory referral, and prejudgment attachment will encourage the development of international arbitration as a dispute settling mechanism. The court's opinion is a reasonable interpretation of the Convention and the Foreign Arbitration Act and conforms to the basic policies favoring international arbitration.

In regard to the waiver issue, Podar was operating at a considerable disadvantage by virtue of being based in India and initially responded to I.T.A.D.'s complaint with an affidavit prepared by its Indian counsel.[105] Although the affidavit referred to Podar's understanding of an agreement to arbitrate, the motion to compel arbitration was not made until the case had been removed to federal district court some three and a half years later. The Fourth Circuit nonetheless recognized that the removal was proper. The question of when a motion to compel arbitration *should* be made depends on such strategic factors as out-of-court negotiations to bring about arbitration voluntarily, the risk of acquiescing to a state court's jurisdiction unnecessarily, and the likelihood that the arbitration agreement will or will not be upheld as valid. I.T.A.D. had sued for breach of contract in the South Carolina court in spite of an apparent agreement to arbitrate, and these factors may well have influenced Podar's delays. The fact that the Foreign Arbitration Act authorizes removal from a state court to a federal court at any time prior to trial conforms with a policy of acknowledging these strategic problems.

Once a federal court has jurisdiction to order arbitration under the Convention, the requirement that the court *shall* refer the parties to arbitration is also a wise policy. If the discretionary scope of section 206 of the Act were broadened by judicial interpretation from the limited authority to identify a situs of arbitration and to appoint arbitrators in conformity with the arbitration agreement, to encompass a more general authority to decide whether to order arbitration at all, it would be in direct conflict with the Convention's mandatory language. Not only would this offend the other contracting parties to the Convention and place the United States in the awkward position of justifying judicial

jurisdiction over the defendant, in line with the Supreme Court ruling, but also in spite of the fact that arbitration had already begun. Id. at 1049.

[103] 451 F. Supp. at 1050, 1052.

[104] See, supra notes 92 and 96.

[105] Brief of Appellant at 9, I.T.A.D. Assocs., Inc. v. Podar Bros., 636 F.2d 75 (4th Cir. 1981).

rulings in conflict with the Convention; it would also discourage American involvement in international commerce. Arbitration agreements are a convenient mechanism to avoid the potential uncertainties, inconsistencies, and bias of subjecting commerical disputes to the laws of one of the parties. Instead, the parties can agree in advance to a mutually acceptable forum for resolving their disputes.

Of course, I.T.A.D. and Podar had not agreed on a mutually acceptable forum. Both parties relied on conflicting boiler plate arbitration clauses in their respective business forms, although neither party questioned the existence of an agreement to arbitrate. The absence of agreement on situs also meant the absence of agreement on the rules to govern the arbitration. The basic purpose of avoiding the vagaries of one country's laws by having an arbitration agreement was thus not realized. Even so, the policy of encouraging arbitration for the sake of comity in international commerce justified the *I.T.A.D.* outcome.

The prejudgment attachment in the South Carolina court, was part of a proceeding in which I.T.A.D. was suing Podar for breach of contract. Moreover, it served as the basis for asserting jurisdiction over Podar in the state court. Thus, the attachment was intermingled with actions which were contrary to the arbitration agreement. It conflicted with the policy that arbitration should serve as the preferred setting for the settlement of international commercial disputes when the parties have an agreement to arbitrate. And it conflicted with the limited role for the courts under the Convention. The Fourth Circuit acted properly in ordering that the bond posted by Podar to supersede the attachment be released.

Finally, the Fourth Circuit emphasized the importance of uniform standards in the operation of international arbitration but neglected to identify the source of these standards in any more detail than the broad language of the Convention. There are, in fact, several sources of more detailed rules for arbitration than the Convention provides.[106] In addition, each country tends to have its own variations.[107] The trend in most countries is toward international uniformity, and some analysts see this as reflecting the development of an international arbitration law.[108] The language of the Fourth Circuit's opinion is supportive of the internationalizing of arbitration law even if the authorities it cites, with the excep-

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[106] The International Chamber of Commerce and the American Arbitration Association are the two largest private agencies providing arbitration services. Each has an elaborate set of rules. The United Nations Commission on International Trade Law has also promulgated rules on arbitration although it does not provide an arbitration service.

[107] Examples are discussed in Evans & Ellis, supra note 23; Comment, A Survey of Arbitral Forums: Their Significance and Procedure, 5 N.C.J. Int'l L. & Com. Reg. 219 (1980); Almond, Settlement of International Commercial Disputes, 4 N.C.J. Int'l L. & Com. Reg. 107 (1978).

[108] McClelland, Toward a More Mature System of International Commercial Arbitration: The Establishment of Uniform Rules of Procedure and the Elimination of the Conflict of Laws Question, 5 N.C.J. Int'l L. & Com. Reg. 169 (1980); Smedresman, supra note 61; Ehrenhaft, supra note 61.

tion of the Convention itself, are domestic. The fact that the Fourth Circuit favored international uniformity and ruled accordingly in this case is a welcome sign.

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