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Compelling Arbitration and the Judicial Review of Arbitral Awards

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I. INTRODUCTION

I will discuss the enforceability of agreements to arbitrate commercial disputes. This will be supplemented, as necessary, by a more abbreviated discussion of the enforceability of arbitral awards and of foreign judgments confirming foreign awards. I intend to focus on the law likely to prevail in a state or federal court sitting in Florida in cases where the arbitration is to occur outside this State. Normally, the place of arbitration is designated in the arbitral agreement or by mutual agreement of the parties after a dispute arises. On occasion, an arbitral association (e.g., American Arbitration Association, International Chamber of Commerce) is given the responsibility for designating the place of the arbitration.

In discussing the enforceability of agreements to arbitrate, I will focus on two distinct types of action. The first is a simple motion, filed after one of the parties has commenced a judicial proceeding, asking the court to stay those proceedings while the parties arbitrate their dispute in accordance with the agreement. The second type of enforcement action is a request that the court compel the reluctant party to arbitrate the dispute in accordance with the arbitral agreement. This latter is, of course, in the nature of a request for specific performance and may accompany a motion to stay a judicial proceeding or may be brought as an original matter.

In dealing with a case where the arbitration is to take place outside this State, the Florida lawyer, whether acting as draftsman of an arbitral agreement or as advocate in a potential enforcement action, confronts a problem that may be unique in all American law. First, there is a basic disparity between Florida and federal law on the fundamental question of whether such agreements are enforceable. Second, this disparity is reflected in a similar difference between Florida and federal law regarding the enforceability of any arbitral award that might actually be obtained in the case. Third, grave uncertainties at-

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tend the question of whether and when the Florida courts will or are required to apply federal law (the federal courts will clearly apply Florida law when federal law is, by its terms, inapplicable). Fourth, courts in other jurisdictions, both in the United States and abroad, frequently follow a much more liberal policy toward arbitration than Florida law permits, and the possibilities for, and effects of, actions in these courts is a matter which the Florida lawyer cannot afford to ignore. These four basic propositions interact to establish the strategic possibilities that the Florida lawyer may eventually face. Before describing these strategic possibilities and the ways to deal with them, however, it is necessary to review each of the basic propositions in turn.

II. Disparity Between Florida and Federal Law Regarding the Enforceability of Agreements to Arbitrate

Traditionally, because arbitration tends to compete with the courts as a means for the settlement of private controversies, the common law looked askance at all agreements to arbitrate future disputes.[1] Such agreements were deemed revocable at any time prior to the issuance of an award, and were thus unenforceable.[2] Both the Congress of the United States and the Florida legislature, however, have changed the common law, but they have done so in differing ways.

Under the Florida Arbitration Code (the "Florida Code"),[3] written agreements to arbitrate future disputes are enforceable, but only if the arbitration is subject to the Florida Code.[4] The question whether the Florida Code will control is a matter of the parties' intent.[5] Where the agreement makes no specific reference to the

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1. S. Elliot, Arbitration, Materials and Cases (1968).
2. *Id.*
3. Fla. Stat. §§ 682.01-.22 (1977).
4. Fla. Stat. § 682.02 (1977), which states:

> Two or more parties may agree in writing to submit to arbitration any controversy or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the refusal to perform the whole or any part thereof. Such agreement or provisions shall be *valid, enforceable*, and *irrevocable* without regard to the justiciable character of the controversy; *provided that this act shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply or to any arbitration or award thereunder.* (emphasis added).

5. Wickes Corp. v. Industrial Fin. Corp., 493 F.2d 1173 (5th Cir. 1974) (where the parties clear intent was that the Florida Arbitration Code not apply, contract must be interpreted by common law principles).

Code, a stipulation that the place of arbitration is to be outside Florida will be read as implying an intent not to have the Florida Code apply.[6] In such a case, the common law rule comes into play and the agreement to arbitrate is unenforceable. Presumably, the same rule would apply if a foreign situs were chosen by mutual agreement of the parties after the dispute arose, provided the agreement made no specific reference to the Florida Code.

If the arbitral agreement is silent, both as to the applicability of the Florida Code and the place of arbitration, the Florida courts have considered as controlling any general choice of law clause found in the contract.[7] If the contract is to be governed by Florida law, this will usually be treated as evidence of an intent to arbitrate under the Florida Code, and the arbitral agreement will be considered enforceable. No case has been found involving a general Florida choice of law clause, coupled with an arbitral clause, designating a foreign arbitral situs. Arguably, the general choice of law clause should be construed as manifesting an intent to arbitrate under Florida law, but no decision as yet exists to confirm the point. In the absence of a choice of law clause, the courts have tended to examine the extent to which the underlying subject matter of the contract is connected with Florida in determining whether the parties "intended" for the arbitration to occur under the Florida Code.

If, as a consequence of these rules, Florida law would treat an agreement to arbitrate as unenforceable, either party to the agreement can simply refuse to submit the dispute to arbitration and can then proceed to file suit in a Florida court on the merits of that

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6. Damora v. Stresscon Int'l., Inc., 324 So.2d 80 (Fla. 1975). In this case, the Supreme Court of Florida held that the rights of the parties were dependent on the contract terms and not the State of Florida arbitration procedures. Where the contract provided that the arbitration would take place in New York, the inference was that New York arbitration law would govern; but New York arbitration could not be held to oust a Florida court of jurisdiction.

7. In Knight v. H.S. Equities, Inc., 280 So.2d 456 (1973), the Fourth District Court of Appeals of Florida stated:

> [T]he customer's agreement contained a specific stipulation that the laws of the State of New York shall govern the enforcement of the agreement. Such a proviso, we feel, falls within the emphasized language appearing in Section 682.02 . . . rendering arbitration provisions unenforceable in Florida. Where it is stipulated that an agreement to arbitrate and its enforcement are governed by the laws of another state, such agreement does not comply with Chapter 682 and is not specifically enforceable in this state. 280 So.2d at 459.

See also Condotel Bahamas, Ltd. v. Leavell Bahamas, Ltd., 276 So.2d 189, *cert. denied,* 281 So.2d 211 (Fla. 1973).

dispute. That court will neither stay its own proceedings nor compel the recalcitrant party to comply with the arbitral agreement. In such a situation, however, it is quite possible that the agreement to arbitrate will be enforceable by a court in some other jurisdiction in spite of the proceedings pending in Florida. The situation, in other words, invites a race to the courthouse with a number of possible consequences to which we shall turn later.

All of this is in sharp contrast to the situation under federal law. The latter is embodied in two sources: the Federal Arbitration Act (the "Federal Act"); and the United Nations Convention on the Enforcement and Recognition of Arbitral Awards (the "U.N. Convention").[8] Under the Federal Act, agreements to arbitrate are enforceable if in writing and if contained in "any maritime transaction" or in "a contract evidencing a transaction involving commerce."[9] The place of arbitration designated in the agreement has no direct bearing on the question of whether the agreement is enforceable. This means that in any case involving an arbitral agreement subject to the Federal Act, a federal court must stay its own proceedings, even if arbitration is to be held outside the United States.[10] There is some question as to whether the venue provision contained in section 4 of the Federal Act[11] prohibits a federal court from issuing an order compelling arbitration if the place of arbitration is outside the district in which the court sits. The authorities seem divided on the point. Nevertheless, the Fifth Circuit Court of Appeals has held that the venue provisions of section 4 are waivable by agreement of the parties, and that a clause fixing the place of arbitration outside a particular district constitutes such a waiver, provided venue is otherwise properly laid in that district.[12]

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8. 9 U.S.C. §§ 1-14 (1970). Chapter one of title nine will hereinafter be referred to as "Federal Act," while chapter two will be referred to as "the implementing legislation." The latter implements the Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 (hereinafter the "U.N. Convention").

9. 9 U.S.C. § 2 (1970).

10. Agostini Bros. Bldg. Corp. v. United States *ex rel.* Virginia-Carolina Electrical Works, 142 F.2d 854 (4th Cir. 1944) (granting a stay of proceedings until arbitration could be had in a suit by subcontractor against contractor and surety to receive for labor and materials furnished pursuant to § 3 of the Federal Act); Penalver v. Compagnie de Navigation Frutiere Matouba, 428 F. Supp. 1070 (E.D.N.Y. 1977) (stay was not precluded by the fact that arbitration might have to take place in London where contract provided for such arbitration).

11. 9 U.S.C. at § 4.

12. City of Naples v. Prepakt Concrete Co., 490 F.2d 182 (5th Cir.), *reh. denied*, 494 F.2d 511 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974). *Accord*, Garner Lumber

As already noted, the Federal Act only applies if the arbitral clause is contained in a "contract evidencing a transaction involving commerce." "Commerce" is defined as "commerce among the several States and with foreign nations."[13] This has been interpreted to exclude any contract involving only commerce between two foreign nations, even if one or both parties are citizens of the United States or the contract was made in this country.[14] Moreover, while the Supreme Court has made clear that the term "commerce" is not limited to contracts between merchants for the interstate or foreign shipments of goods,[15] there has been some dispute over whether the phrase "transactions involving commerce" is to be interpreted more narrowly than the phrase "affecting commerce" traditionally used in federal statutes.

In *Bernhart v. Polygraphic Company of America*,[16] the Supreme Court held that a contract between a New York corporation engaged in interstate commerce and a private individual which was made in New York for the performance of services exclusively in Vermont was not a "transaction involving commerce." Where, however, the local services were found to be "inextricably related" to the interstate sale of goods, the Federal Act was held to be applicable.[17] The Act was also applied to a sub-contract made in Georgia between a Georgia sub-contractor and a New York prime contractor for work to be performed exclusively in Georgia because the prime contractor made interstate shipments of materials and personnel for the Georgia project.[18] Where both the guarantor and debtor in a contract of guaranty were Texas residents and the debt was incurred in Texas,

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Co. v. Randolph E. Valensi Lange, Inc., 513 F.2d 1171 (4th Cir. 1975). *But see* Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449 (1935); Batson Yarn & Fabrics Machine Group v. Saurer-Allma GmbH-Allgaver Maschinenbau, 311 F. Supp. 68 (D. S.C. 1970). *See also*, the implementing legislation of the U.S. Convention, 9 U.S.C. § 206 (1970).

13. 9 U.S.C. at § 1.

14. The Volsinio, 32 F.2d 357 (E.D.N.Y. 1929).

15. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (hereinafter "Prima Paint").

16. 350 U.S. 198 (1956) (hereinafter "Bernhardt"). *Accord*, Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973).

17. Prima Paint, 388 U.S. at 401.

18. Electronic & Missile Facilities, Inc. v. United States, 306 F.2d 554 (5th Cir. 1962), *rev'd on other grounds sub nom.*, Moseley v. Electronic & Missile Facilities, Inc., 374 U.S. 167 (1963) (hereinafter "Moseley"). *See also* Varley v. Tarrytown Assoc., Inc., 477 F.2d 208 (2d Cir. 1973), suggesting that the "local services" limitation of *Bernhardt* was no longer viable in light of Flood v. Kuhn, 407 U.S. 258 (1972) (baseball held to be exempt from the scope of the federal antitrust laws).

the Federal Act was held applicable to the guaranty agreement, since the debt was found to be related to the debtor's business as a Texas distributor for products supplied by the New York creditor, even though the latter was not a party to the guaranty agreement. [19]

In sum, under the Federal Act, in contrast to the Florida Code, all written contracts to arbitrate that come within the scope of the Act are enforceable subject only to some uncertainty regarding the power of the federal court to compel arbitration at a place outside the district in which it sits. Certainly, however, such a court must stay its own proceedings.

The U.N. Convention has a similar effect. Any nation that is a party to the Convention is required "to recognize an agreement" to arbitrate which is writing. [20] Apparently, no distinction is to be drawn between the "recognition" of agreements (i.e., a stay of judicial proceedings) and the "enforcement" of agreements (i.e., compelling arbitration). [21] This seems clear from the implementing legislation which expressly empowers the federal district courts to "direct that arbitration be held in accordance with the agreement." Such directions may pertain to arbitration at any place "within or without" the United States.

Moreover, it should be noted that the U.N. Convention is closely tied to several provisions of the Federal Act. Only "commercial" agreements that are subject to the Federal Act (i.e., relate to a "maritime transaction" or a "transaction involving commerce among the several States and with foreign nations") are subject to the Convention. [22] The "commercial agreement" requirement, however, is to be interpreted very broadly. It was apparently intended to exclude only such matters as "matrimonial and other domestic relations agreements, political agreements and the like." [23] The requirement that the arbitral agreement relates to interstate or foreign commerce, however, is to be interpreted in the same way as under the Federal Act. Thus, arbitral agreements pertaining solely to commerce between two foreign nations are apparently not subject to the

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19. Griffin v. Semperit of America, Inc., 414 F. Supp. 1384 (S.D. Tex. 1976).

20. Convention on the Recognition and Enforcement of Arbitral Awards, *supra* note 8, at art. II (1).

21. *Id. Accord,* McCreary Tire & Rubber Co. v. Ceat S.p.A., 501 F.2d 1032 (3d Cir. 1974).

22. 9 U.S.C. at § 202.

23. Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1, 13 (S.D.N.Y.), *aff'd, without deciding point,* 489 F.2d 1313 (2d Cir. 1973), *cert. denied,* 416 U.S. 986 (1974).

Convention. Also, under the implementing legislation, if both parties to the agreement are United States citizens, the Convention applies only if "the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."[24]

Lastly, among the more ambiguous limitations upon the applicability of the Convention is that derived from a "reservation" which the United States issued when it ratified the Convention. The Convention applies only "in respect of arbitral awards" issued in a foreign state that is also party to the Convention and then only upon the basis of "reciprocity."[25] This raises two questions: first, does the "reciprocity" requirement for the enforcement of arbitral awards carry over into the enforcement of arbitral agreements? It would seem logical to think so. If this is the case, does it mean that where a non-citizen is party to the arbitral agreement, the Convention applies only if: (1) that citizen is a citizen of a nation that is party to the Convention; (2) the arbitration is to take place in a nation that is party to the Convention; or (3) the arbitral agreement has some substantial relationship or contact with a nation that is party to the Convention?

This "reciprocity" requirement is potentially a major limitation on the use of the Convention in arbitral agreements involving trade with the other countries of the Americas. While, as of January 1, 1978, forty-nine other countries had become parties to the Convention, the only countries to ratify the Convention in the Americas by that date were Chile, Cuba, Ecuador, Mexico, Trinidad and Tobago and territories to which the Convention is applicable by reason of British and Dutch accession.[26]

Against the background of this brief comparison between federal law and Florida law, one can begin to appreciate the nature of the problem confronting the Florida lawyer. Insofar as the enforcement of agreements to arbitrate is concerned, the Florida legislature has, in effect, mandated only a very grudging exception to the old common law rule that viewed all such agreements with hostility. Only agreements under which the arbitration is to be subject to the Florida Code are enforceable. Federal law, on the other hand, whether derived from the Federal Act or the U.N. Convention, mandates a complete reversal of the common law rule in the case of any arbitral agreement within the purview of that law. Such agreements are enforceable without regard

24. 9 U.S.C. at § 202.
25. The U.N. Convention, 21 U.S.T. at 2519, T.I.A.S., No. 6997.
26. See note 11, *supra*.

to the place of arbitration or the law governing the conduct of the arbitral proceedings.

Later, we shall observe how this disparity carries over into the enforcement of arbitral awards. Before doing so, however, it is necessary to examine two other circumstances: (1) the rules governing the exercise of federal court jurisdiction in these matters; and (2) the attitude of the Florida courts toward the Federal Act.

III. Jurisdiction of the Federal Courts and Enforcement of the Federal Act in the Florida Courts

A unique characteristic of the Federal Act is that no action to enforce an arbitral agreement may be maintained in a federal court, even if the agreement is subject to the Act, on the ground that the case "arises under" federal law. In other words, the mere fact that the case is controlled by federal law is not sufficient to warrant the exercise of "federal question" jurisdiction within the meaning of 28 U.S.C. § 1331. Jurisdiction of the federal court must be predicated upon diversity of citizenship, admiralty, or some other jurisdictional grant.[27]

It is easy to assume that when a contract pertains to an international transaction, diversity of citizenship will always exist. But this is not so. No diversity exists, for example, if both parties to the agreement are foreign citizens, a result that may obtain if both parties are wholly-owned subsidiaries of American corporations. No diversity exists if both parties to the contract are citizens of the same state, a not unlikely circumstance in international transactions because many U.S. corporations place their international operations in separate corporations organized under domestic law. No diversity exists in a multiparty suit if one plaintiff and one defendant are citizens of the same state, even though all other plaintiffs and defendants are citizens of different states. Moreover, even if diversity of citizenship does exist, only a non-resident defendant can remove a case commenced in the Florida courts to a federal court. On the other hand, these jurisdictional problems do not arise in cases governed by the U.N. Convention. Under the implementing legislation, all such cases are expressly deemed to raise a "federal question."

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27. 9 U.S.C. at §§ 203, 205. McCreary Tire & Rubber Co. v. Ceat S.p.A., 501 F.2d at 1037.

With respect to the Federal Act, the problem of access to the federal courts is particularly important to the Florida lawyer because of the uncertainities that exist regarding the willingness of the Florida courts to apply that Act in cases where it is otherwise applicable to the arbitral agreement. It is this uncertainty that creates what is quite possibly a situation unique to American law.

The Supreme Court of the United States has established two propositions. First, where the arbitral agreement relates solely to intra-state commerce, or commerce between two foreign countries, a federal court, sitting in diversity, is required to apply the appropriate state or foreign law regarding the enforceability of the agreement.[28] Second, where the arbitral agreement relates to interstate or foreign commerce, the Federal Act has been construed to create a body of substantive federal law binding upon a federal court, even though the court's jurisdiction rests exclusively upon the diverse citizenship of the parties.[29] Against this background, the question is whether that body of substantive federal law is also binding upon state courts in cases where the arbitral agreement relates to interstate or foreign commerce.

On this question, it is possible to argue that the leading Supreme Court decision, *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[30] is ambiguous. That decision may be interpreted as footing the Federal Act narrowly upon Congress' power to prescribe rules of procedure for the federal courts rather than upon Congress' substantive power to regulate interstate and foreign commerce. Under such a reading, of course, the Federal Act would not be binding upon the State courts.[31]

At the same time, it is important to emphasize that this reading of the majority opinion in *Prima Paint* is contrary to the reading by Justice Black in dissent.[32] It has not been followed by the lower federal courts or by the highest courts of most States, including those in New York, California, Illinois, and Georgia. All of the latter have read the Federal Act as footed upon the commerce clause and have,

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28. Bernhardt, 350 U.S. at 198.
29. Prima Paint, 388 U.S. at 404-05.
30. *Id.*
31. *Id.* at 405-06 n.13. In dissent, Mr. Justice Black disagreed with this hypothesis, and read the *Prima Paint* majority as basing the Federal Act upon the commerce clause. Thus, in his opinion, the Federal Act was binding upon the states. *Id.* at 409-10.
32. *Id.*

therefore, considered themselves bound to apply that Act in all cases involving arbitral agreements to which the Act is, by its terms, applicable.

Unfortunately, the situation in Florida is not so clear. There are a number of Florida decisions in which the Florida courts proceeded to apply Florida law without mention of the Federal Act,[33] although it was clearly arguable that the arbitral agreements related to interstate commerce. Perhaps these cases rest *sub silentio* upon a finding that only intrastate commerce was involved. If so, a number of them are very suspect indeed. Alternatively, perhaps they rest on the view that the Florida courts are free to ignore the Federal Act (i.e., a narrow reading of *Prima Paint*). Possibly, these cases reflect nothing more than an ignorance of the issue by attorneys and judges alike. Whatever the explanation, the consequence is that until the point is definitely settled by the Florida Supreme Court, no Florida lawyer can confidently rely upon the federal rule of enforceability unless he can also assure his client access to the federal courts.

IV. Judicial Review of Arbitral Awards and the Recognition of Foreign Judgments Confirming Awards

The third element in the basic legal framework that confronts the Florida lawyer dealing with an agreement to arbitrate outside this State concerns the enforceability of arbitral awards and the recognition of foreign judgments confirming such awards. Even if the Florida courts would not enforce the agreement to arbitrate, the Florida lawyer must consider the effect in Florida of a foreign arbitral award should the arbitration proceeding actually take place. This latter is always a possibility because the parties may voluntarily go to arbitration in spite of the non-enforceability of the agreement. Alternatively, the arbitrators may be empowered to issue an award on the basis of an *ex parte* proceeding; and we shall see in the next section, a foreign court may be prepared to compel the parties to arbitrate even if a court sitting in Florida would not do so.

Federal Law

Under the Federal Act, a federal district court, upon the petition of a party to an arbitration proceeding, must confirm an arbitral

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33. For treatment of this sensitive issue *see* Damora v. Stresscon Int'l., Inc., 324 So.2d at 80; Kosters Rederi A/S v. Arison Shipping Co., 280 So.2d 678 (Fla. 1973), *cert. denied*, 414 U.S. 1131 (1974); Watson v. Chase Chemical Corp., 249 So.2d 53

award, provided certain conditions are met and the award is *not* subject to challenge on the grounds specified in the Act.[34] The Act also provides for applications to vacate, to modify, or to correct an award.[35]

Before an award may be confirmed, the following conditions must be met. First, the underlying agreement to arbitrate or the award itself must relate to a "maritime transaction" or to "commerce among the several states or with foreign nations."[36] Second, the parties must have agreed that a judgment of a court may be entered upon the award.[37] This requirement can be met by incorporating the rules of a trade or arbitration association into the agreement, provided, of course, that those rules expressly call for the judicial confirmation of awards. It can be implied from a stipulation that the arbitration was to be conducted pursuant to the arbitral laws of a particular state, if those laws provide for judicial confirmation of awards. Third, the application for confirmation must be made to the court specified by the parties in the required agreement. Where no court is specified, application must be made to the court for the district in which the award was rendered. While there is some question as to the effect of this provision in the case of an award issued in a foreign country, caution suggests that the draftsman of any agreement pertaining to foreign arbitration specify a particular U.S. District Court if it is expected that judicial confirmation of the award will be desirable. It should also be noted that the federal courts have authority to entertain a common law action to confirm an award provided the court otherwise has jurisdiction of the parties. In this circumstance, however, the court would be bound to apply the appropriate substantive state law on the subject.

Under the Federal Act, a court must refuse to confirm an award upon a showing: (1) that the award was procured by fraud; (2) that an arbitrator was partial or corrupt; (3) that the arbitrators exceeded their powers; or (4) that the arbitrators refused to postpone hearings upon sufficient cause or refused to hear material evidence or engaged in other prejudicial behavior.[38]

(1971); Shearon, Hammill & Co. v. Vouis, 247 So.2d 733, *reh. denied*, 253 So.2d 444 (Fla. 1971).

34. 9 U.S.C. at § 9.

35. The grounds for such are specified in 9 U.S.C. at §§ 10, 11.

36. Bernhardt, 350 U.S. at 201 (stay provisions of § 3 which, like § 9 are not expressly restricted, held applicable only to transactions involving maritime, interstate, or foreign commerce).

37. Varley v. Tarrytown Assoc., Inc., 477 F.2d at 208.

38. *See* notes 34 and 35, *supra*.

Under the U.N. Convention and its implementing legislation, the courts in the United States, state as well as federal, are obliged to confirm foreign awards if the following conditions are met: (1) the reciprocity requirement noted above has been fulfilled; (2) the agreement to arbitrate or the award relates to a maritime transaction or to "commerce among the several states or with foreign nations;" and (3) the award has become final. [39]

Unlike cases governed exclusively by the Federal Act, the implementing legislation relating to the Convention does not require that the parties expressly agree to the entry of judgment upon an award. It has, however, been argued that this requirement of the Federal Act should be read into the Convention. In response, the courts have either refused to decide the issue or have, without discussion, appeared to treat such an agreement as unnecessary. While the latter would seem to be the better view, caution again suggests that the draftsman include a provision for judicial enforcement in the underlying arbitral agreement. Also, under the U.N. Convention, a court is required to refuse confirmation to an award generally on the grounds outlined above under the Federal Act. [40]

When we turn to the federal law regarding the recognition of foreign country judgments confirming foreign arbitral awards, we encounter something of an anomaly. As noted, the Federal Act makes specific provision for judicial confirmation of arbitral awards generally, and the implementing legislation under the U.N. Convention specifically provides for the judicial enforcement of foreign awards. Nothing in federal law, however, provides for the recognition of foreign judgments confirming foreign arbitral awards. Generally, the question of the effect to be given in the United States to a judgment rendered by a court in a foreign country is a question to be determined by state law even when the action is in a federal court. [41] Thus, we appear to have a situation where, if one of the parties applies to a federal court directly from a foreign arbitral proceeding asking that court to con-

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39. This is not a serious problem with awards issued in the United States where, generally, judicial confirmation is conceived of as wholly separate from the arbitral process, and an award is considered final upon its issuance by arbitrators. In some foreign legal systems, however, provision is made for summary entry of the award as a "rule of the court." The question, therefore, remains as to whether this additonal step is necessary to render the award final.

40. U.N. Convention, at art. V.

41. Samportex, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3rd Cir. 1971), *cert. denied*, 405 U.S. 1017 (1975); Svenska Handelsbanken v. Carlson, 258 F. Supp. 488 (D. Mass. 1966).

firm the arbitral award, federal law will control the result. If, however, that same party reduces the foreign arbitral award to judgment in a foreign court, and then asks a federal court to enforce the foreign judgment, state law will control the decision. Indeed, under the U.N. Convention, one lower court has held that the recognition of a foreign judgment entered upon a foreign arbitral award is a matter controlled by state law, even if the Convention (i.e., federal law) would have governed an effort to seek direct confirmation of the arbitral award. [42]

Here, a *caveat* is definitely in order. There are good grounds for suggesting that the Supreme Court may yet decide that the recognition of foreign judgments relating to arbitral awards which are in turn, subject to federal law, will likewise be controlled by federal law—in this instance, federal common law.[43] Also, under the U.N. Convention, some courts have tended to disregard the fact that the foreign arbitral award was reduced to judgment abroad, and to treat the application for the enforcement of the foreign judgment as an application for confirmation of the underlying award.[44]

Florida Law

When next we turn to the Florida law regarding the judicial confirmation of foreign arbitral awards, we again find a disparity between Florida law and federal law. Under Florida law, a basic distinction must be drawn between arbitral awards issued in a statutory arbitration (an arbitration conducted under the Florida code), and awards issued in so-called common law proceedings (i.e., proceedings not subject to the Code). [45] Awards issued in a fully-contested statutory proceeding may, upon the motion of one of the parties, be confirmed by a court unless it is shown that: (1) the award was procured by fraud or undue means; (2) a neutral arbitrator was partial or that any

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42. Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1 (S.D.N.Y. 1973).

43. The Supreme Court has not yet concurred in the refusal of the above-cited decisions to extend the principles enunciated in *Banco National de Cuba v. Sabbatino*, 376 U.S. 398 (1964), to the matter of recognizing foreign country judgments. The argument for doing so is fairly persuasive.

44. *In re* Fotochrome, 377 F. Supp. 26 (E.D.N.Y. 1974).

45. This may be defined as any arbitral proceeding conducted pursuant to an agreement to arbitrate, which would be enforceable under the Florida Code, should one of the parties refuse to comply therewith.

Under Florida law, all arbitral proceedings conducted under agreements not intended to be subject to the Florida Code are characterized as "common law" arbitrations, even though the agreement is enforceable under the laws of another state or foreign country. *See* Wickes Corp. v. Industrial Fin. Corp., 493 F.2d at 1173.

of the arbitrators was guilty of corruption or misconduct; (3) the arbitrators exceeded their powers; or (4) the arbitrators refused to postpone the proceedings upon sufficient cause shown or refused to hear material evidence, or otherwise so deviated from statutory procedures as to prejudice the rights of a party.[46] These conditions, it will be noted, are very similar to the grounds for refusing confirmation of an award under the Federal Act. Upon grant of a motion to confirm an award, the latter becomes a judgment enforceable by all means available for the enforcement of judgments and decrees generally.[47]

The losing party in a fully-contested statutory proceeding need not wait for the winning party to seek judicial confirmation. He may, by timely motion, seek an order vacating the award.[48] While there is no authority squarely on point, a strong argument can be made that under the Florida Code, the courts of this State are fully empowered to confirm an award issued in a statutory (i.e., a proceeding subject to that Code) even if one of the parties has defaulted and the award is issued after an *ex parte* arbitral hearing, provided that under the rules applicable to the arbitration, the arbitrators have jurisdiction to conduct such an *ex parte* proceeding.

When we turn to the provisions of Florida law relating to the confirmation of awards issued in proceedings that are not subject to the Florida Code (i.e., a common law arbitration), we find that the Florida Code contains some interesting provisions. While, in such a case, the agreement to arbitrate is unenforceable, any award that does in fact issue from the arbitral proceedings is nevertheless enforceable by the Florida courts if three conditions are met.[49] First, there must have been a prior unsuccessful action under the Florida

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46. FLA. STAT. at §§ 682.12, 682.17.

47. *Id.* at § 682.15.

48. *Id.* at §§ 682.13, 682.14.

49. FLA. STAT. at § 682.13(1)(e). Section 682.13, in terms, provides only for the vacating of common law awards, unless the stated conditions are met. If those conditions are met, then the statute expressly requires the court to confirm the award. The question, therefore, is whether the winning party can bring an action to confirm such an award rather than waiting to respond to the losing party's motion to vacate. The Florida Code is silent on this point, but requiring the winning party to wait would be anomalous indeed. Moreover, at common law, awards, even under unenforceable agreements, would be confirmed if both parties voluntarily submitted their dispute to arbitration. *Accord,* Johnson v. Wells, 73 So. 188 (Fla. 1916). Thus, § 682.13 is only in partial derogation of the common law. It requires actual participation *plus* a prior unsuccessful § 682.03 proceeding. Nothing in this would suggest a purpose to deprive the winning party of his traditional common law right to confirm the award so long as the additional condition for the protection of the loser is met.

Code to compel arbitration. In other words, the losing party must have been put on notice by a prior judicial proceeding that his agreement to arbitrate was unenforceable. Second, in spite of such a judgment, the parties must have proceeded voluntarily to arbitrate the dispute.[50] This means, of course, that no award issued in an *ex parte* common law arbitral proceeding is enforceable under Florida law, even if the agreed-upon rules governing the arbitration authorized the arbitrators to conduct such a proceeding.[51] Third, the award must meet all the substantive requirements for confirmation noted above.[52] In sum, what the Florida Code says is that if a losing party is put on notice by a court that he is not compelled to arbitrate, but does so voluntarily, the Florida courts are to enforce any award that may issue against him.

Lastly, we turn to the rules governing the Florida courts in cases where those courts are asked to enforce foreign judgments confirming foreign arbitral awards. Here, two distinct situations can arise. First, in the case of a foreign judgment issued by a court sitting in a sister state of the Union, the Florida courts are very likely to find themselves under an injunction to accord that judgment "full, faith and credit" within the meaning of Article VI of the United States Constitution. This, of course, is not the place to detail the scope of that clause. Nevertheless, two points are of particular note. Even if neither the arbitral agreement nor the award underlying the judgment could be enforced in Florida if brought directly to the courts of this State, those courts may nevertheless be required to enforce any sister state judgment confirming such an award, at least to the extent the latter calls for the payment of damages. The mere fact that a money judgment rendered by the courts of one state violates the public policy of a state in which enforcement is sought, will not, as a general rule, relieve the latter from giving "full, faith and credit" to the judgment.[53]

The second point of note, however, is that these rules do not apply where the judgment sought to be enforced in a Florida court has issued from a court in a foreign country. The enforcement of such

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50. *Id.*

51. Note also that the defaulting party could have sought a stay of arbitration if he thought the agreement to arbitrate was invalid, as the dispute was not arbitrable. Frank J. Rooney, Inc. v. Charles W. Ackerman of Fla., Inc., 219 So.2d at 110 (injunction will lie).

52. *See* note 46, *supra*.

53. Fauntleroy v. Lum, 210 U.S. 230 (1908).

judgments in Florida is governed by the rules of international comity.[54] Careless statements by some commentators to the contrary, it is clear that the rules of international comity do not require the recognition of foreign judgments with anything like the rigor of the "full, faith and credit" clause.

Broadly, the Florida courts apply the criteria for granting comity to foreign country money judgments that have been developed over the years through an elaboration upon the United States Supreme Court's famous decision in *Hilton v. Guyot*.[55] Under those criteria, all such judgments are to be recognized and enforced unless it is shown that: (1) the foreign court's exercise of jurisdiction over the person of the defendant in the Florida enforcement proceedings did not conform to U.S. ideas of fairness as embodied in the "due process" clause;[56] (2) the foreign judicial sytem, or the particular foreign court, was biased, arbitrary, or incapable of doing justice, the latter a most difficult matter to prove; (3) the judgment was obtained by fraud; (4) the foreign court manifestly disregarded its own law relating to the exercise of personal jurisdiction over the defendant in the Florida proceedings; (5) the foreign judgment was offensive to the public policy of Florida; or (6) courts in the country from whence the judgment issued would not reciprocate by recognizing comparable American judgments.[57] This latter requirement has been abandoned by many if not most states, but still appears to be a part of Florida law.[58]

In connection with our immediate subject, the most important of these conditions is likely to be the public policy defense. While there are no cases directly on point, such authority as does exist suggests that the Florida courts are unlikely to enforce any foreign country judgment confirming a foreign arbitral award if that award could not be brought directly to a Florida court and enforced as provided for in the Florida Code.[59]

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54. Ogden v. Ogden, 37 So.2d 870 (Fla. 1948).

55. 159 U.S. 113 (1895).

56. *See* Samportex Ltd. v. Philadelphia Gum Corp., note 41 *supra*; Jackson v. Stelco Employees Credit Union Ltd., 203 So.2d 669 (Fla. 1967).

57. These criteria are nearly all includable within the grounds for non-recognition of an arbitral award under the U.N. Convention.

58. Ogden v. Ogden, 37 So.2d 870 (Fla. 1948); Warren v. Warren, 75 So. 35 (Fla. 1917).

59. *Cf.* Pacific Mills v. Hillman Garment, 87 So.2d 599 (Fla. 1956) (It is doubtful that an *ex parte* common law award, which cannot be confirmed under § 682.12, can be enforced by simply reducing the award to judgment in an *ex parte* proceeding in the country of rendition).

V. Foreign Enforcement of Arbitral Agreements and Awards

The last basic point a Florida lawyer dealing with an agreement or a proposal to arbitrate outside the state must consider is the possibility that a court sitting elsewhere than in Florida will enforce the arbitral agreement or any award that might issue from the arbitral proceedings even if a Florida court would not do so. The basic fact is that the courts in many states of the Union are fully empowered: (1) to compel arbitration even if the place of arbitration is outside their territorial jurisdiction; (2) to enforce foreign arbitral awards, even awards issued in *ex parte* proceedings; and (3) to enforce foreign judgments entered upon foreign awards. Also, it must be remembered that most of the states that have reviewed the question consider themselves bound to apply the Federal Act in any instance where the arbitral agreement relates to interstate or foreign commerce. One must assume that all state courts, includng those in Florida, would comply with the supremacy clause of the United States Constitution and honor the U.N. Convention in cases to which it is applicable. Inevitably, therefore, the Florida lawyer who is called upon to advise a client in connection with an arbitral agreement or award that is unenforceable under the Florida Code must extend his inquiry to other jurisdictions.

If his client is anxious to proceed with arbitration or is anxious to obtain judgment on an award already rendered, he must consider the possibilities of seeking enforcement in some other jurisdiction. If the client is the recalcitrant party, the lawyer must carefully consider these other possibilities before advising his client to ignore the other party's demand for arbitration. This is especially true if the client has assets out of which an award can be satisfied that are located in some other state which follows a more liberal policy than that found in the Florida Code. Even if this is not the case, he must never forget that a foreign award, unenforceable under Florida law, might be reduced to judgment in some other state of the Union and then made binding upon the Florida courts through the operation of the "full, faith and credit" clause.

In all of this, of course, a sister state court will only enforce an arbitral agreement or an award if it has personal jurisdiction over the recalcitrant party under the appropriate state jurisdictional (i.e., "long-arm") statute. With regard to arbitration, however, some states have statutes stipulating that any agreement to arbitrate in that state constitutes a consent by each of the parties to the jurisdiction of the courts of that state in all proceedings to enforce the agreement or to

enforce any award resulting from the agreed-upon arbitral proceedings, even *ex parte* proceedings. In such instances, no other jurisdictional nexus is necessary.

VI. Review of Tactical Options

As a way of summarizing what has been said, it seems useful to sketch, in very general terms, some of the basic tactical options open to the Florida lawyer who confronts an agreement or a proposed agreement to arbitrate outside this State, and also to note some of the practical considerations that will influence his decision.

For the draftsman called upon to prepare an agreement to arbitrate outside Florida, the first step is to carefully probe the client's real sentiments toward arbitration as a device for the settling any future dispute that might arise in his dealings with the other party. If the client is serious about arbitration—if the arbitral clause is more than a negotiated accommodation to the other party—and if the client is likely to prefer an arbitrated settlement of future disputes, the draftsman should expressly provide that the arbitration is to take place outside Florida but subject to the Florida Code.

Such a clause is not so anomalous as might first appear. The Florida Code is not a detailed set of rules governing the conduct of arbitral proceedings. Its procedural injunctions are very sketchy indeed. With few exceptions, such procedural rules as are contained in the Code conform to good arbitral practice generally, would probably be used even if not mandated by statute, and can, with few exceptions, be modified by the parties. In other words, it is eminently practical for the parties to stipulate that their disputes shall be arbitrated under the Florida Code and then either to include in the agreement a detailed set of rules governing the conduct of the arbitration, or to specify that the arbitration will be conducted in accordance with the rules of some trade or arbitral association. The latter frequently occurs. All that the lawyer drafting such a provision must do is to carefully compare the provisions of the Florida Code with the arbitral rules that the parties otherwise expect to follow in order to make certain that any inconsistencies between the two pertain to matters on which the Florida Code permits modification by agreement. Also, if it has been agreed that the contract generally will be governed by some substantive law other than that of Florida, the lawyer, in drafting the arbitral clause, must make clear that the stipulation for arbitration under the Florida Code constitutes an exception from the general choice of law clause. Finally, in order to preserve the option of seeking enforcement in either a Florida court or a federal court,

the draftsman should also be careful, in any agreement subject to the Federal Act or the U.N. Convention, to stipulate for: (1) judicial enforcement of any arbitral award issuing under the agreement; and (2) in the case of an agreement to arbitrate outside the United States, for federal enforcement in a named district court sitting in this State.

The lawyer dealing with an existing arbitral agreement which is unenforceable under the Florida Code because the place of arbitration is outside this State faces a much more complex situation. If the agreement to arbitrate is subject to the Federal Act or the U.N. Convention, if the parties have stipulated for the judicial enforcement of the award, and if jurisdictional requisites can at all times be met, the Florida lawyer should probably plan to rely exclusively upon the federal courts to enforce any award and to compel arbitration, should the other party prove recalcitrant. In selecting his federal court, however, the lawyer must pay careful attention to the venue provisions of the Federal Act and to the stipulations by the parties.

Where, however, the agreement is not subject to federal law, or the parties have failed to stipulate for judicial enforcement, or where, in the case of an agreement subject to the Federal Act, the lawyer cannot be certain of access to a federal court both before and after arbitration, he must, for all practical purposes, concentrate on the situation in the Florida courts. Here he must remember that even if both parties are voluntarily prepared to submit to arbitration, he cannot guarantee judicial enforcement of any resulting award in Florida unless he has first brought an unsuccessful proceeding to enforce the agreement to arbitrate under the Florida Code. *Query*, if neither party is actually objecting to arbitration, is there a justiciable controversy? Further, *query*, if questions of justiciability go to "subject matter" jurisdiction, is it not possible that an alert court will raise the issue *sua sponte* even if not raised by the pleadings? Moreover, he must weigh the merits of his client's case. If the case is weak, he will want to consider the advisability of waiting for the other party to commence the action to compel arbitration and of interposing the non-justiciability defense without submitting the merits of the dispute to the court. Lastly, it is doubtful that the justiciability question can be circumvented by a declaratory judgment action, even though the Florida courts have, in certain circumstances, entertained such actions in lieu of motions brought under the Florida Code.

On the other hand, the lawyer representing a client with a strong case who is anxious to arbitrate the dispute and is being resisted by the other party must obviously consider first the filing of a motion in a Florida court to compel arbitration even though he knows

he will be unsuccessful. This is necessary to preserve the enforceability of the award should the other party later change his mind and voluntarily submit to arbitration. At the same time, he must also consider the possibility that the other party will remain recalcitrant. This, in turn, means he must begin to canvass the possibilities for resorting to state courts elsewhere in the Union, or to courts abroad. He may have a number of options, but before turning to a review of these options, some practical considerations should be mentioned.

The lawyer may very quickly discover that these alternative means of bringing the recalcitrant party to the arbitration table are more time consuming and expensive than simply submitting the merits of the dispute to a Florida court, or to some court that can take jurisdiction of the case. This is especially so if the recalcitrant party has already commenced or is likely to commence a suit in the Florida courts on the merits. The lawyer who would prefer to arbitrate may still find it necessary to defend that suit simply to protect his client's interests should he lose the race to the courthouse. In all events, if the recalcitrant party has filed suit in the Florida courts on the merits of the dispute, the lawyer should consider removal of the case to a federal court, provided federal law is applicable. If, in spite of the applicability of federal law, removal is not possible, he certainly should plead the rule of enforceability under the Federal Act or the U.N. Convention as a bar to the Florida action. He may even go so far as requesting the Florida court to compel the recalcitrant party to arbitrate. While good arguments exist in favor of granting such relief (i.e., the Florida courts are certainly empowered to grant specific performance of contracts to be performed outside the state), whether he will succeed or not is anyone's guess. Lastly, he should keep in mind the possibility that if the Florida courts persist in ignoring federal law, he may be able to bring an original action in a federal court under the supremacy clause to enjoin the Florida judicial proceedings.

Because of the present uncertainties surrounding the Florida court's willingness to apply federal law, the lawyer whose client wants to arbitrate abroad, but who cannot get into a federal court, should immediately canvass the possibilities for seeking the aid of some court outside Florida, whether it be the court of a sister state in the Union or even a court in a foreign country. Here the selection of the court will be governed by a number of considerations.

If the recalcitrant party has assets that can be reached to satisfy the award in the state or country where the arbitration is to take

place, the lawyer who wants to arbitrate will obviously first want to consider bringing an action to compel arbitration in the courts of that state or country. He will want to be sure that those courts will have jurisdiction over the recalcitrant party, and will thus be empowered to compel arbitration and to enforce any resulting award. He will also need to consider the advisability of bypassing an action to compel arbitration in favor of proceeding directly to arbitrate on an *ex parte* basis. Here two conditions must be met: (1) the agreed-upon rules governing the arbitration must expressly permit the arbitrators to proceed on that basis; and (2) the courts of the state or country in which the assets are located must be empowered to enter judgment upon an *ex parte* award.

If, on the other hand, the lawyer will ultimately be forced to look to a Florida court for the effective enforcement of any arbitral award that his client might obtain, his basic inquiry must be directed at finding a sister state court that will be empowered to enter judgment upon that award, a judgment he can then bring to Florida under the aegis of the "full, faith and credit" clause.

Typically, if the arbitration is to take place elsewhere in the United States, he will look to a court of the state in which the arbitration is to occur. Again, he must be certain that the court in question will have jurisdiction over the recalcitrant party. Again, he will also want to consider the possibility of bypassing an action to compel arbitration in favor of relying upon an *ex parte* arbitral proceeding.

If, however, the arbitration is to occur outside the United States, he must remember that the Florida courts will not honor any award that the arbitrators might issue if the recalcitrant party has not voluntarily submitted to arbitration. Nor will they honor any judgment of a foreign court entered upon such an award. He must, in other words, find a sister state court that will have jurisdiction over the recalcitrant party and will be empowered to honor an *ex parte* foreign country award or a foreign judgment entered upon such an award.

Lastly, if he can find no such sister state court, he will be required to bring an action compelling arbitration in either a sister state court or a court sitting in the country where the arbitration is to occur. In this latter event, he may find that his only leverage over the recalcitrant party is the contempt power of the court issuing the order. The practical value of such an order must be carefully assayed, along with the expense and delays likely to attend such an involved course of action.