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COMMENT

INTERNATIONAL COMMERCIAL ARBITRATION UNDER THE UNITED NATIONS CONVENTION AND THE AMENDED FEDERAL ARBITRATION STATUTE

Camden chose to do business with Amtorg and to accept, as one of the conditions imposed, arbitration in Russia; it may not now ask the courts to relieve it of the contractual obligation it assumed.¹

With little fanfare the United States in 1970 revolutionized its treatment of private international arbitration by acceding to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and by amending the federal arbitration statutes to give extremely broad effect to the arbitral remedy in most international transactions.² As a result, a party with an agreement to arbitrate an international commercial dispute to which the new enactments apply can look to the federal courts and federal law for enforcement of the agreement to arbitrate and for recognition of the award of the arbitrators, regardless of whether the arbitration is to take place in the United States or abroad.³

The new federal court role is not unlimited. Primarily due to the method by which the United States acceded to the Convention, there is a vast area of international commercial arbitration *not* covered by the new scheme. In addition, even where the new rules apply, it is

1. *Amtorg Trading Corp. v. Camden Fibre Mills Inc.*, 304 N.Y. 519, 109 N.E.2d 606, 607 (1952).

2. The President issued a proclamation on December 11, 1970 announcing the United States accession to the Convention, effective from December 29, 1970. Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter cited as Convention], *opened for signature* June 10, 1958, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (effective for United States Dec. 29, 1970).

The enabling legislation passed to conform American law to the Convention can be found in 9 U.S.C.A. §§ 201-08 (Supp. 1971). Those sections constitute a new chapter to Title 9 of the Code. To distinguish them from the pre-existing arbitration statutes (9 U.S.C. §§ 1-14 (1970)), the new provisions will be referred to as the 1970 Act, while the pre-existing sections of Title 9 will be referred to as the 1925 Act.

3. It would appear that the arbitration need not involve an American party, so long as there is a basis for the court to assume jurisdiction. *See* 9 U.S.C.A. § 202 (Supp. 1971). The 1970 statute specifically states that the federal district courts shall have original jurisdiction over an action brought under the Convention. *Id.* § 203.

often necessary to refer back to the pre-existing law to provide solutions to specific questions concerning the enforcement of the arbitral remedy. This comment will briefly discuss international commercial arbitration and its enforcement machinery, after which it will analyze the federal judicial role in international commercial arbitration, both under the 1925 Federal Arbitration Act and under the system created by the United Nations Convention and the 1970 Act. Special attention will be paid to the changes from immediate past procedures and to an analysis of the extent to which existing decisional law under the 1925 Act remains relevant to international commercial arbitration.

Many commentators have recognized the need for an effective arbitral remedy for the settlement of disputes arising as the natural result of increased international trade and commerce between parties of different nationalities. This need has been succinctly expressed as follows:⁴

[I]nternational trade and investment must be seriously inhibited if . . . disputes are not resolved promptly in a manner which reconciles the interests of both parties. If the disputes are brought to courts of law there will often be costly, lengthy, and bitter litigation. Differences in procedure and substantive law between national courts may cause unfairness to one of the parties. Litigation may end in such animosity as to destroy existing business relationships. The very apprehension of the dangers inherent in litigation, the despair of ever achieving a speedy and satisfactory settlement of differences, may inhibit certain transactions from taking place at all. International commercial arbitration, by providing an alternative method for the resolution of controversies, may remove this impediment to trade and investment and thus make a major contribution to the prosperity of the . . . world.

To fulfill this need, three elements are required: 1) an agreement to arbitrate; 2) a generally recognized system for arbitration; and 3) a method for enforcing arbitration and recognizing awards resulting from arbitration. The first requirement is frequently met by the insertion of arbitration clauses in commercial contracts involving international transactions. A properly drafted clause will resolve questions concerning what is to be arbitrated, when, where, how the arbitrators

4. Gardner, *Economic and Political Implications of International Commercial Arbitration*, in *INTERNATIONAL TRADE ARBITRATION* 15, 16-17 (M. Domke ed. 1958) [hereinafter cited as I.T.A.]

are to be chosen, and what rules are to be followed.⁵ The second requirement is fulfilled through the increasingly effective private organizations which provide the machinery for arbitration, foremost of which are the International Chamber of Commerce and the American Arbitration Association.⁶ The third element requires the development of judicial machinery which will provide a reasonable opportunity for enforcement of the arbitral remedy with a minimum of distinction between foreign and domestic arbitration. It is this requirement which has been the most troublesome and to which this analysis is primarily devoted. It must be fulfilled both at the national and international levels.

The American judicial machinery for handling arbitration of any type was slow to develop. There was a persistent judicial prejudice against the arbitral remedy, with the courts often holding on public policy grounds that a pre-dispute agreement to arbitrate was void as

5. Most of the arbitration clauses involved in the cases cited in this comment include all or most of these elements. *See, e.g.*, *Farr & Co. v. Cia. Intercontinental de Navegacion de Cuba*, 243 F.2d 342 (2d Cir. 1957) (arbitration in New York by commercial men residing in New York under the American Arbitration Association rules); *Standard Magnesium Corp. v. Fuchs*, 251 F.2d 455 (10th Cir. 1957) (arbitration to be settled under the International Chamber of Commerce rules); *United Aircraft Int'l, Inc. v. Greenlandair, Inc.*, 298 F. Supp. 1329 (D. Conn.), *aff'd*, 410 F.2d 761 (1st Cir. 1969) (arbitration in Paris under the International Chamber of Commerce rules).

The arbitration clause may be invoked to bar an aggrieved party from taking his dispute to a court which would otherwise have jurisdiction and to force settlement by arbitration, assuming, of course, that the dispute is one intended to be covered by the arbitration clause, and that certain other criteria are met. *See* part II B, *infra*. When a valid arbitration clause governs a dispute, the arbitration procedures ordinarily will be applied in accordance with the contract, as modified by applicable statutes and treaties. The rules established by a private association conducting arbitration will be followed insofar as relevant and applicable.

6. For an indication of the role of the American Arbitration Association activities, one need only thumb through any copy of its own publication, *The Arbitration Journal*. *See also* M. DOMKE, COMMERCIAL ARBITRATION 24-30 (1965) [hereinafter cited as DOMKE]. Regarding the International Chamber of Commerce, *see generally* Wilnur, *Determining the Law Governing Performance in International Commercial Arbitration: A Comparative Study*, 19 RUTGERS L. REV. 646 (1965); Gormley, *The Place of Commercial Arbitration in Multi-national and International Organizations*, 24 OHIO S.L.J. 617 (1963); Cohn, *The Rules of Arbitration of the International Chamber of Commerce*, 14 INT'L & COMP. L.Q. 132 (1965); and Eisemann, *Arbitration under the International Chamber of Commerce Rules*, in *International Arbitration: A Symposium*, 15 INT'L & COMP. L.Q. 726 (1966).

Private bilateral arrangements also exist. For example, the Japanese Commercial Arbitration Association and the American Arbitration Association concluded an agreement in 1952 to govern arbitration involving commerce between the two countries. Agreement between the Japan Commercial Arbitration Association and the American Arbitration Association to Facilitate the Use of Commercial Arbitration in Trade Between Japan and the United States of America, reprinted in Appendix to Kawakami & Henderson, *Arbitration in U.S./Japanese Sales Disputes*, 42 WASH. L. REV. 541, 586 (1967) [hereinafter cited as Kawakami & Henderson].

an attempt to oust the courts of jurisdiction.⁷ Only with the enactment of the 1925 Federal Arbitration Act and individual state arbitration statutes did the arbitration remedy receive any real assurance of enforcement in the United States.⁸ Even with enactment of these statutes, however, there was no uniformity of treatment of arbitration problems, and parties who included an arbitration clause in their agreement remained uncertain as to whether and how it would be enforced.⁹ However, recent court decisions and the enactment of the 1970 Act have reduced some of this uncertainty by making the federal arbitration statutes the primary law to which a party can look for enforcement of an arbitral remedy in international transactions.¹⁰

The development of American arbitration law has been accompanied by efforts to establish effective machinery on an international basis. Until recently, the United States concentrated its efforts on the development of bilateral treaties of friendship, commerce and navigation (FCN treaties), which included provisions purporting to provide for judicial enforcement of international arbitration.¹¹ These provisions are designed with rather limited goals. Rather than giving positive assurance that foreign arbitration will be enforced and awards

7. Many early decisions reflect this attitude. *See, e.g.*, *Tatsuuma Kisen K.K. v. Prescott*, 4 F.2d 670 (9th Cir. 1925), where the court held that an arbitration clause requiring arbitration in Seattle as a condition precedent to a court action was void and unenforceable; and *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y. 1915).

One of the principal purposes of enacting the 1925 Act was to reverse this judicial attitude. *See* H.R. REP. NO. 96, 68th Cong., 1st Sess. (1924); S. REP. NO. 536, 68th Cong., 1st Sess. 2-3 (1924); and 65 CONG. REC. 1931 (1924).

8. In addition to the 1925 Federal Arbitration Act, by 1967 there were 22 states, including most of the more commercially important states, which had enacted so-called modern arbitration statutes. *See* Kawakami & Henderson, *supra* note 6, at 560-61. The Washington statute can be found in WASH. REV. CODE ch. 7.04 (1961).

9. *See* Kawakami & Henderson, *supra* note 6, at 560-62. The authors indicate, however, that there has been some tendency toward uniformity, largely due to the adoption of the Uniform Arbitration Act of 1956 by a number of jurisdictions. *See* *Id.* n.65.

Even among the jurisdictions with the so-called "modern" statutes, there can be strong disagreement on how the courts should treat certain issues. For example, one of the major issues in federal court cases concerned clashes between New York law and the law applied under the Federal Act regarding separability of the arbitration clause from the rest of the contract. *See, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967); and *Lummus Co. v. Commonwealth Oil Ref. Co.*, 280 F.2d 915, 924 (1st Cir.), *cert. denied*, 364 U.S. 911 (1960).

10. *See* notes 26-72 and accompanying text, *infra*.

11. As of 1965 the United States had 16 bilateral treaties which included arbitration provisions. These included treaties with Belgium, Denmark, West Germany, France, Greece, Iran, Ireland, Israel, Italy, Japan, Luxembourg, Korea, the Netherlands, Nicaragua, Pakistan, and Vietnam. ДОНКЕ, *supra* note 6, at 105. By 1969 Togo and Thailand had been added to this list. *See* [1967] 18 U.S.T. 1, T.I.A.S. No. 6193; [1968] 19 U.S.T. 5843, T.I.A.S. No. 6540.

from such arbitration recognized by American courts, they simply indicate that such arbitration will not be unenforceable merely because of the presence of foreign elements.¹² Nevertheless, these treaties (where applicable) may provide one basis for the courts to give effect to foreign arbitration.¹³

There have been several twentieth century multilateral efforts to establish international machinery to enforce arbitration.¹⁴ However, prior to the 1960's the United States refused to ratify any of these treaties, and they played no role in American litigation concerning international commercial arbitration.¹⁵ This American policy was reversed by the ratification of two important multilateral treaties, the first designed to settle investment disputes between a government of one country and citizens of another country,¹⁶ and the second the 1958

12. A typical provision is that contained in the Treaty of Friendship, Establishment, and Navigation between the United States and Belgium, art. III, ¶ 6, quoted in DOMKE, *supra* note 6, at 105-06:

Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement by the authorities of either Party merely on the grounds that the place where such award was rendered is outside the territories of such Party or that the nationality of one or more of the arbitrators is not that of such Party.

13. See notes 109-14, 127-33, and 177-83, and accompanying text, *infra*.

14. Representative efforts include the Geneva Convention on the Execution of Foreign Arbitral Awards, *adopted* September 26, 1927, 92 L.N.T.S. 301; the Geneva Protocol on Arbitration Clauses, *adopted* September 24, 1923, 27 L.N.T.S. 158; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 2; and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* March 18, 1965, T.I.A.S. No. 6090.

15. For an explanation of the United States' position through the 1950's, see Sullivan, *United States Treaty Policy on Commercial Arbitration—1920-1946*, in I.T.A., *supra* note 4, at 35, and Walker, *United States Treaty Policy on Commercial Arbitration—1946-1957*, in I.T.A., *supra* note 4, at 49. Both authors were with the United States Department of State when the articles were written.

Sullivan indicates that the major obstacle to American participation in the post-World War I treaties was the existence of inconsistent state laws. Other reasons included concern over the diversity of national laws concerning arbitration and a distrust of the treaty process as a mode of regulating arbitration matters, especially on a multilateral approach. Sullivan, *supra*, at 44-46. After World War II, the United States' concentration on negotiation of bilateral treaties of friendship, commerce, and navigation long prevented a full consideration of the merits of a multilateral approach, despite some recognition that the broadened definition of the commerce power made it feasible to handle international commercial arbitration matters on the federal level. See generally Walker, *supra*, at 54-56.

16. Convention on the Settlement of Investment Disputes Between States and Na-

Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁷

The 1958 Convention provides a method for the enforcement of agreements to arbitrate and for recognition of awards made by a foreign arbitral panel.¹⁸ Enforcement and the recognition of awards can be denied only on specifically enumerated grounds.¹⁹ There are, however, several limitations on the applicability of these provisions. As a concession to countries with a federal system, the Convention purported to be binding only as to matters within the legislative jurisdiction of the federal authority, thus requiring no change in individual state laws.²⁰ The Convention also provided that a ratifying or acceding party could sign with reservations. The first reservation states that a country, based on reciprocity, will provide recognition and enforcement only for awards made in the territory of another contracting nation, while the second reservation declares that a country will apply the Convention only to legal relationships considered as commercial under the acceding party's laws.²¹ In acceding to the Convention, the United States adopted both reservations.²² There

tionals of Other States, *supra* note 14. This Convention set up an arbitration center under the auspices of the International Bank of Reconstruction and Development (IBRD) with jurisdiction over

any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

Id. art. 25(1).

A major impetus for this treaty was the desire of countries like the United States to develop a means of protecting the overseas investments of their own citizens. *Cf.* 18 STAN. L. REV. 1359 (1966). Given this motive it is not surprising that Congress deviated from its previous non-adherence policy in this instance. In doing so, however, it clearly recognized that the machinery could be invoked against the United States as well and, therefore, exempted this convention from application of the Federal Arbitration Act. *See* 22 U.S.C. § 1650a (1970).

17. *See* note 2, *supra*. The Convention replaced two earlier agreements which did not have United States adherence, the Geneva Protocol on Arbitration Clauses and the Geneva Convention on the Execution of Foreign Arbitral Awards. Convention art. VII(2). *See* note 14, *supra*.

18. Convention arts. II and III. The provisions of the Convention are discussed in several authorities. Of special interest are 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, 1059-74 (1961), and Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283, 291-308 (1959).

19. Convention art. V.

20. *Id.* art. XI.

21. *Id.* art. I(3).

22. T.I.A.S. 6997, *supra* note 2, at 50. The United States reservation read as follows:

The United States of America will apply the Convention, on the basis of reci-

are interpretive problems involved in harmonizing these reservations with the Convention and the statutes passed to give effect to it.²³

As a result of the reservations made by the United States, the Convention extends only to arbitration taking place in a country adhering to the Convention, regardless of the nationality of the parties. In contrast, the bilateral treaties of friendship, commerce and navigation discussed above extend their protection to nationals of the signatory powers, regardless of the place of arbitration.²⁴ This distinction makes it crucial to choose the place of arbitration carefully when drafting an arbitration clause.²⁵

I. THE FEDERAL ROLE IN INTERNATIONAL COMMERCIAL ARBITRATION

Recent case law, America's accession to the Convention, and enactment of the 1970 Act have focused attention on the federal courts as the primary forum for enforcing arbitration and recognizing awards resulting from arbitration involving international transactions. To understand the federal role under the present system, it is necessary to examine the original 1925 Act, the new 1970 Act and the Convention.

The process of determining what provisions apply in which situations is far from easy. The following generalizations, however, should be kept in mind whenever an arbitration problem arises. First, the 1970 Act and the Convention do not apply to all international commercial arbitration.²⁶ Second, where the 1970 Act and the Conven-

procuity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.

The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States.

23. See notes 56-71 and accompanying text, *infra*.

24. Compare the treaty provision at note 12, *supra*, with the United States reservations to the Convention in note 22, *supra*.

25. For example, notwithstanding the fact that France is a party to the Convention, an arbitration award made in London under an agreement between a French corporation and a United States corporation would not be entitled to recognition in the United States under the Convention, because the United Kingdom has not acceded to the Convention; on the other hand, it would come within the terms of the bilateral agreement with France.

26. See 9 U.S.C.A. § 202 (Supp. 1971); T.I.A.S. 6997, *supra* note 2, at 50; and notes 56 to 72, and accompanying text, *infra*.

tion do not apply, the 1925 Arbitration Act applies in full and without any modification.²⁷ Third, all provisions of the 1925 Act apply even to arbitration coming under the Convention and 1970 Act, except to the extent that the 1925 Act provisions conflict with the provisions of the 1970 Act.²⁸ Thus, an analysis of the federal role in international commercial arbitration must begin with an understanding of the scope of application of the 1925 Act.

A. *The Federal Judicial Role under the 1925 Act*

When first enacted the 1925 Act represented a significant departure from pre-existing arbitration law. Its major accomplishment was to declare an arbitration clause valid and enforceable when incorporated into a maritime transaction or a contract involving interstate or foreign commerce.²⁹ However, the Act cannot be readily characterized and classified. One perplexing group of problems concerns the authority upon which Congress acted and whether it intended to create procedural law for the federal courts or substantive law to be applied in both non-diversity and diversity cases under the rule of *Swift v. Tyson*.³⁰ Some language in the Act and some of the legislative history indicate that Congress only intended to create procedural law for the federal courts.³¹ However, there is strong evidence that the legislators relied upon federal control over interstate and foreign commerce and

27. The 1970 Act is limited to arbitration covered by the Convention. See 9 U.S.C.A. § 201 (Supp. 1971). The 1970 Act was created as a separate part of the federal arbitration statute, and made no modification of any provision of the original 1925 Act when that Act applies to arbitration not covered by the Convention.

28. See *Id.* § 208, and notes 74-75 and accompanying text, *infra*.

29. 9 U.S.C. § 2 (1970).

30. 41 U.S. (16 Pet.) 1 (1842). This decision was overruled by the Supreme Court in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

31. One of the drafters described the Act as one that "declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement." H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924). In another place, the House Report unambiguously stated:

Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made.

Id. at 1. From this history, Justice Black concluded in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 418 (1967) (dissenting opinion), that the statute "rests upon the constitutional provision by which Congress is authorized to establish and control Federal courts." *But see* the majority's reading of the legislative history. *Id.* at 405.

admiralty³² to create substantive law. Recent court treatment of the Act appears to substantiate the latter view.³³

Substantial complications regarding the characterization of the 1925 Act were created after the Supreme Court, in *Erie Railroad Co. v. Tompkins*,³⁴ held that federal courts could not constitutionally create substantive law in diversity cases. These issues came to the fore in *Bernhardt v. Polygraphic Co. of America*,³⁵ where the Supreme Court held that the 1925 Act was inapplicable to a diversity case involving a contract not in interstate or foreign commerce and indicated that the rights of the parties were to be governed solely by state law. The holding in that case was based upon the court's determination that the 1925 Act did not extend to contracts not within interstate commerce. Matters governing arbitration were treated as "outcome-determinative" in the sense that term was used in *Guaranty Trust Co. v. York*,³⁶ and both the majority and concurring opinions intimated that there was a serious constitutional question concerning whether Congress had power to prescribe rules for the federal courts to apply to arbitration questions in diversity cases even when the contract involved interstate commerce.³⁷ This view, carried to its logical conclusion, would have made the 1925 Act inapplicable to all but

32. See H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924): "The remedy is founded also upon the federal control over interstate commerce and over admiralty;" and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967): "[I]t is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'"

33. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956); and *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *appeal dismissed*, 364 U.S. 801 (1960).

34. 304 U.S. 64 (1938).

35. 350 U.S. 198 (1956).

36. 326 U.S. 99 (1945). See *Bernhardt*, 350 U.S. at 203-04, 208-09.

37. The majority in *Bernhardt* indicated the 1925 Act could not apply to a case not involving interstate commerce. 350 U.S. at 202. However, the court in dicta stated "Erie R. Co. v. Tompkins indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases." *Id.* It then distinguished and all but overruled *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1934), an earlier diversity case applying the 1925 Act to a contract in interstate commerce, stating that its validity was doubtful today as a result of the *Erie* decision. *Id.* Justice Frankfurter's concurring opinion indicated serious doubt about the application of the 1925 Act to any diversity case, but then stated:

[A] voidance of the constitutional question is for me sufficiently compelling to lead to a construction of the Act as not applicable to diversity cases.

350 U.S. at 208. He also doubted the continuing validity of *Shanferoke*. *Id.* n.2.

admiralty cases and those few commerce cases where the federal courts had jurisdiction based upon independent federal question grounds.³⁸ However, the Second Circuit in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*³⁹ subsequently held the 1925 Act applicable to a diversity case involving interstate commerce. In doing so, it also indicated that the Act created "a new body of federal substantive law affecting the validity and interpretation of arbitration agreements."⁴⁰

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁴¹ a diversity case involving interstate commerce, the Supreme Court appears to have adopted the *Robert Lawrence* rationale. In doing so, however, it still left a number of questions unanswered. Relying heavily upon *Robert Lawrence*, the Court applied the 1925 Act to the interpretation of the arbitration clause in the contract between the parties. It stated that the Act's application to this case was constitutional and untouched by *Erie* and its progeny.⁴² While the case spoke approvingly of the *Robert Lawrence* "federal substantive law" characterization,⁴³ it did not state flatly that it adopted this terminology. However, both the critics and the dissent have treated this case as an implicit acceptance of the substantive law characterization laid upon

38. See Comment, *Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farago of Rights, Remedies, and a Right to a Remedy*, 69 YALE L.J. 847, 848-49 (1960).

39. 271 F.2d 402 (2d Cir. 1959), *appeal dismissed*, 364 U.S. 801 (1960).

40. *Id.* at 406. The court then held:

[T]he Arbitration Act in making agreements to arbitrate "valid, irrevocable, and enforceable" created national substantive law clearly constitutional under the maritime and commerce powers of the Congress and . . . the rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, including diversity cases. . . . We hold that the body of law thus created is substantive not procedural in character and that it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs. . . .

Id. at 409.

The Second Circuit adjudicates the bulk of the Federal Arbitration Act cases, largely due to the presence of the American Arbitration Association facilities in New York City. Consequently, by sheer numbers of cases the *Robert Lawrence* view became the majority interpretation. Some other circuits, however, did not follow the *Robert Lawrence* rationale. See, e.g., *Lummus Co. v. Commonwealth Oil Ref. Co.*, 280 F.2d 915 (1st Cir.), *cert. denied*, 364 U.S. 911 (1960), where the First Circuit applied state law to a diversity case arguably involving a contract in interstate commerce.

41. 388 U.S. 395 (1967).

42. *Id.* at 405. In a sharply worded dissent, Justice Black objected, *inter alia*, to the majority's acceptance of the *Robert Lawrence* federal substantive law doctrine. *Id.* at 421.

43. *Id.* at 400, 404-05.

the foundation of Congress' power to regulate interstate and foreign commerce.⁴⁴

The *Prima Paint–Robert Lawrence* line of cases is troublesome. If the 1925 Act is substantive law, it is a peculiar form of substantive federal law, which, as pointed out in the dissent in *Prima Paint*, is susceptible to forum shopping of the type *Erie* and *Guaranty Trust* sought to avoid, unless 1) the 1925 Act provides an independent federal question basis for federal court jurisdiction, or 2) it also applies to state court proceedings involving arbitration disputes on contracts involving interstate or foreign commerce.⁴⁵

Nothing in the facts of *Prima Paint* indicates that the federal courts have jurisdiction absent diversity. Any federal question jurisdiction could only have come from a determination that the 1925 Act provided an independent basis for federal jurisdiction. However, up to the present, it has been felt that the Act did *not* provide an independent basis for federal jurisdiction.⁴⁶ There are several possible explanations for this view. First, Congress' failure to include specific language granting original federal jurisdiction may create a negative implication that none was intended.⁴⁷ Second, some authorities stress the lan-

44. See *Prima Paint*, 388 U.S. at 421 (dissenting opinion); Aksen, *Prima Paint v. Flood & Conklin—What Does It Mean?* 43 ST. JOHN'S L. REV. 1 (1968); Comment, *Federal Arbitration Act and Application of the "Separability Doctrine" in Federal Courts*, 1968 DUKE L.J. 588; 43 N.Y.U.L. REV. 565 (1968).

45. See *Prima Paint*, 388 U.S. at 417, 420. The majority discussed neither of these two problems. It should be noted, however, that when the Second Circuit first declared the 1925 Act to be federal substantive law, it indicated in dicta that the Act was equally binding in state courts as well. See *Robert Lawrence*, 271 F.2d at 407, and notes 52-54 and accompanying text, *infra*.

46. See, e.g., *Robert Lawrence*, 271 F.2d at 408: "[T]hough new substantive federal rights were created, suits involving the application of the Arbitration Act do not furnish an independent basis of federal jurisdiction. . . ." (Medina, J.) (dictum).

This viewpoint has been basic to much analysis both among the courts and commentators. See, e.g., 1968 DUKE L.J., *supra* note 44, at 608 & n.94; 69 YALE L.J., *supra* note 38, at 861-63. Some of the legislative history can be read differently. See H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924):

The purpose of this bill is to make valid and enforceable (*sic*) agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or (*sic*) admiralty, or which may be the subject of litigation in the Federal courts. . . .

The matter is properly the subject of Federal action. . . . The remedy is founded also upon the Federal control over interstate commerce and over admiralty. . . .

....

. . . The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement. . . .

47. This implication is further intensified by the fact that Congress felt it necessary to give explicit authorization for federal court original jurisdiction over disputes coming under the 1970 Act. See 9 U.S. C.A. § 203 (Supp. 1971).

guage of section 4 indicating a party may seek an order compelling arbitration where the district court would have jurisdiction "save for such [arbitration] agreement."⁴⁸ Third, some authorities rely on the fact that section 3, granting a stay of proceedings pending arbitration, cannot be invoked unless the case has reached federal court on some independent jurisdictional basis.⁴⁹ In opposition to this position, however, it can be pointed out first that the language in section 4 merely was intended to preserve the federal jurisdiction otherwise ousted by the arbitration clause itself,⁵⁰ and second that the jurisdictional problem posed by section 3 is more semantic than real, as a determination that the Act provided an independent basis for federal jurisdiction would enable a party seeking a stay of proceedings to obtain removal from state courts and then to invoke the Act to obtain a stay of proceedings there.⁵¹ Thus, it is possible that subsequent decisions may clarify *Prima Paint* by holding that the 1925 Act provides an independent ground for federal jurisdiction.

48. 9 U.S.C. § 4 (1970). This view was adopted in *Robert Lawrence*, 271 F.2d at 408. It also has the approval of several commentators. See, e.g., *Scope of the United States Arbitration Act in Commercial Arbitration: Problems in Federalism*, in *Symposium, Arbitration and the Courts*, 58 Nw. U.L. REV. 468, 489-91 (1963).

49. 9 U.S.C. § 3 (1970). It provides for a defense motion to stay federal court proceedings pending arbitration, a remedy available only if either the suit was originally brought in the federal courts (which assumes a jurisdictional basis other than the arbitration clause, since the plaintiff's action would be brought in defiance of and not reliance upon that clause) or if the defendant had removed it there under 28 U.S.C. §1441 (1964), a procedure unavailable to a resident defendant in a diversity action.

Some analysts use this section as primary support for their view that the Act created no independent basis for federal jurisdiction. See, e.g., 60 COLUM. L. REV. 227, 231 (1960); and 58 Nw. U.L. REV., *supra* note 48, at 490.

50. This reasoning conforms to the tenor of the times when the Act was passed. See notes 7-8, and accompanying text, *supra*.

Some commentators indicated that section 4 should not be interpreted as an impediment to federal jurisdiction deriving from the Federal Arbitration Act. See, e.g., 69 YALE L.J., *supra* note 38, at 862; and 60 COLUM. L. REV., *supra* note 49, at 231.

The 1970 Act, which clearly grants original jurisdiction to the federal courts, includes similar language in its venue provision. 9 U.S.C.A. § 204 (Supp. 1971). It can be argued that the use of that phrase in the 1970 Act indicates that the previous interpretation of section 4 has been too narrow.

51. This solution was followed in the 1970 Act. See 9 U.S.C.A. § 205 (Supp. 1971).

The removal statute, 28 U.S.C. § 1441(b) (1970), indicates that where the district courts would have original jurisdiction based upon a claim of right under a federal law, defendant can exercise his right of removal without the non-residence requirements for removal in diversity cases. Treatment of the 1925 Act as creating federal court jurisdiction would eliminate the anomaly that the Act's remedies are available in the non-admiralty case only when diversity jurisdiction is invoked either by plaintiff or by a defendant not barred from invoking the removal remedy of Section 1441.

This solution also removes the basis for an equal protection argument frequently invoked by those critical of the *Prima Paint* formula. See, e.g., 1968 DUKE L.J., *supra* note 44, at 607-09, and 69 YALE L.J., *supra* note 38, at 862-64.

The alternative approach for resolving the question of the application of federal substantive law would involve the determination that the 1925 Act should be applied both in state and federal courts. This approach would preserve the *Erie* doctrine, reconcile *Bernhardt* with *Prima Paint* and *Robert Lawrence*, and avoid the question of whether the 1925 Act created an independent ground for federal jurisdiction. The language of the Act and its legislative history appear to confine its application to the federal courts.⁵² However, a contrary view, at least as to parts of the Act, has been advanced both by scholars and in dicta in some federal court cases, including *Robert Lawrence*.⁵³ In addition, two recent state court decisions support the view that the 1925 Act may apply to some state court cases.⁵⁴

52. Sections 3 to 13 inclusive refer either to United States district courts or to "the court" in a context clearly indicating that the provisions applied only in those courts. 9 U.S.C. §§ 3-13 (1970). Furthermore, the committee reports at the time of passage emphasized that the Act was intended to govern the federal courts. See H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924).

53. The Act states unqualifiedly in section 2 that it makes "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1970). Section 1 defines "commerce" to include what is ordinarily considered interstate and foreign commerce in the constitutional sense. 9 U.S.C. § 1 (1970). Nothing in those sections indicates that they are qualified in the same manner as sections 3 to 13. Furthermore, arguably the intention of Congress was to make these clauses enforceable in all contracts with the proper relationship to interstate and foreign commerce, assuming, perhaps, that the federal courts would ordinarily have jurisdiction to enforce them. Cf. H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924); and S. REP. No. 536, 68th Cong., 1st Sess. 2-3 (1924). Some commentators have supported this viewpoint. See, e.g., 60 COLUM. L. REV., *supra* note 49, at 231-32; and 69 YALE L.J., *supra* note 38, at 861-63; cf. 1968 DUKE L.J., *supra* note 44, at 14; 43 N.Y.U.L. REV. 565, 568-69 (1968). But see 58 NW. U.L. REV., *supra* note 48, at 490-91.

Although the Supreme Court has not declared itself on this point, the Second Circuit is on record, in dicta, favoring the theory that the Act is binding on the state courts. See *Robert Lawrence*, 271 F.2d at 407: "This is a declaration of national law equally applicable in state or federal courts." Cf. *American Airlines, Inc. v. Louisville & Jefferson County Air Board*, 269 F.2d 811 (6th Cir. 1959).

The 1970 Act finesses this problem by giving the federal courts original jurisdiction over controversies covered by it and allowing the defendant to remove them to federal court if brought in state courts. 9 U.S.C.A. §§ 203, 206 (Supp. 1971).

54. In *A/S J. Ludwig Mowinckels Rederi v. Dow Chem. Co.*, 25 N.Y.2d 576, 255 N.E.2d 774 (1970), the New York Court of Appeals held the 1925 Act applicable in a state court case involving a maritime transaction, indicating: "*Prima Paint* leaves no plausible alternative but application of the Federal statute in state courts as well as in Federal courts." *Id.*, 255 N.E. 2d at 775-76. However, the court indicated that since this was a case in admiralty, where federal substantive law normally would govern in any case, its decision to apply the 1925 Act would have been made even without the support of *Prima Paint*. *Id.* at 779. The court did not indicate if it would apply the same reasoning in a non-admiralty case involving interstate or foreign commerce.

In *REA Express v. Missouri P. R.R.*, 447 S.W.2d 721 (Tex. Civ. App. 1969), involving a contract in interstate commerce, the court denied a motion to compel arbitra-

When the United States decided to accede to the Convention the federal law of arbitration was in a state of uncertain transition. *Prima Paint*, whether viewed as a case allowing the 1925 Act to apply in all cases in federal courts dealing with arbitration of contractual disputes involving interstate and foreign commerce, or as a case pointing toward the creation of a truly national law of arbitration, affirmed the growing importance of the Act in disputes involving "commerce," whether interstate or foreign. However, the 1925 Act was not considered to be a reliable statutory basis for enforcement of the provisions of the Convention, and apparently for this reason the 1970 Act was considered necessary.⁵⁵ The 1925 Act, with all its uncertainties, still remains important, however, because its provisions apply fully to international commercial arbitration not within the scope of the 1970 Act and Convention, and because the 1970 Act can only be understood through an appreciation of the difficulties involved in applying the 1925 Act. Frequent reference to the 1925 Act's provisions is also needed to determine which are still applicable to arbitration coming within the 1970 Act's statutory scheme.

*B. The Federal Judicial Role under the 1970 Act: Arbitration to Which the 1970 Act Applies*⁵⁶

The 1970 Act grants original jurisdiction to the federal courts for all matters within the Act's purview.⁵⁷ The scope of the Act is set out in section 202.⁵⁸ On its face that section would appear to make the

tion, indicating it was uncertain whether federal or state law applied, but "in the event federal law is applicable, . . . appellant waived its right to arbitration as a matter of law." *Id.* at 727. Since a similar result could be reached under Texas law, the court's statement is at most an alternative holding that the 1925 Act might apply.

55. See S. EXEC. REP. NO. 10, 90th Cong., 2d Sess. 1-2, 5-6 (1968); cf. H.R. REP. NO. 1181, 91st Cong., 2d Sess. (1970), and S. EXEC. DOC. E, 90th Cong., 2d Sess. (1968).

56. The research and analysis in this and the next section were completed in the spring of 1971. Subsequently, there has been one article written interpreting the 1970 Act. See McMahon, *Implementation of the UN Convention on Foreign Arbitral Awards in the U.S.*, 26 *ARB. J.* 65 (1971), reprinted and fully annotated in 2 *J. MARITIME LAW & COMMERCE* 735 (1971) [hereinafter cited as McMahon]. The present analysis is written without regard to the above article; however, where appropriate, the footnotes include reference to McMahon either to indicate areas of agreement or to give the reader ready access to differing interpretations.

57. 9 U.S.C.A. § 203 (Supp. 1971). That section indicates that such proceedings are deemed to arise under the laws and treaties of the United States.

58. 9 U.S.C.A. § 202 (Supp. 1971):

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transac-

1970 Act applicable to all arbitration agreements and arbitral awards based on commercial relationships in the following categories: 1) admiralty, 2) foreign commerce, 3) interstate commerce but involving at least one foreign party, or 4) interstate commerce and involving only United States parties, but with a reasonable relationship to a foreign state.⁵⁹

Such a superficial reading of section 202 is inaccurate, however, and the actual scope of the 1970 Act is far more limited than a reading of section 202 alone would indicate. The true scope of the 1970 Act can be determined only by reading section 202 together with the Convention as acceded to by the United States. As already noted, the United States, like many other nations, adhered to the Convention with two reservations.⁶⁰ The first reservation limits application of the Convention to disputes arising out of legal relationships "considered as commercial under the national law of the United States," while the second indicates the United States "will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting state."⁶¹

tion, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. . . .

Section 2 referred to above is 9 U.S.C. § 2 (1970), the part of the 1925 Act which defines the scope of that Act to include arbitration clauses "in any maritime transaction or a contract evidencing a transaction involving commerce. . . ."

59. 9 U.S.C.A. § 202 (Supp. 1971). Although that section specifically excludes transactions between United States citizens which neither involve property located abroad, performance or enforcement abroad, nor some reasonable relation with one or more foreign states, the section otherwise incorporates the full definition of commerce and maritime transactions in the 1925 Act. Therefore, a transaction apparently could be within interstate but not foreign commerce and still qualify for coverage under section 202. The above interpretation is supported by the legislative history. *See* H.R. REP. No. 1181, 91st Cong., 2d Sess. 2 (1970):

The second sentence of section 202 is intended to make it clear that an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not enforceable under the Convention in U.S. courts unless it has a reasonable relation with a foreign state.

But cf., McMahon, *supra* note 56, at 70. It should also be noted that the definition is broader than in the 1925 Act. Thus, where the 1925 Act specifically excludes some employment contracts (9 U.S.C. § 1 (1970)), the 1970 Act may include such contracts.

60. *See* notes 21-23 and accompanying text, *supra*.

61. T.I.A.S. 6997, *supra* note 2, at 50.

The first reservation, limiting the scope of the Convention to matters the United States defines as "commercial," does not pose serious problems in assessing the geographical application of the Convention and the 1970 Act. Section 202 of the Act attempts to formulate the definition of the term "commercial" which that reservation requires, and it does so expansively. Where the 1925 Act was limited to matters of admiralty or commerce, section 202 explicitly states that a "relationship . . . which is considered as commercial" includes but is not limited to the subject matter of the 1925 Act.⁶² Unfortunately, however, it will probably take several court tests to determine whether and how much this definition expands the scope of the 1970 Act into subject areas where the 1925 Act was forbidden to enter.⁶³

The second reservation, dealing with the reciprocal recognition and enforcement of arbitral awards, creates uncertainty as to the intended geographical scope of the Convention and the 1970 Act. The text of the reservation is taken verbatim from Article 1(3) of the Convention; thus an understanding of its meaning requires interpretation of the sometimes confusing use of terminology in the Convention as well as a look at the basic organization of that document. While the substantive provisions of the Convention are primarily divided between Article II, concerning enforcement of agreements to arbitrate, and Articles III through VI, concerning recognition and enforcement of arbitral awards,⁶⁴ these Articles are preceded by several general provisions found in Article I. Article I includes both a statement of the scope of the Convention,⁶⁵ and the authorization for signatory nations to adhere to the Convention with the above indicated reservations.⁶⁶ Despite the fact that Article II deals with enforcement of agreements to arbitrate, both the scope clause and the reservation clause of Article I mention only "the recognition and enforcement of *arbitral awards*"

62. Compare 9 U.S.C.A. § 202 (Supp. 1971) with 9 U.S.C. §§ 1-2 (1970). But see McMahon, *supra* note 56, at 71-72. McMahon believes the courts will construe "commercial relationship" to mean "commerce" as defined in the 1925 Act.

63. Accord, McMahon, *supra* note 56, at 72. One example involves employment contracts. The 1925 Act specifically excluded many such contracts from the scope of that Act. See 9 U.S.C. § 1 (1970). On the other hand, a dispute concerning an employment contract between an American citizen and a foreign corporation clearly is a dispute "arising out of a legal relationship . . . which is considered as commercial." Thus, it arguably fits within the scope of the 1970 Act.

64. Convention, *supra* note 2, arts. II-VI.

65. *Id.* art. 1(1).

66. *Id.* art. 1(3).

and fail to mention “the enforcement of *arbitration agreements*.” This confusion leads to three possible interpretations of this reservation:

- 1) it may apply only to post-arbitral recognition of foreign awards;
- 2) it may apply both to enforcement of agreements to arbitrate in a foreign country and to the recognition of foreign awards; or
- 3) it may preclude the application of the Convention to arbitration taking place within the United States.

A literal reading of the reservation and of Article 1(3) leads to the conclusion that the reservation, by failing to mention enforcement of arbitration agreements, applies strictly to the post-arbitral treatment of foreign awards. If this interpretation is correct, then, although the 1970 Act and the Convention would apply to agreements to arbitrate in a country not a party to the Convention, they would not apply to the recognition and enforcement of the resulting arbitral awards made in these non-signatory countries. It would be an absurd result, however, for the Convention and statute to authorize the court to compel arbitration in a non-signatory nation but to deny the use of their machinery for enforcement of the award which follows.⁶⁷ Furthermore, a more harmonious interpretation of the Convention rejects this view. Since Article 1(1), defining the scope of the Convention, does not mention the enforcement of *agreements* to arbitrate, but Article II specifically covers these same agreements, the term “recognition and enforcement of awards” as used in Article I should be considered to subsume the topic of “agreements to arbitrate.” This interpretation is logically consistent, both because Article II is considered by many to be an essential part of the Convention,⁶⁸ and because enforcement of an agreement to arbitrate is often an essential step in the process leading to the recognition of the award which ultimately results. If this construction is accepted, then the United States’ reservation would make the Convention and 1970 Act inapplicable both to the pre-arbitral enforcement of an agreement to arbitrate in a non-signatory nation and to the enforcement of an award made there.⁶⁹

67. *But cf.* Quigley, *supra* note 18, at 1063, which indicates Article II was not necessarily intended to align itself perfectly with the rest of the Convention. Article II was inserted as an afterthought, and the present language is the result of compromise. See Contini, *supra* note 18, at 295-96.

68. *Cf.* Quigley, *supra* note 18, at 1062-64; Contini, *supra* note 18, at 296.

69. A collateral problem under this interpretation involves the “on the basis of reciprocity” language of the United States reservation. It is possible to argue that that language means that the United States will enforce an agreement to arbitrate in a foreign

The next question is whether the reservation should be construed so as to exclude all arbitration in the United States from the application of the Convention and the 1970 Act. There would appear to be no valid reason for doing so. First, the use of the phrase "on the basis of Reciprocity" implies that the reservation is intended to apply only to arbitration in foreign countries. Furthermore, the Convention indicates that it extends to arbitration taking place within the territory of a signatory power, but not considered "domestic" by that country's laws.⁷⁰ In addition, several sections of the 1970 Act indicate a legislative intention to make the Convention and Act applicable to arbitration within the United States which falls within the subject matter of section 202.⁷¹

Based upon the above analysis, it seems clear that the sweeping provisions of the 1970 Act apply to arbitration both within the United States and abroad, and that they preempt only a part of the field of international commercial arbitration. Where the arbitration is to take place in a country not a party to the Convention, one can only look to the pre-existing legal structure for guidance.⁷² The list of countries *not* parties to the Convention is quite long, and it includes several major commercial countries.⁷³ Thus, it is unwise to rely upon the Act and

country only if that country is a party to the Convention *and* if its courts would similarly enforce agreements to arbitrate in this country. However, there is no evidence that the United States has placed such an interpretation upon that reservation. Rather, it was intended to limit enforcement to arbitration in countries party to the Convention. See MESSAGE FROM THE PRESIDENT TRANSMITTING THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, SEN. EXEC. DOC. E., 90th Cong., 2d Sess. 18 (1968).

70. Convention *supra* note 2, art. I(1). The distinction between "domestic" and "non-domestic" arbitration appears in the laws of several European countries, but is unknown to the common law countries. It relates more to the choice of law than to the place of arbitration. See Contini, *supra* note 18, at 292-93, and Quigley, *supra* note 18, at 1060-61. Nothing in the Convention, however, precludes a country from establishing a category of "non-domestic" arbitration to which the Convention would apply.

McMahon appears to conclude that the Convention does not apply to arbitration in the United States. He does recognize, however, that application of the Convention to some arbitration within the United States would not be illogical, given the language in Section 202. See McMahon, *supra* note 56, at 70.

71. See, e.g., 9 U.S.C.A. §§ 202, 204, 206 (Supp. 1971). It would appear that the statute has isolated a class of arbitration controversies which can be labeled as "not wholly domestic" and indicated that they fall within the Convention's terms.

72. Under all interpretations of the United States reservation, the 1970 Act will not apply to arbitration awards made in non-signatory countries. See notes 64-69 and accompanying text, *supra*, and McMahon, *supra* note 56, at 72.

73. For a list of the countries adhering to the Convention as of December 29, 1970, see T.I.A.S., No. 6997, *supra* note 2, at 45-50. Perhaps surprisingly, most European communist nations have ratified. Non-signators include the United Kingdom, Canada,

Convention without first determining whether the particular dispute concerning arbitration is covered by this new system.

II. ANALYSIS OF THE IMPACT OF THE 1970 ACT UPON FEDERAL COURT TREATMENT OF ARBITRATION PROBLEMS

To determine the full impact of the 1970 Act on pre-existing law, it is necessary to examine the operation of the 1970 Act provisions, and then to note how they will apply in the critical areas where the courts have been brought into the arbitration process. This involves comparison and contrast with the results derived from the 1925 Act and the bilateral treaty structure set up by the United States prior to acceding to the Convention. These areas include the pre-arbitration problems concerning motions to stay judicial proceedings pending arbitration and motions to compel arbitration, and the post-arbitral problems in recognizing and enforcing arbitral awards.

A. Operation of the 1970 Act

The drafters of the 1970 Act chose to superimpose its provisions upon the existing structure of the 1925 Act, rather than to make specific amendments to the individual sections of that Act.⁷⁴ The final provision of the 1970 Act, section 208, declares all provisions of the 1925 Act applicable to actions and proceedings under the 1970 Act "to the extent [the 1925 Act] is not in conflict with [the 1970 Act] or the Convention as ratified by the United States."⁷⁵ As a drafting tech-

Australia, New Zealand, Sweden, Spain, Portugal, most Latin American and African countries, most of the Arab world, China, and nine countries with which the United States has bilateral FCN treaties with provisions for the enforcement of arbitration agreements and awards. These latter include Belgium, Denmark, Iran, Ireland, Luxembourg, Korea, Nicaragua, Pakistan, and Vietnam. Compare note 11, *supra*, with T.I.A.S. No. 6997, *supra* note 2, at 45-50. Of the non-signatory nations, the United Kingdom is most frequently used as a site for arbitration. However, it is quite possible it and others may accede to the treaty now that the United States has joined. See M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* § 44.04, at 370 (1968).

74. This approach was followed in order to leave the growing body of interpretation of the existing Act undisturbed and to avoid complications the drafters felt would have arisen had the new provisions been integrated into the 1925 Act. Letter from H. G. Torbert, Jr., Acting Assistant Secretary of State, to Rep. John W. McCormack, Dec. 3, 1969, in H.R. REP. No. 1181, 91st Cong., 2d Sess. (1970).

75. 9 U.S.C.A. § 208 (Supp. 1971).

nique, this method leaves much to be desired, and it is an open invitation for litigation testing whether a particular segment of a complex section of the 1925 Act is or is not in conflict with the recent enactments. This provision requires thorough study of the extent to which provisions of the two Acts conflict.

The 1970 Act is short and relatively straight-forward. In addition to sections 208 and 202 already discussed,⁷⁶ there are five sections of the statute of substantive importance. Each of these either modifies or clarifies a portion of the 1925 Act as applied to arbitration within the scope of the 1970 Act; however, with one exception,⁷⁷ none of these five provisions makes any specific reference to the 1925 Act. First, section 203 explicitly provides for original jurisdiction in the federal courts over any action or proceeding falling under the Convention, regardless of the amount in controversy.⁷⁸ Second, section 204 contains a broad venue provision, clearly separating the place of arbitration from the place where the action is brought.⁷⁹ Third, if an action is brought in state court, section 205 allows a defendant to remove it to federal court, in which case the action will be deemed to be an ac-

76. See notes 58-75 and accompanying text. *supra*.

77. 9 U.S.C.A. § 205 (Supp. 1971). See note 80 and accompanying text. *infra*.

78. 9 U.S.C.A. § 203 (Supp. 1971):

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

It is generally thought that the 1925 Act did *not* of itself provide an independent basis for federal jurisdiction. See notes 46-51 and accompanying text. *supra*.

McMahon, reading section 203 together with sections 206 and 207, indicates that the 1970 Act was intended to grant exclusive jurisdiction to the federal courts for all matters coming within the scope of the Convention. McMahon, *supra* note 56, at 73-74.

79. 9 U.S.C.A. § 204 (Supp. 1971):

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 . . . may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

Compare 9 U.S.C. § 2 (1970), which has been given a restrictive interpretation, and *Id.* §§ 4 & 9-11, which appear to require that the action ordinarily be in the district where the arbitration would take place. See notes 115-26 and 164-70 and accompanying text. *infra*.

McMahon, while recognizing the fact that section 204 now assures that a federal court can compel arbitration outside of its own district, feels that that section could be interpreted to narrow the choices for venue in an action to confirm an award in certain situations. However, he reads the 1970 and 1925 Acts together in order to resolve this problem in favor of a broadening interpretation. See McMahon, *supra* note 56, at 74-76.

tion originally brought in the federal district court. The diversity of citizenship restrictions for removal are inapplicable.⁸⁰ Fourth, section 206 provides that the court may compel arbitration in accordance with the arbitration agreement, regardless of whether the arbitration would take place within the United States or in a foreign country.⁸¹ Fifth, section 207 establishes a procedure for giving recognition and enforcement to foreign awards.⁸²

B. Pre-Arbitration Problems

Although one purpose of arbitration is to avoid time-consuming and expensive litigation, courts are frequently involved in pre-arbitration maneuvers where one party seeks to ignore or avoid arbitration. To understand the 1970 Act, it is necessary to consider its impact on federal court decisions in the major situations where one party seeks the court's aid to enforce an arbitration agreement. These cases usually fit one of the following patterns:

80. 9 U.S.C.A. § 205 (Supp. 1971):

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant . . . may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except. . . . For the purposes of [the 1925 Act] any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

The 1925 Act contains no provision regarding removal, but the general removal statute is, of course, applicable to it, at least in a diversity case. See notes 49-51 and accompanying text, *supra*. See also McMahon, *supra* note 56, at 79-80.

81. 9 U.S.C.A. § 206 (Supp. 1971):

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. . . .

Compare 9 U.S.C. § 4 (1970), which has generally been interpreted to require that the district court's power to compel arbitration only be exercised as to arbitration taking place within its own district. See notes 115-26 and accompanying text, *infra*. See generally McMahon, *supra* note 56, at 80-81.

82. 9 U.S.C.A. § 207 (Supp. 1971):

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Under the 1925 Act, the status of awards rendered outside the district is unclear, but most authorities believe they are not covered by that Act. See notes 164-70 and accompanying text, *infra*. See generally McMahon, *supra* note 56, at 83-85.

- 1). One party sues on the contract and the other invokes the arbitration clause defensively to move for a stay of litigation pending arbitration in the United States, or in a foreign country.
- 2). One party invokes the district court's aid to compel arbitration in the United States, or in a foreign country.

1. *Stay of Proceedings Pending Arbitration*

Under section 3 of the 1925 Act,⁸³ when one party has brought suit in federal court on a matter covered by a valid arbitration clause and the other makes a timely and proper motion for a stay of that proceeding, the court will grant a stay pending arbitration regardless of whether the arbitration will take place within the jurisdiction of that court, elsewhere in the United States, or in a foreign country. Although this proposition was originally in doubt,⁸⁴ it was settled definitively for domestic arbitration in 1934,⁸⁵ and has since been applied

83. 9 U.S.C. § 3 (1970). It reads in part as follows:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court . . . upon being satisfied that the issue . . . is referable to arbitration . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

84. In *The Silverbrook*, 18 F.2d 144 (E.D. La. 1927), the first arbitration case decided under the Act, the district court denied a stay of an admiralty suit pending arbitration in London, indicating it believed section 3 and the Act as a whole applied only to arbitration taking place within the jurisdiction of the court granting a stay. It reasoned in part:

This court cannot direct and otherwise supervise and conclude an arbitration to be held in London, or assume to vacate, modify, or correct any award that might be made there, or, indeed, anywhere, except within this district nor has it power . . . to arbitrarily reform, or modify the terms of the contract by ordering an arbitration elsewhere or otherwise than agreed upon by the parties.

Id. at 147. *Cf. The Beechwood & The Inverarder*, 35 F.2d 41 (S.D.N.Y. 1929). *But see* *Danielsen v. Entre Rios Ry.*, 22 F.2d 326, 328 (D. Md. 1927), another admiralty case, where the court granted a stay pending arbitration in London, indicating:

[T]here is nothing in the Act which indicates that, although the arbitration provided for may be beyond the jurisdiction of the court, this shall forestall or in any way curtail jurisdiction which the court would normally have of maritime suits. . . .

[T]he only limitation imposed upon the court is a stay pending the perfection of what cannot be accomplished within the jurisdiction of the court, and such a stay is to be clearly distinguished from prohibitions against assumption of jurisdiction in the first instance.

85. In *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1934), plaintiff sued for damages in the Federal District Court of the Southern District of New York and defendant sought a stay pending arbitration in New York under a clause which allowed a party to invoke state court machinery to compel arbitration. In affirming the circuit court's reversal of the district court's denial of a stay, the Supreme

consistently to cases involving foreign arbitration.⁸⁶ The Supreme Court, however, has never passed upon the application of section 3 to a case where the arbitration would take place outside the United States.⁸⁷

Court found that section 3 of the Act authorized a stay regardless of whether the court could have compelled arbitration under the agreement or otherwise. The court clearly recognized that to deny a stay on the grounds that section 3 did not apply would nullify the arbitration remedy whenever the federal court had jurisdiction, but the arbitration clause looked to another jurisdiction for its enforcement. It reasoned as follows:

[T]here is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with § 4 of the Act. . . .

There is, on the other hand, strong reason for construing the clause as permitting the federal court to order a stay even when it cannot compel the arbitration. For otherwise, despite congressional approval of arbitration, it would be impossible to secure a stay of an action in the federal courts when the arbitration agreement provides for compulsory proceedings exclusively in the state courts. . . .

Id. at 452.

86. There are many instances where a federal court has granted a stay of court proceedings pending arbitration in a foreign forum, usually basing the decision on section 3 of the 1925 Act. One of the most recent is *Batson Yarn & Fabrics Mach. Corp. v. Saurer-Allma G.m.b.H.-Allgauer Maschinebau*, 311 F. Supp. 68 (D.S.C. 1970), where plaintiff, a South Carolina distributor, sued a German manufacturer for contract damages and defendant successfully obtained a stay pending arbitration in Paris. After extensively reviewing the case authorities, the court concluded that the rationale of *Shanferoke* remained good law, "whether the arbitration is to be in the United States or in a foreign country." *Id.* at 75.

Numerous other cases have reached a similar result. *See, e.g.*, *Sumaza v. Cooperative Ass'n.*, 297 F. Supp. 345 (D.P.R. 1969) (involving a Puerto Rican distributor as plaintiff and a Danish association as defendant on a contract calling for arbitration in Denmark); *Mannesmann Rohrleitungsbrau G.m.b.H v. S.S. Bernhard Howaldt*, 254 F. Supp. 278, 279 (S.D.N.Y. 1965) ("The circumstance that the arbitration is to take place in a foreign country does not affect the right to a stay under 9 U.S.C. § 3."); *Oregon-Pacific Forest Prods. Corp. v. Welsh Panel Co.*, 248 F. Supp. 903 (D. Ore. 1965) (American plaintiff and Japanese and American defendants on a contract of purchase from Japan containing a clause for arbitration in Japan); and *Fox v. The Giuseppe Mazzini*, 110 F. Supp. 212 (E.D.N.Y. 1953) (American plaintiff and Italian defendant on a contract to ship goods from Germany to the United States with a London arbitration clause).

87. The Supreme Court may have little occasion to pass upon the question of the applicability of section 3, as a stay pending arbitration is generally held to be an interlocutory order not ordinarily appealable. *Lowry & Co. v. S.S. Le Moyne D'Iberville*, 372 F.2d 123 (2d Cir. 1967), *dismissing appeal from* 253 F. Supp. 396 (S.D.N.Y. 1966). There the circuit court specifically refused to make an exception to the non-appealability rule when the arbitration is to take place abroad. *Id.* at 124. *But cf.* *Nederlandse Erts-Tankersmaatschappij v. Isbrandtsen Co.*, 339 F.2d 440 (2d Cir. 1964), where the same court earlier reviewed a district court's decision *not* to grant a stay of a suit where arbitration already was taking place in London between plaintiff and a party for whom defendant was a guarantor of performance; *Altshul Stern & Co. v. Mitsui Bussan Kaisha, Ltd.*, 385 F.2d 158 (2d Cir. 1967), where the circuit court reversed a district court denial of a stay of proceedings pending arbitration in Japan; and *Carcich v. Rederi A/B Nordie*, 389 F.2d 692 (2d Cir. 1967), where the district court's refusal to allow a stay pending arbitration in London based on defendant's supposed waiver of arbitration was reversed on appeal.

The distinction in the cases might be justified by a rationale that when a stay is granted, it merely means that the court will retain jurisdiction and have an opportunity

The Convention and 1970 Act add very little to the pre-existing law governing stays of proceedings. The Convention confirms that a stay can be granted pending foreign arbitration in a country to which it applies,⁸⁸ while the 1970 Act indicates that the party seeking to invoke this remedy can obtain federal court jurisdiction over the dispute by removal, if necessary.⁸⁹ If, as it appears, the 1925 Act's treatment of stays of proceedings does not conflict with the Convention and the 1970 Act, then the body of law governing section 3 of the 1925 Act would be directly applicable to a case covered by the Convention and the 1970 Act.⁹⁰ It is thus necessary to consider the factors involved in deciding whether, when, and for what issues a stay will be granted under the 1925 Act. The court should not grant a stay pending arbitration unless "satisfied that the issue involved . . . is referable to arbitration under such an agreement."⁹¹ This determination may involve deciding 1) whether there is a valid and enforceable arbitration clause, 2) whether the clause covers the particular dispute, 3) whether fraud would bar referral to arbitration, and 4) whether the moving party has waived or otherwise lost his right to arbitrate.

The courts, in deciding to grant a stay pending arbitration, must often face threshold questions concerning the existence of a contract and of an arbitration clause pursuant thereto. The earlier cases generally assumed that all basic contract formation questions had to be resolved by the court prior to a decision on the motion for stay of pro-

to look at the situation anew once arbitration has run its course, whereas a denial of a stay effectively foreclosed defendant's right to an arbitral settlement. This distinction, however, loses some vitality when one considers the obstacles to a court's post-arbitral enforcement of a foreign arbitration award not covered by the Convention and the 1970 Act. See notes 164-83 and accompanying text, *infra*.

88. The Convention indicates the court having a case involving an agreement to arbitrate "within the meaning of this article [shall], at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Convention art. II(3). This provision was intended to provide for a stay of proceedings similar to that in 9 U.S.C. § 3 (1964). See Quigley, *supra* note 18, at 1064; cf. Contini, *supra* note 18, at 296.

Concerning the geographic scope of the application of the Convention, see notes 64-69 and accompanying text, *supra*.

89. 9 U.S.C.A. §§ 203, 205 (Supp. 1971). See notes 78 & 80 and accompanying text, *supra*.

90. 9 U.S.C.A. § 208 (Supp. 1971). See text accompanying note 75, *supra*.

91. 9 U.S.C. § 3 (1970). This language does not appear to conflict with the language in the Convention. See Convention art. II(3):

The court . . . [shall], at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ceedings and could not be subjects for arbitration.⁹² However, distinctions later developed between formation of the basic contract and formation of the arbitration agreement, and it now appears that as a result of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*⁹³ the courts will limit their inquiry to issues related to the arbitration clause itself.⁹⁴ The *Prima Paint* rationale gives the Supreme Court's imprimatur to the Second Circuit's view that the arbitration clause is separable from the main contract and is not affected by the illegality of the main contract or by its breach or repudiation by one of the parties.⁹⁵

A second important factor in deciding whether to grant a stay is the nature of the particular arbitration clause, with the courts generally distinguishing between limited and unlimited clauses.⁹⁶ Even with the

92. A leading case for this proposition is *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942), where the court indicated in a dispute over defendant's repudiation of a charter party agreement with plaintiff that the issue of whether a charter party had been made was not to be decided by the arbitrators, stating:

The Arbitration Act does not cover an arbitration agreement sufficiently broad to include a controversy as to the existence of the very contract which embodies the arbitration agreement. . . . [A] controversy relating to the denial that the parties ever made a contract is not a controversy arising out of that contract.

Id. at 986. It then found the requisite contract formation and granted a stay.

93. 388 U.S. 395 (1967).

94. *Prima Paint* involved a purely domestic controversy. In it the Court held: "[I]n passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate." *Id.* at 404. Although the Court was speaking specifically to the issue of fraud or fraud in the inducement (see notes 99-104 and accompanying text, *infra*), at least one circuit has interpreted the Court's holding to exclude the court's examination of all issues related to the basic contract but not to the arbitration clause. The primary exponent of this view was *Hilti, Inc. v. Oldach*, 392 F.2d 368 (1st Cir. 1968), again a domestic case, in which the court indicated that the claim of no contract was an issue which under the pre-*Prima Paint* rules would have been decided by the court, but now was left to the arbitrators for decision. *Hilti*, 392 F.2d at 371. *Sumaza v. Cooperative Ass'n*, 297 F. Supp. 345 (D.P.R. 1969), which involved a contract between a Puerto Rican distributor and a Danish producer, relied heavily upon *Hilti* in concluding that a stay should be granted pending arbitration in Denmark and appears to support the *Hilti* rationale in a foreign arbitration setting.

95. See, e.g., *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 409-10 (2d Cir. 1959), *appeal dismissed*, 364 U.S. 801 (1960).

96. Compare *Sumaza v. Cooperative Ass'n*, 297 F. Supp. 345 (D.P.R. 1969) with *In re Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961). In *Sumaza* the court granted a stay pending arbitration in Denmark under a clause reading "[e]ventually arising differences are to be settled with a perfect and mutual understanding. Place of arbitration will be . . . Denmark." *Sumaza*, 297 F. Supp. at 347. The Puerto Rican plaintiff argued that the Danish defendant had conspired to take over the plaintiff's market, and that it breached the contract in several other particulars. The court noted the difference between limited and unlimited arbitration clauses, indicated this clause was "broad and open," and allowed a stay over plaintiff's objection that the dispute was not covered by the clause. In *Kinoshita*, a section 4 case, the court dealt with an arbitration clause lim-

standard broad arbitration clause, the courts must determine the scope of arbitration authority. For example, in *Necchi v. Necchi Sewing Machine Sales Corp.*,⁹⁷ the court decided that under a standard Arbitration Association clause covering "disputes arising out of or in connection with" a contract, the clause did not extend to matters related to the working relationships of the parties.⁹⁸

A third closely related problem is the often raised issue of fraud or fraud in the inducement. A party attempting to prevent arbitration frequently claims that the contract and/or the arbitration clause was obtained by fraud, and that the other party ought not to be allowed to invoke the fraudulently obtained remedy, as this would mean that the remedy obtained by fraud would be invoked to determine the issue of fraud. The Supreme Court has twice dealt with this problem in the past decade, both times in cases *not* involving international commercial arbitration. In *Moseley v. Electronic Facilities*,⁹⁹ the party opposing arbitration claimed that the contract was based on fraud, and that the arbitration clause was an integral part of the fraudulent scheme. The Court indicated:¹⁰⁰

ited to disputes or differences which arise under a ship charter. The court construed this clause to cover only matters of performance or questions of interpretation of the contract, and indicated that, unlike the standard arbitration clause, which covers controversies "arising out of or relating to" the contract, the scope of arbitrable issues was to be narrowly interpreted. *Kinoshita*, 287 F.2d at 953.

97. 348 F.2d 693 (2d Cir. 1965), *cert. denied*, 383 U.S. 909 (1966). Although this case did not involve a stay of proceedings, the analysis is the same.

98. That case was part of the involved dispute between Necchi and several American affiliates, distributors and dealers. Plaintiff sought a declaratory judgment that certain items were not arbitrable. The district court refused to decide if each matter fell within the scope of the arbitration clause, but instead "took the position that this decision was to be made by the arbitrators." *Necchi*, 348 F.2d at 696. The circuit court reversed in part, indicating:

[A] court must interpret [the arbitration] provision to determine whether it requires arbitration on certain items prior to granting such relief. . . . Neither the federal policy in favor of arbitration nor the ostensibly broad reach of the arbitration provision in question relieves the District Court of judicial responsibility of determining the question of arbitrability, unless the arbitration provision is so unusually broad that it clearly vests the arbitrators with the power to resolve questions of arbitrability as well as the merits.

. . . .
It is undoubtedly true that [the excluded items] would not have arisen if the exclusive distributorship arrangement had never existed. . . . But this is not sufficient to render them arbitrable within the specific meaning of the arbitration clause . . . which requires that the matter arise out of or in connection with that agreement rather than the working relationship between the parties.

Id. at 696, 698.

99. 374 U.S. 167 (1963).

100. *Id.* at 171.

The issue of fraud should first be adjudicated before the rights of the parties under the sub-contract can be determined. . . . [W]e believe that . . . the issue goes to the arbitration clause itself, since it is contended that it was to be used to effect the fraudulent scheme. If this issue is determined favorably to the petitioner, there can be no arbitration under the sub-contract.

But in *Prima Paint* the Court held that the issue of fraud was for the arbitrators, not the court, distinguishing between fraud related to the arbitration clause itself and fraud related only to the main contract.¹⁰¹ In so doing, it adopted the position previously espoused by the Second Circuit and in effect limited *Moseley* to those cases where the arbitration clause was directly involved in the fraudulent scheme.¹⁰² The *Prima Paint* rationale should also apply to a motion to stay pending foreign arbitration. However, there seems to be no case in which the courts have clearly been confronted with this issue. It would appear that the policy favoring enforcement of arbitration agreements implicit in the Convention and the 1970 Act would require application of this doctrine to cases falling within their purview.¹⁰³ Even if a court were to reject application of the *Prima Paint* view to foreign arbitration, it still could decide the limited question of fraud, and then grant a stay pending arbitration of the remaining issues.¹⁰⁴

101. *Prima Paint*, 388 U.S. at 404.

102. See notes 93-95 and accompanying text, *supra*. See *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410-11 (2d Cir. 1959), *appeal dismissed*, 364 U.S. 801 (1960), where the court, after having found the arbitration clause separable, further indicated:

[T]he parties are entitled to agree, should they desire to do so, that one of the questions for the arbitrators to decide . . . is whether or not one of the parties was induced by fraud to make the principal contract. . . . [A]rbitration should not be denied or postponed upon the mere cry of fraud in the inducement, as this would permit the frustration of the very purpose sought to be achieved by the agreement to arbitrate.

. . . If this arbitration clause was induced by fraud, there can be no arbitration. . . . It is not enough that there is substance to the charge that the contract to deliver merchandise of a certain quality was induced by fraud.

103. See Convention art. II(3).

104. See, e.g., *International Refugee Org. v. Republic S.S. Co.*, 93 F. Supp. 798 (D. Md. 1950), where the court granted a stay pending London arbitration, indicating that disposition of the fraud issue in a companion case prevented raising the issue as a bar to a stay of proceedings pending arbitration. Cf. *Reynolds Jamaica Mines, Ltd. v. La Societe Navale Caennaise*, 239 F.2d 689 (4th Cir. 1956), in which defendant successfully invoked a clause calling for London arbitration. In that case, plaintiff brought a breach of contract action, defendant asserted the arbitration clause as an affirmative defense, and plaintiff argued fraud in the inducement. The court held that plaintiff's actions had affirmed the contract and its arbitration clause, thereby foreclosing the fraud issue as a

A fourth frequently litigated issue where defendant seeks a stay is whether defendant has waived his arbitration right or is subject to the doctrine of laches. Originally the question of waiver of a right to arbitrate depended on rules of pleading and similar technical matters.¹⁰⁵ Subsequent cases have greatly modified this viewpoint, so that the issue of waiver turns largely upon the presence or absence of prejudice to the other party.¹⁰⁶ In the Second Circuit, the doctrine has undergone further modification, so that waiver may even have ceased to be an issue for the court. There is language in cases involving a stay of proceedings and in other cases that, by analogy to the fraud in the inducement cases,¹⁰⁷ indicates that the question of waiver is for the arbitrators and not the courts.¹⁰⁸

The federal courts usually have treated motions for a stay pending arbitration in a uniform manner, regardless of whether the arbitration

defense to the counterclaim. Plaintiff's failure to invoke the arbitration clause within the contractually specified time then barred any recovery even though defendant was using the clause as a defense and not to force a stay pending arbitration.

105. See, e.g., *Almacenes Fernandez, S.A. v. Golodetz*, 148 F.2d 625 (2d Cir. 1945).

106. See, e.g., *Carcich v. Rederi A/B Nordie*, 389 F.2d 692 (2d Cir. 1967), where one defendant sought a stay pending arbitration in a suit involving a longshoreman's injury arguably related to a maritime charter contract with a London arbitration clause. The district court denied the stay, indicating that defendant's participation in pre-trial proceedings and its delay tactics were inconsistent with its announced desire to arbitrate and thereby waived it. In reversing, the circuit court indicated:

It is not "inconsistency," but the presence or absence of prejudice which is determinative of the issue. . . . [S]uch participation, standing alone, does not constitute a waiver. . . . [M]ere delay in seeking a stay of the proceedings without some resultant prejudice to a party . . . cannot carry the day.

Id. at 696. *Accord*, *Michael v. S.S. Thanasis*, 311 F. Supp. 170 (N.D. Cal. 1970), involving London arbitration; and *Batson Yarn & Fabrics Mach. Group v. Saurer-Allma G.m.b.H.-Allgauer Maschinenbau*, 311 F. Supp. 68 (D.S.C. 1970), where defendant, a German manufacturer, sought stay of proceedings pending arbitration in Paris against its exclusive United States distributor. In granting the stay, the court indicated:

[W]aiver or "default" . . . may not rest mechanically on some act such as the filing of a complaint or an answer but must find a basis in prejudice to the objecting party.

Id. at 73.

107. See notes 99-102 and accompanying text, *supra*.

108. See *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965), involving two United States corporations and New York arbitration, where the court held that waiver was an arbitrable issue, indicating:

If the parties would entrust to arbitrators the defense of fraud in the inducement, they would also entrust to arbitrators the defense of waiver. . . .

....

Nothing in the Act prevents the parties from making a binding agreement to arbitrate the defense of waiver.

Id. at 364. *Accord*, *Lowry & Co. v. S.S. Le Moyne D'Iberville*, 253 F. Supp. 396 (S.D.N.Y. 1966), *appeal dismissed*, 372 F.2d 123 (2d Cir. 1967) (involving a stay pending arbitration in Paris); and *Auxiliary Power Corp. v. Eckhardt & Co.*, 266 F. Supp. 1020 (S.D.N.Y. 1966) (involving an action to confirm an arbitration award). *But*

was to take place in the United States or abroad. This has been done on the basis of the courts' reading of section 3 of the 1925 Act as having no language limiting it to situations in which the arbitration would be held in the United States. Due to this approach, neither the 1970 Act and Convention nor the previously negotiated bilateral treaties¹⁰⁹ modify the existing court doctrine surrounding stays of proceedings, once the matter has reached the federal courts.¹¹⁰ Rather, it can be anticipated that the 1970 Act and the Convention merely will provide additional justification for application of the pre-existing provisions of the 1925 Act to the issues surrounding a stay pending foreign arbitration. Such a role for the 1970 Act and the Convention would be analogous to the present use of the bilateral treaties. In at least three cases outside the Second Circuit, district courts have relied on our bilateral treaties with Japan,¹¹¹ Denmark,¹¹² and West Germany¹¹³ in reasoning toward a decision to grant a stay pending for-

cf. *Tsakalotos Navig. Corp. v. Sonaco, Sociedad Internacional de Comercio S.A.*, 259 F. Supp. 210, 213 (S.D.N.Y. 1966), where the court concluded:

[T]he issue of waiver, at least where it is based on the commencement of other Court action, is for the court to determine. . . . Determination of waiver by other conduct would appear to be within the province of the arbitrator.

109. See notes 11-13 and accompanying text, *supra*.

110. Note, however, that the 1970 Act may still be essential in order to reach the federal courts in the first place. See notes 46-51, 78 & 80 and accompanying text, *supra*.

111. *Oregon Pac. Forest Prods. Corp. v. Welsh Panel Co.*, 248 F. Supp. 903 (D. Ore. 1965). In that case, which involved a complicated business relation between several Pacific Northwest firms and Japanese firms in the wood products field, the court indicated that the parties to the contract were deemed to have known of the FCN treaty between Japan and the United States, and were bound by its provisions which made arbitration agreements providing for arbitration in another country not unenforceable on the grounds that the arbitration would not take place within the territory of the country called upon to enforce the contract.

112. *Sumaza v. Cooperative Ass'n*, 297 F. Supp. 345 (D.P.R. 1969). In that case, involving a contract between a Puerto Rican plaintiff and a Danish defendant and including a clause requiring arbitration in Denmark, the court alluded to the FCN treaty with Denmark as an additional reason for its view that "arbitration in foreign places has been repeatedly upheld." *Id.* at 349. It seems clear from this opinion, however, that the treaty's existence was not essential to the decision.

113. *Batson Yarn & Fabrics Mach. Corp. v. Saurer-Allma G.m.b.H.-Allgauer Maschinenbau*, 311 F. Supp. 68 (D.S.C. 1970). In this case, which involved a clause allowing arbitration either in the United States or in a foreign country, the West German defendant made a demand for arbitration in France, after which plaintiff sued for damages, defendant moved to stay pending arbitration in Paris, and plaintiff then sought to compel arbitration in the United States. The court determined that under section 3 of the Act there was no bar to granting a stay pending arbitration in a foreign country and indicated that the "party first demanding arbitration should have the right to exercise the right of choice. . . ." *Id.* at 73. Noting that a FCN treaty with Germany was also involved, the court used it as an additional reason for granting a stay, indicating:

To hold . . . that arbitration abroad of a dispute under a contract entered into between a German national or company and an American company cannot be had would nullify the plain terms of the treaty.

Id. at 76.

ign arbitration. All three of these cases were decided by courts relatively inexperienced with multi-national arbitration cases, and it appears that the courts were unsure whether the 1925 Act, alone, would have been sufficient justification for their decision. Although the Second Circuit, where the bulk of such cases are tried, freely grants a stay pending foreign arbitration without relying upon treaty provisions,¹¹⁴ a litigant elsewhere would be well advised to include reference in his pleadings to the 1970 Act and Convention or an applicable bilateral treaty to insure that the court will properly apply the 1925 Act's basic analysis to a stay pending foreign arbitration.

2. *Action in Federal Court to Compel Arbitration*

a. *1925 Act.* Where the 1970 Act does not apply, the primary basis for compelling arbitration in the federal courts is section 4 of the 1925 Act.¹¹⁵ In cases involving arbitration within the United States, this section has been utilized effectively as a means of forcing a recal-

114. Typical Second Circuit decisions granting a stay pending foreign arbitration without mention of a FCN treaty include: *Carcich v. Rederi A/B Nordie*, 389 F.2d 692 (2d Cir. 1967); *Altshul Stern & Co. v. Mitsui Bussan Kaisha, Ltd.*, 385 F.2d 158 (2d Cir. 1967); *Lowry & Co. v. S.S. Le Moyne D'Iberville*, 253 F. Supp. 396 (S.D.N.Y. 1966). *appeal dismissed*, 372 F.2d 123 (2d Cir. 1967); *Mannesmann Rohrleitungsbrau G.m.b.H. v. S.S. Bernhard Howaldt*, 254 F. Supp. 278 (S.D.N.Y. 1965); *Associated Metals & Minerals Corp. v. The S.S. Mihalis Angelos*, 234 F. Supp. 236 (S.D.N.Y. 1964); *Bienvenido Shipping Co. v. Sub-Freights of S.S. Andora*, 168 F. Supp. 127 (E.D.N.Y. 1957); *Giuffre v. The Magdalene Vinnen*, 152 F. Supp. 123 (E.D.N.Y. 1957); *Fox v. The Giuseppe Mazzini*, 110 F. Supp. 212 (E.D.N.Y. 1953); and *Uniao de Transportadores para Importacao e Comercio, Ltda. v. Companhia de Navegacao Carregadores Acoreanos*, 84 F. Supp. 582 E.D.N.Y. 1949).

115. 9 U.S.C. § 4 (1970). It reads in part as follows:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed *in the manner provided for in such agreement*. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*. *The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed*. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. . . . If [the court or jury] find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration *in accordance with the terms thereof*. (emphasis added).

citant party to arbitrate, both in cases involving interstate commerce and those with more international aspects.¹¹⁶ However, it has been generally held that section 4 has no application to arbitration in a foreign country, and in this respect the courts have regularly distinguished the section 3 motion to stay proceedings from the section 4 motion to compel arbitration. For example, in the recent case of *Batson Yarn & Fabrics Machinery Corp. v. Saurer-Allma G.m.b.H-Allgauer Maschinenbau*,¹¹⁷ the court granted a stay under section 3 pending arbitration in Paris, indicating:¹¹⁸

[T]he power to grant a stay pending arbitration under § 3 of the Act was not conditioned upon the existence of a power to compel arbitration under § 4 and . . . the Court may properly “order a stay when it cannot compel the arbitration” and even though arbitration must take place beyond the jurisdiction of the Court.

This pronouncement relies heavily on dicta from the 1934 Supreme Court decision in *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*,¹¹⁹ a section 3 case without international elements which effectively severed sections 3 and 4 and allowed section 3 to flourish.¹²⁰ That this view of section 4 is more than dicta, however, can be seen from the virtual absence of cases in which section 4 has been applied to compel foreign arbitration.¹²¹

116. Representative cases involving multi-national aspects include: *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568 (2d Cir. 1968); *Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce*, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966); *In re Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961); *Cia. Panamena Maritime San Gerassimo, S.A. v. J.E. Hurley Lumber Co.*, 244 F.2d 286 (2d Cir. 1957); and *Farr & Co. v. Cia. Intercontinental de Navegación de Cuba*, 243 F.2d 342 (2d Cir. 1957).

Cases involving purely domestic aspects include: *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965); and *Metro Industrial Painting Corp. v. Terminal Constr. Co.*, 181 F. Supp. 130 (S.D.N.Y.), *aff'd*, 287 F.2d 382 (2d Cir. 1960).

117. 311 F. Supp. 68 (D.S.C. 1970). Earlier cases laying the basis for this distinction are found in note 84, *supra*.

118. 311 F. Supp. at 75.

119. 293 U.S. 449, 452 (1934). There the Court stated:

There is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with § 4 of the Act. . . .

There is, on the other hand, strong reason for construing the clause as permitting the federal court to order a stay even when it cannot compel arbitration.

120. See notes 85-119 and accompanying text, *supra*.

121. The writer has only found one case which may have granted a motion to compel arbitration. In *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796 (9th Cir. 1961), an action to enforce an award made by arbitrators in Montreal under a charter party apparently between two non-U.S. parties, the

The basis for this traditional view of the 1925 Act is the following language in section 4:¹²²

The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

The "hearing" involved is the court hearing to determine if the court will compel arbitration.¹²³ It has apparently been assumed that the "proceedings" referred to were the arbitration proceedings. However, section 4 taken as a whole can convey a contrary meaning, as the same section in three places indicates that the object is to order arbitration "in the manner provided for in such agreement" or "in accordance with the terms of the agreement."¹²⁴ The terms of the agreement often include the place and manner of arbitration; consequently, the section as a whole arguably should be interpreted so that a court could also compel arbitration outside of the territory of the court's jurisdiction.¹²⁵ This interpretation, however, has not been accepted by the courts, nor does it now seem likely that it will be.¹²⁶

circuit court in reciting the history of the dispute indicated that the district court of Hawaii had originally ordered the arbitration to take place in Montreal as provided for in the arbitration agreement. As there is no written opinion for the district court, it is not possible to verify the meaning of the statement. It would appear, however, that the district court may have actually granted a stay pending arbitration. If the Ninth Circuit in fact does not distinguish between compelling arbitration and granting a stay pending arbitration, it apparently is the only circuit deciding on the issue which has failed to do so.

122. 9 U.S.C. § 4 (1970).

123. That hearing is referred to in the next preceding sentence in section 4:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*.

Id. (emphasis added).

124. *Id.* See note 115, *supra*.

125. A similar analysis of section 4 can be found in Sturges & Murphy, *Some Confusing Matters Relating to Arbitration under the United States Arbitration Act*, 17 LAW & CONTEMP. PROB. 580, 621-23 (1952). There the authors resolved the internal contradictions of section 4 so that the language apparently restricting arbitration proceedings to those held within the district would be applicable "*only where the arbitration agreement does not specify another place (outside the district) where the arbitration shall be held.*" *Id.* at 622 (emphasis in original).

126. There are several reasons such an interpretation is not now likely. First, in the ordinary case involving arbitration in the United States there is less need for that interpretation, as it ordinarily is possible to bring the suit in the district where the arbitration would take place. Second, where foreign arbitration is involved, it is only when the Convention or a bilateral FCN treaty does not apply that the 1925 Act alone will be the sole applicable law in the federal courts. Third, when the Act is the sole applicable law, it is neither certain that in the ordinary course the award which follows the order to compel foreign arbitration can be enforced in the federal courts, nor what rules would be applied if it were enforced there. See notes 164-76 and accompanying text, *infra*.

b. Bilateral Treaties. In those cases not covered by the 1970 Act and Convention, but to which a bilateral FCN treaty is applicable,¹²⁷ a stronger case can be made to allow the federal courts to compel foreign arbitration. The typical FCN treaty provides that "contracts . . . shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories. . . ."¹²⁸ A treaty is the supreme law of the land,¹²⁹ and courts have clearly indicated in cases involving a stay of proceedings that FCN treaty provisions provide one basis for the federal courts to give effect to the parties' contractual intent to hold arbitration abroad.¹³⁰ Thus, if a court were to decide that, notwithstanding the treaty provisions, it could not compel arbitration abroad under an agreement to arbitrate there, that decision would violate the treaty clause by making such agreements unenforceable only because of the place of arbitration.

However, the bilateral treaties remain unsatisfactory vehicles for this purpose. First, since section 4 of the 1925 Act has been narrowly interpreted to prevent a court from compelling arbitration in another district, arguably the court's refusal to compel arbitration under a contract within the purview of a FCN treaty merely treats such arbitration agreement on a par with the rules for domestic arbitration and therefore does not violate the treaty.¹³¹ Furthermore, the bilateral treaties, like the 1925 Act, provide no assurance that the federal courts will have jurisdiction at all,¹³² nor is it certain how or whether an award rendered abroad on an order of the court can be enforced in federal court thereafter.¹³³ Consequently, the bilateral treaties provide little additional support to a party seeking to compel foreign arbitration through federal court action.

c. 1970 Act. The 1970 Act, in section 206, clearly provides au-

127. See note 73, *supra*.

128. See *DOMKE*, *supra* note 6, at 105-06. See also notes 11-13 and accompanying text, *supra*.

129. *Missouri v. Holland*, 252 U.S. 416 (1920); *Oregon Pac. Forest Prods. Corp. v. Welsh Panel Co.*, 248 F. Supp. 903 (D. Ore. 1965).

130. See notes 111-13 and accompanying text, *supra*.

131. This argument, however, ignores the fact that in a domestic arbitration, there always is one district court which can compel arbitration, while no such U.S. forum would exist to compel foreign arbitration. See note 126, *supra*.

132. See notes 46-51 and accompanying text, *supra*.

133. See note 126, *supra*, and notes 177-83 and accompanying text, *infra*.

thority for a federal court to compel arbitration in a foreign country.¹³⁴ Section 206 is one of the most significant aspects of the 1970 Act and a major breakthrough in international commercial arbitration. Coupled with section 203, granting original jurisdiction to the federal courts,¹³⁵ and section 205, allowing removal to the federal courts,¹³⁶ it provides a needed certainty that an aggrieved party wishing to enforce its arbitration agreement either in the United States or in a foreign country will have reasonable opportunity to do so.

The language of section 206 ("a court . . . may direct that arbitration be held")¹³⁷ was inserted intentionally to distinguish between the permissive nature of granting a motion to compel arbitration under the 1970 Act and the mandatory nature of granting of similar motion under section 4 of the 1925 Act.¹³⁸ However, it is not clear how successful this attempt will be, for the terms of the Convention itself may require an interpretation that a motion must be granted. First, the Convention in mandatory language indicates that each country shall "recognize an agreement in writing . . . to submit to arbitration. . . ."¹³⁹

134. 9 U.S.C.A. § 206 (Supp. 1971); *see* note 81, *supra*.

It should be reiterated that the 1970 Act does not extend to arbitration in countries not parties to the Convention. As to these situations, the limitations of section 4 of the 1925 Act remain fully applicable. *See* notes 72-73 and accompanying text, *supra*. The impact of extending section 206 to arbitration in the United States, however, should *not* be underestimated. *See* notes 70-72 and accompanying text, *supra*. It will now be possible to compel arbitration in the United States but outside the federal court's district in a number of cases involving both United States or foreign defendants. This extension should benefit an aggrieved party having difficulty obtaining service of process over a potential defendant who would ordinarily be able to evade service from the court in the district where the arbitration would take place. Query whether a similar modification of the 1925 Act to cover purely domestic arbitration would not be a significant step forward.

135. 9 U.S.C.A. § 203 (Supp. 1971); *see* note 78, *supra*.

136. 9 U.S.C.A. § 205 (Supp. 1971); *see* note 80, *supra*.

137. 9 U.S.C.A. § 206 (Supp. 1971).

138. *See* Letter from H.G. Torbert, Jr., Acting Secretary of State for Congressional Relations, to Representative John W. McCormack, Dec. 3, 1969, in H.R. REP. No. 1181, 91st Cong., 2d Sess. (1970):

Section 106 [*sic*], permits a court to direct that arbitration be held at the place provided for in the arbitration agreement. 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.

Compare 9 U.S.C.A. § 206 (Supp. 1971): "A court . . . may direct that arbitration be held in accordance with the agreement. . . ." *with* 9 U.S.C. § 4 (1970): "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration. . . ."

139. Convention art. II(1).

and that "the court . . . shall, at the request of one of the parties, refer the parties to arbitration. . . ."140 It then provides exceptions where the court finds that the "agreement is null and void, inoperative, or incapable of being performed."¹⁴¹ Article III of the Convention requires that conditions placed upon recognition and enforcement of foreign arbitral awards not be more onerous than those imposed on domestic awards.¹⁴² Thus, if the provisions of Article III apply to the enforcement of arbitration agreements as part of the recognition and enforcement of arbitral awards, it would appear that this distinction between section 4 and section 206 cannot be sustained.¹⁴³ Second, section 4 itself is mandatory only after certain preliminary determinations have been made.¹⁴⁴ The permissive language in section 206 may mean no more than that the court need not compel foreign arbitration unless and until it has considered the issues mentioned in Article II of the Convention and in section 4 of the 1925 Act. Considering that the 1970 Act draws upon the 1925 Act provisions not inconsistent with the 1970 Act or the Convention,¹⁴⁵ there is a rational basis for engrafting most of the section 4 provisions onto the 1970 Act, excluding, of course, any limitation as to the location of the arbitration.

Whether or not the bulk of section 4 of the 1925 Act is directly applicable to a motion to compel arbitration under section 206 of the 1970 Act, the rules developed for judicial interpretation of section 4 still remain relevant to foreign arbitration, and it can be expected that the courts will use them as a starting point for analysis under section 206. In construing section 4 the courts have weighed many of the same factors important to a decision to stay proceedings pending arbitration.¹⁴⁶ Under both sections 3 and 4, the courts have had an opportunity to grapple with such questions as when an agreement to arbitrate has been formed, what issues are arbitrable, when arbitration

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

141. *Id.*

142. *Id.* art. III.

143. See notes 67-69 and accompanying text, *supra*. The Department of State in its analysis of the Convention appears to admit the validity of the analysis which would consider the provisions of Article II subject to the limitations and provisions referring to recognition and enforcement of arbitration. See MESSAGE FROM THE PRESIDENT TRANSMITTING THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, 90th Cong., 2d Sess. 18-19 (1968).

144. 9 U.S.C. § 4 (1970). See note 115, *supra*.

145. 9 U.S.C.A. § 208 (Supp. 1971); see note 75 and accompanying text, *supra*.

146. See notes 91-108 and accompanying text, *supra*.

should be prevented due to fraud, or when one side should be precluded from invoking the arbitration clause due to its own conduct subsequent to the formation of the contract. The federal courts generally treat these issues in a similar manner under both sections, and the cases frequently cite past decisions without differentiating between those involving a stay of proceedings and those involving a motion to compel arbitration.¹⁴⁷ However, frequently the examination of these issues under section 4 has, if anything, been more specific than in section 3 cases. One reason for this more minute examination is the requirement in section 4 that the court must determine that there is no dispute as to the making of the contract. If such a dispute exists, section 4 requires the court to resolve it through a trial procedure before an order compelling arbitration can be issued. Section 4 also requires the court, when compelling arbitration, to do so in accordance with the terms of the agreement.¹⁴⁸

When deciding whether to compel arbitration, the court will consider whether a valid arbitration clause exists and whether a given dispute is arbitrable. This examination frequently includes deciding which individual issues are to be submitted to the arbitrators. Thus, in *Pan American Tankers Corp. v. Republic of Viet Nam*¹⁴⁹ involving a dispute between a New York plaintiff and an arm of the Vietnam government acting in a commercial capacity, the court ordered defendant to present evidence related to the claim that it was not a party to the agreement and had never agreed to arbitrate disputes under it in New York. The court indicated:¹⁵⁰

If either of these contentions is, in fact, being advanced, a new and independent issue will have been raised under § 4. . . . In that event, the Court must proceed "summarily to the trial of that issue."

Similarly in *El Hoss Engineering & Transport Co. v. American Independent Oil Co.*,¹⁵¹ involving a dispute between a Lebanese plaintiff

147. For example, the leading cases of *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *appeal dismissed*, 364 U.S. 801 (1960), and *Kulkundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942), both of which involved a stay of proceedings motion, have been widely cited to support decisions under both sections 3 and 4.

148. 9 U.S.C. § 4 (1970). See note 115, *supra*.

149. 296 F. Supp. 361 (S.D.N.Y. 1969).

150. *Id.* at 367.

151. 289 F.2d 346 (2d Cir. 1960), *cert. denied*, 368 U.S. 837 (1961), *rev'g* 183 F. Supp. 394 (S.D.N.Y. 1960).

seeking to compel arbitration and a United States defendant, the circuit court found that the arbitration clause and the whole contract were ineffective without plaintiff's fulfillment of certain conditions precedent, and remanded the case for a trial on the issue of fulfillment of the conditions, with the decision on the motion to compel arbitration to abide the outcome. Likewise, in *Necchi v. Necchi Sewing Machine Sales Corp.*,¹⁵² the circuit court indicated that the question of the arbitrability of specific issues was for the courts, and then determined that only two out of the nine issues submitted fell within the scope of the arbitration clause.

The question of fraud in the inducement also is a matter with which the court concerns itself in deciding whether to compel arbitration. It appears that the analysis utilized in a section 3 action is directly applicable to a section 4 case,¹⁵³ especially since *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*¹⁵⁴ is used as a starting point for analysis. For example, in the leading case of *In re Kinoshita & Co.*,¹⁵⁵ the court in dicta followed *Robert Lawrence* and considered the arbitration clause as separable from the main contract, indicating that under the standard American Arbitration Association clause this determination would be sufficient to leave the issue to the arbitrators.¹⁵⁶ The Supreme Court's acceptance of the *Robert Lawrence* rationale in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*¹⁵⁷ would also appear to extend to a motion to compel arbitration.¹⁵⁸

The issues of waiver and laches are frequently raised in an action to compel arbitration. In contrast to rules applied in section 3 cases, a court may find that conduct inconsistent with a right to arbitration, standing alone, constitutes waiver of a right to compel arbitration.¹⁵⁹

152. 348 F.2d 693 (2d Cir. 1965), *cert. denied*, 383 U.S. 909 (1966). See discussion at notes 97-98, *supra*.

153. See notes 99-104 and accompanying text, *supra*.

154. 271 F.2d 402 (2d Cir. 1959), *appeal dismissed*, 364 U.S. 801 (1960).

155. 287 F.2d 951 (2d Cir. 1961).

156. *Id.* at 953. Cf. *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965), in which the court, relying heavily upon *Robert Lawrence*, decided that both the issue of fraud and that of waiver could be entrusted to the arbitrators in a section 4 proceeding.

157. 388 U.S. 395 (1967). See notes 101-02 and accompanying text, *supra*.

158. *Prima Paint* was a section 3 case, but the issue in that case was framed in terms which clearly covered both sections 3 and 4 situations, and the analysis used appeared not to be limited to a section 3 situation.

159. *Compare Tsakalotos Navigation Corp. v. Sonaco, Sociedad Internacional de Comercio, S.A.*, 259 F. Supp. 210 (S.D.N.Y. 1966), a section 4 case where the court indicated inconsistent court action usually acts as a waiver to a right to arbitrate, *with*

However, the Second Circuit may have mooted the distinction by its view that laches or waiver can be an arbitrable issue in a proceeding to compel arbitration.¹⁶⁰

Section 4 proceedings include a safeguard not normally available in stay of proceedings cases—the right to appeal from a decision to compel arbitration.¹⁶¹ The rationale for granting an appeal was explained in *Krauss Brothers Lumber Co. v. Louis Bossert & Sons, Inc.*, where the court stated:¹⁶²

So far as the arbitration proceeding itself is concerned, the last deliberate action of the court is the appointment of the arbitrators, who thereupon take over the controversy and dispose of it. Their disposition is not, properly speaking, reviewed by the court, in spite of possible disturbances under sections 10 and 11. It seems to us, therefore, that the decree is final and appealable.

The above language remains good law today.¹⁶³

In sum, the procedures available under section 4 of the 1925 Act are generally consistent with the 1970 Act and Convention and can reasonably be applied to foreign arbitration agreements under the 1970 Act, assuming that the post-arbitral considerations would make such an application feasible. As will be noted in the following section, it is precisely in the area of post-arbitral enforcement that the Convention and the 1970 Act make the most significant change in the existing law—a change which should go far toward the goal of establishing a reasonable method of settling multi-national commercial disputes enforceable in the United States and foreign countries.

Carcich v. Rederi A/B Nordie, 389 F.2d 692 (2d Cir. 1967), a section 3 case where the court emphasized that not inconsistency but the presence or absence of prejudice is determinative of waiver. See notes 105-106 and accompanying text, *supra*.

160. Compare *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 364 (2d Cir. 1965) ("If the parties would entrust to arbitrators the defense of fraud in the inducement, they would also entrust to arbitrators the defense of waiver.") with *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568, 572 (2d Cir. 1968) ("On a motion to compel arbitration a District Court may consider only claims of laches which relate to issues which the court must decide."). See notes 107-08 and accompanying text, *supra*.

161. A stay of judicial proceedings is not generally considered to be an appealable decision. See note 87, *supra*.

162. 62 F.2d 1004, 1005 (2d Cir. 1933).

163. See, e.g., *Chatham Shipping Co. v. Fertex S.S. Corp.*, 352 F.2d 291 (2d Cir. 1965); *Farr & Co. v. Cia. Intercontinental de Navegación de Cuba, S.A.*, 243 F.2d 342 (2d Cir. 1957).

C. ENFORCEMENT OF ARBITRATION AWARDS IN THE FEDERAL COURTS

1. Under the 1925 Act

Several years ago Martin Domke observed that “no arbitration statute in the United States . . . include[s] any provision for the enforcement of foreign arbitration awards.”¹⁶⁴ Except perhaps where the arbitration agreement specifies that a federal court will render judgment on a foreign award, the language of section 9 of the 1925 Act provides no basis for enforcement. It reads in part:¹⁶⁵

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then . . . any party to the arbitration may apply to the court so specified for an order confirming the award. . . . If no court is specified . . . then such application may be made to the United States court in and for the district within which such award was made.

Consequently, where the federal courts have in fact enforced foreign arbitration awards, the basis for their action must be authority other than the precise language of section 9 of the Act.¹⁶⁶

164. Domke, *Enforcement of Foreign Arbitral Awards in the United States*, 13 *ARB. J.* 91, 92 (1958). See also Kawakami & Henderson, *supra* note 6, at 570-73.

165. 9 U.S.C. § 9 (1970). It would be a rare arbitration clause that specified arbitration in one country and enforcement in any other; consequently this provision in effect precludes the Act's application to the enforcement of all foreign arbitration awards, except those covered by section 8. See note 166, *infra*.

166. Section 8 appears to provide such a basis for enforcement of the award in an admiralty action in rem. It reads:

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure . . . and the court . . . shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. § 8 (1970). However use of that clause as a basis for judicial enforcement of a foreign arbitration award has been greeted with judicial skepticism. See *Konstantinidis v. S.S. Tarsus*, 248 F. Supp. 280 (S.D.N.Y. 1965), *aff'd*, 354 F.2d 240 (2d Cir. 1965), where the court in dicta expressed doubt that section 8 provided any basis for it to enforce an award rendered in Turkey, indicating:

Literally [§ 8 of the Act] confers upon the court the power to confirm regardless of where the arbitration takes place. . . . [H]owever, [this means that] § 8 seems inconsistent with many other sections of the Act which provide that it is the court of the district in which the arbitration takes place that has power to subpoena witnesses (9 U.S.C. § 7), confirm the award (9 U.S.C. § 9), vacate it (9 U.S.C. § 10), or modify it (9 U.S.C. § 11).

Id. at 287-88. Furthermore, section 8 clearly cannot be used to cover the non-admiralty case.

A look at the cases confirms the anomalous position of the foreign commercial arbitration award. Although there are several reported cases where domestic arbitration awards have been enforced in the federal courts¹⁶⁷ and where the federal courts have granted a stay of proceedings pending arbitration abroad,¹⁶⁸ there are very few cases reported where the federal courts have enforced a foreign arbitration award.¹⁶⁹ Furthermore, the cases give no indication that a court would be more willing to enforce a foreign arbitration award rendered after the court has issued a stay of proceedings pending arbitration or an order compelling arbitration than to enforce an award based upon foreign arbitration previously unconnected with the federal courts.¹⁷⁰

Regardless of the treatment given arbitration awards under the 1925 Act, a prevailing party in foreign arbitration has not been entirely without a federal court remedy. He could frequently obtain a foreign judgment based on the award and then sue on that judgment in the federal court in the same manner as with any other foreign judgment. Even under the traditional doctrine of *Hilton v. Guyot*,¹⁷¹ such a judgment would, as a minimum, be given conclusive effect in the federal courts, at least where there was reciprocity between the United States and the country of judgment.¹⁷² Moreover, there is reason to believe that a long-term effect of the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*¹⁷³ may be to narrow the

167. See, e.g., *Saxis Steamship Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577 (2d Cir. 1967); *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp.*, 312 F.2d 299 (2d Cir.), cert. denied, 373 U.S. 949 (1963); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805 (2d Cir. 1960); *Murray Oil Prods. Co. v. Mitsui & Co.*, 146 F.2d 381 (2d Cir. 1944).

168. See note 88, *supra*.

169. The author only found two cases from the past 15 years where a foreign arbitration award had been enforced in the federal courts—*Standard Magnesium Corp. v. Fuchs*, 251 F.2d 455 (10th Cir. 1957), and *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796 (9th Cir. 1961). The latter case commenced with an admiralty action when Saguenay seized defendant's ship in Hawaii and passed through arbitration in Montreal to an action in the district court in Hawaii for enforcement of the award. Thus, the result could be explainable under section 8 of the 1925 Act. See note 166, *supra*.

170. This conclusion is based primarily upon a negative implication: There are few cases involving foreign arbitration awards. None of these makes the above distinction. Therefore, foreign awards based upon arbitration following a stay of proceedings or order to compel arbitration do not enjoy a preferred status before the court..

171. 159 U.S. 113 (1895).

172. *Id.*; *Svenska Handelsbanken v. Carlson*, 258 F. Supp. 448 (D. Mass. 1966); *Leo Feist, Inc. v. Debmar Publ. Co.*, 232 F. Supp. 623 (E.D. Pa. 1964).

173. 376 U.S. 398 (1964).

gap between recognition of foreign country judgments and those of other American courts.¹⁷⁴

The treatment of prevailing parties in foreign arbitration is inadequate when compared to enforcement of domestic arbitration under the 1925 Act.¹⁷⁵ Furthermore, should the court be willing to enforce a foreign arbitral award, the safeguards of sections 10 and 11 of the 1925 Act, providing a statutory basis for vacating, modifying, or correcting an award, appear to be unavailable to the party defending against its enforcement.¹⁷⁶ Consequently, under the 1925 Act the machinery for dealing with foreign arbitral awards has been highly deficient. Barring a reversal of judicial attitudes concerning the Act, it is highly unlikely that the 1925 Act by itself can be turned into a reliable instrument for giving effect to foreign arbitral awards not covered by the Convention and the 1970 Act. Since the Convention would now validate awards coming within its purview, there is far less reason for so applying the 1925 Act to those cases not covered by treaty than there would have been in the past, and such a judicial extension may well be dismissed from serious consideration.

2. *Under Bilateral Treaties*

When a bilateral FCN treaty with a clause covering arbitration is applicable, there are valid reasons for the federal courts to recognize and enforce arbitral awards so covered, notwithstanding that they do not come within the purview of the Convention and the 1970 Act.¹⁷⁷ Where a bilateral treaty applies, both countries are pledged to enforce an award rendered in favor of a national of the other country to the

174. The Court limited *Hilton* to a fairly narrow area, indicating: Although *Hilton v. Guyot* . . . contains some broad language about the relationship of reciprocity to comity, the case in fact imposed a requirement of reciprocity only in regard to conclusiveness of judgments, and even then only in limited circumstances.

Id. at 411. Justice White, dissenting, seemed to fear that the Act of State doctrine as espoused by the majority opinion ran counter to and undermined the *Hilton* view of the validity of foreign judgments. *Id.* at 448-50. *Cf. Svenska Handelsbanken v. Carlson*, 258 F. Supp. 448 (D. Mass. 1966).

175. See 9 U.S.C. §§ 9-11 (1970).

176. 9 U.S.C. §§ 10-11 (1970). Both sections begin as follows:

In either of the following cases the United States court in and for the district wherein the award was made may make an order . . . upon the application of any party to the arbitration. . . .

177. See notes 11-13, 24-25 and accompanying text, *supra*.

same extent as if it had been rendered in its own country.¹⁷⁸ Since these treaties are based on reciprocal enforcement, their application to the recognition and enforcement of foreign awards should work to the long-term benefit of nationals of both countries and promote international commerce. A problem exists, however, in converting the treaty rights into a viable enforcement mechanism. It seems unlikely that the courts will declare that awards rendered abroad under bilateral FCN treaties are covered by the 1925 Act;¹⁷⁹ it is unrealistic to think the courts would fashion a remedy based on the existence of the treaty provisions alone;¹⁸⁰ and clearly the 1970 Act does not have any effect on these bilateral treaty rights.¹⁸¹ However, these treaty provisions could be given vitality by a simple amendment to the 1970 Act placing bilateral treaty rights on a par with those derived from the Convention.¹⁸² Considering the long-standing United States policy to promote FCN treaties, there is much merit in making this change in order not to penalize those nations which supported our bilateral ef-

178. See note 12 and accompanying text, *supra*.

179. To do so would strain the language of sections 9-11 of the 1925 Act. See notes 165 and 176 and accompanying text, *supra*. Furthermore, the 1970 Act was felt necessary because it was considered that the 1925 Act could not be used as a vehicle for enforcing such treaty rights. See note 55 and accompanying text, *supra*.

180. Such a solution would first pose a jurisdictional problem, with little likelihood of federal court jurisdiction, except through diversity. Cf. notes 46-51 and accompanying text, *supra*. Furthermore, this solution would involve the development of a form of federal common law likely to clash with the *Erie* doctrine, unless saved by application of an extension of the *Clearfield Trust* doctrine. See *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

181. The Convention clearly states that it does not "affect the validity of . . . bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States. . . ." Convention art. VII(1). The scope of the 1970 Act is limited to arbitration covered by the Convention as acceded to by the United States. See notes 58-73 and accompanying text, *supra*.

182. Such an amendment could add an additional section to 9 U.S.C., reading as follows:

§ 209. For purposes of this Chapter, an arbitral award which falls within the terms of the arbitral provision of a bilateral FCN treaty between the United States and another country and which is not within the terms of the Convention as acceded to by the United States solely because the site of the arbitration was in a country not a party to the Convention will be deemed to be an award covered by this Chapter; PROVIDED, however, that the grounds for vacating, modifying, or correcting an award will be those listed in sections 10 and 11 of Chapter 1 of this Title; and PROVIDED further that in applying section 208 of this Title, Chapter 1 will be deemed to apply to the extent not in conflict with this Chapter or the terms of the bilateral treaty under which enforcement of the award is sought.

forts but which for various reasons find themselves unable to join the multi-lateral Convention system.¹⁸³

3. *Under the Convention and 1970 Act*

In contrast to the situation created under the 1925 Act and the bilateral treaties, where the Convention applies there is a clear-cut path to recognition of foreign arbitral awards. Section 207 of the 1970 Act provides the statutory basis for federal court enforcement and recognition of the award upon the application of any party¹⁸⁴ within three years of the time the award is made.¹⁸⁵ Section 207 indicates the court *shall* confirm the awards “unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”¹⁸⁶

Although the meshing of the Convention and the statute in enforcing arbitral awards is complex, it would appear that a defendant

183. The following hypothetical examples indicate the problems posed through failure to apply the 1970 Act to arbitral awards covered by the FCN treaties:

1. Arbitration between American and French parties: If held in France, it will be covered by the 1970 Act and Convention as well as our FCN treaty with France. If held in Belgium or England, it would not be covered by the 1970 Act, but only by the FCN treaty with France, as neither Belgium nor the United Kingdom is a party to the Convention.

2. Arbitration between American and Belgian parties: If held in Belgium it would only be covered by our FCN treaty with Belgium. It would still be covered by the FCN treaty with Belgium even if held in England. If held in France, it will be covered by the 1970 Act and Convention as well as the FCN treaty with Belgium.

3. Arbitration between American and British parties: If held in England, it would not be covered by the 1970 Act and Convention or by a FCN treaty. If held in Belgium, it would still not be covered. However, if held in France, it would come under the provisions of the 1970 Act and Convention.

It is submitted that there is no policy justification either under the Convention or the FCN treaties for the differing results in the above situations. Amending the 1970 Act to apply to the FCN treaties would insure that the arbitration is covered by that act so long as the arbitration is held in a country adhering to the Convention or the other party is from a country with which we have a FCN treaty. Only arbitration not covered by either the Convention or a FCN treaty would fall outside the 1970 Act. See the proposed amendment in note 182, *supra*.

184. 9 U.S.C.A. § 207 (Supp. 1971). See note 81 and accompanying text, *supra*. The language of that section makes it clear that there is no nationality requirement as to either party. Both could be United States parties or foreign parties so long as the court has jurisdiction under sections 202 and 203. See notes 58-72 and 78 and accompanying text, *supra*.

185. Compare 9 U.S.C. § 9 (1970), which sets up a one year limitation.

186. 9 U.S.C.A. § 207 (Supp. 1971). Compare the language of 9 U.S.C.A. § 206 (Supp. 1971) regarding an order compelling arbitration: “A court . . . may direct that arbitration be held. . . .” (emphasis added).

against whom an award is being enforced has a network of protection which includes and exceeds that available when a purely domestic award is being enforced. In enforcing domestic arbitration awards, the courts will not ordinarily set aside an award on the basis of errors of fact or law unless there has been a manifest disregard for the law.¹⁸⁷ However, an award can be upset for a number of reasons, including situations in which the arbitrator exceeded his power¹⁸⁸ or was partial or corrupt.¹⁸⁹ The Supreme Court has recently taken a very strict view of the problem of bias or partiality in arbitration proceedings. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*¹⁹⁰ it set aside an arbitration award under section 10(b) of the 1925 Act, relating to bias of arbitrators, even though it found specifically that apart from an undisclosed business relationship with one of the parties there was no evidence whatsoever of possible fraud or bias. It goes without saying that partiality as disclosed in the record also would be a valid basis for reversal in a proper case.¹⁹¹

It appears that under the Convention and the 1970 Act the safeguards built into the domestic award scheme would survive and be

187. The "manifest disregard" principle was definitively set out (albeit in dicta) in *Wilko v. Swan*, 346 U.S. 427, 436 (1953). It has been repeated in many arbitration award cases. See, e.g., *San Martine Compania de Navegacion, S.A. v. Saguinay Terminals Ltd.*, 293 F.2d 796 (9th Cir. 1961); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805 (2d Cir.), cert. denied, 363 U.S. 843 (1960); *Sociedad Armadora Aristomenis Panama S.A. v. Tri-coast S.S. Co.*, 184 F. Supp. 738 (S.D.N.Y. 1960); *Parsons & Whittemore Inc. v. Rederiaktiebolaget Nordstjernan*, 141 F. Supp. 220 (S.D.N.Y. 1956). The rationale for the limited review concept was well expressed in *Amicizia*:

[T]he court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated. . . . The statutory provisions . . . do not authorize its setting aside on the grounds of erroneous finding of fact or of misinterpretation of law.

274 F.2d at 808.

188. 9 U.S.C. § 10(d) (1970). See, e.g., *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp.*, 312 F.2d 299 (2d Cir.), cert. denied, 373 U.S. 949 (1963), where the court refused to uphold an award against one party, indicating that the arbitrators had exceeded their power "in determining the obligations of a corporation which was clearly not a party to the arbitration . . ." 312 F.2d at 300.

189. 9 U.S.C. § 10(b) (1970). See, e.g., *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968); *Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577 (2d Cir. 1967).

190. 393 U.S. 145 (1968).

191. See *Saxis S.S. Co. v. Multifacs Int'l Traders Inc.*, 375 F.2d 577, 582 (2d Cir. 1967), where the court said:

When a claim of partiality is made, the court is under an obligation to scan the record to see if it demonstrates "evident partiality" on the part of the arbitrators . . . the burden of proof on this issue . . . rests upon the party making the claim.

augmented by the new provisions. The 1970 Act looks to the Convention for grounds for non-enforcement of an arbitral award.¹⁹² Article V of the Convention would allow the court to refuse to enforce an award both at the request of a party and on its own motion.¹⁹³ Grounds for so doing appear broad enough to subsume the domestic doctrine developed around sections 9, 10, and 11 of the 1925 Act, so that these sections (absent their geographical limitations) would be brought into the 1970 Act's scheme via section 208.¹⁹⁴

Under the Convention, when one party seeks to set aside an arbitration award, a court may do so on several grounds. First, it may do so where the parties lacked capacity to agree to arbitrate.¹⁹⁵ Second, it may set aside the award where the agreement to arbitrate is invalid under the law to which the parties subjected it or under the law where the arbitration took place if no other law was specified.¹⁹⁶ A third ground is that a party was not given proper notice or was otherwise unable to present its case. This section is broad enough to cover not only due process issues, but also all or most of section 10(c) of the 1925 Act.¹⁹⁷ A fourth ground is that the arbitrators exceeded the scope of the submission to them and that the decisions beyond the scope cannot be separated out. This section would subsume the provi-

192. See text at note 186, *supra*.

193. Convention art. V. For a more detailed discussion of these provisions, see Contini, *supra* note 18, at 298-304, and Quigley, *supra* note 18, at 1066-71.

194. 9 U.S.C.A. § 208 (Supp. 1971). That section indicates that all parts of the 1925 Act apply to proceedings under the 1970 Act unless they conflict with the Convention as ratified. Note, however, that there is only limited power to modify awards under the Convention and no equivalent to section 11 of the 1925 Act, which would modify an award in several particulars. The new scheme is generally limited to enforcement of the entire award, deferral, or refusal to enforce. Compare 9 U.S.C.A. § 207 (Supp. 1971) with Convention art. V, and 9 U.S.C. § 11 (1970). See note 198 and accompanying text. *infra*.

195. Convention art. V(1)(a). The Convention indicates that the issue of capacity is to be determined under the law applicable to the parties. Quigley feels this language was intended to allow the enforcing state to determine under its conflicts rules which law should govern the capacity issue. Quigley, *supra* note 18, at 1067.

196. Convention art. V(1)(a). Contini indicates the intention here was to avoid having the forum decide the applicable law under its ordinary choice of law rules. Contini, *supra* note 18, at 300.

197. Convention art. V(1)(b). See 9 U.S.C. § 10(c) (1970):

In either of the following cases the . . . court . . . may make an order vacating the award upon the application of any party . . .

....

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

Cf. Quigley, *supra* note 18, at 1067.

sions of section 10(d) of the 1925 Act.¹⁹⁸ Fifth, the court may set aside the award where the arbitration authority was improperly constituted.¹⁹⁹ Sixth, a court may set the award aside where it is not yet binding or had been set aside by competent authority where rendered.²⁰⁰ In addition, the court on its own motion can decide to refuse to enforce or recognize an award in two situations: 1) when the subject matter is not capable of settlement by arbitration under United States law, and 2) when recognition and enforcement would be contrary to public policy.²⁰¹ It is through these latter provisions that the expanded protection is available to a defendant fighting local enforcement of a foreign award. These sections are broad enough not only to subsume the parts of section 10 of the 1925 Act dealing with awards procured by corruption, fraud, or undue means, or where the arbitrators evidenced partiality or corruption,²⁰² but also to permit the development of other doctrines which are necessary to insure adequate protection to defendants.

Thus, the scheme developed for enforcement of foreign arbitration awards provides the plaintiff with access to United States courts for enforcement of his foreign arbitral award and also provides the defendant with a network of protection which not only includes that available for enforcement of domestic awards, but is flexible enough to insure that the legitimate interests of the United States will not be subverted by mechanical approval of unjust arbitral awards. However, in a system based upon reciprocity any tendency to take an overly narrow view of foreign arbitral awards will be balanced by a desire to

198. Convention art. V(1)(c). See 9 U.S.C. § 10(d) (1970):

In either of the following cases the . . . court . . . may make an order vacating the award upon the application of any party . . .

....
(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

This provision of the Convention is an exception to the rule under section 207 that the courts cannot modify an award under the Convention. See note 194, *supra*.

199. Convention art. V(1)(d). An improperly constituted arbitral authority would be one not conforming to the agreement, or, absent agreement, contrary to the law of the situs of the arbitration. *Id.*

200. Convention art. V(1)(e). There is considerable confusion regarding the status of an award subject to possible review in the state where rendered, and interpretation of this provision may be difficult. See Contini, *supra* note 18, at 303-04, and Quigley, *supra* note 18, at 1069-70.

201. Convention art. V(2).

202. 9 U.S.C. §§ 10(a) and (b) (1970). See notes 187-91 and accompanying text, *supra*.

obtain the widest acceptance of America's awards among the courts of other signatory states, which also have the public policy loophole available to them.

CONCLUSION

By ending 50 years of hostility toward a broad approach to enforcement of international commercial arbitration and acceding to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the United States has at last recognized the need for a less parochial attitude toward the resolution of multi-national business disputes. The federal court system will play a dominant role in many international commercial arbitration disputes. The 1970 enabling statute bypasses several complicated issues surrounding the status of the 1925 Federal Arbitration Act in the relationship between state and federal jurisdiction. Where the 1970 Act applies a federal court has original jurisdiction to resolve questions related to the enforcement of arbitral agreements, the power to compel arbitration in a foreign country, and a statutory basis for enforcement and recognition of an award properly rendered by a foreign arbitration tribunal covered by the Convention.

The new federal court role is not an unlimited one. Primarily due to the reservations with which the United States acceded to the Convention, there is a vast area of international commercial arbitration *not* covered by the new scheme. The rules guiding this area have not changed, and all the problems and limitations of the pre-existing system remain. Major interpretation problems develop in delineating the border between arbitration covered by the Convention and 1970 Act and arbitration covered by pre-existing law. The consequences of falling on one side or the other make it important to determine exactly when the new scheme will apply. In particular, the United States' accession to the Convention excludes from its application arbitration taking place within the territory of countries which are not parties to the Convention.

The new framework is not unilateral. By making the reservations in accession, the United States has insured not only that it will give effect to arbitration in certain foreign countries, but that these countries, guided by similar rules governing recognition and enforcement of arbitration, will also give effect to arbitration taking place in this

country. The result should work to the advantage of both American and foreign businessmen. For example, an American award rendered in New York can enforce it under the Convention in Tokyo, Paris, Hamburg or Moscow. Fear of unfair treatment from foreign arbitrators or that our own interests will be violated is largely alleviated by the safeguards built into the Convention, including the enforcing court's right to refuse recognition of an award where contrary to the public policy of the forum.

Particular note should be taken of the continued vitality of the 1925 Act, not only where the Convention does not apply, but also under the new system. Much of the 1925 Act is specifically incorporated into the new scheme via section 208 of the 1970 Act, and much of the rest remains persuasive authority. In particular, aside from jurisdictional limitations imposed by the 1925 Act, most of the body of law applicable to pre-arbitral adjudication and most, if not all, of the defenses to post-arbitral enforcement remain valid under the new framework.

Over the past 25 years this country has built up a network of bilateral FCN treaties which include provisions for enforcement of arbitration. Under the new multi-lateral approach, the status of these treaty rights remains in limbo. The Convention leaves them undisturbed, and the 1970 Act does not reach them. A simple amendment to the 1970 Act could clarify this problem and provide these treaty rights with a statutory backup comparable to that provided rights arising under the Convention. Since the bilateral rights are based on nationality of the parties and not the place of arbitration, and because several of the FCN treaties are with countries not parties to the Convention, these treaties will play an important role in the total international commercial arbitration framework and should not be shunted aside by the new policy shift.

Whether the Convention and 1970 Act will play the prominent role expected by those who long advocated United States support of the multi-lateral approach remains to be seen. Nevertheless, a potentially important tool for resolving private international disputes is now available. It is up to those daily involved in international transactions to test it and put it to good use.

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