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Nonrecognition of Post-Bankruptcy Arbitration: *Victrix Steamship Co. v. Salen Dry Cargo A.B.*

I. Facts

Victrix Steamship Company, a Panamanian corporation, and Salen Dry Cargo A.B., a Swedish corporation, entered into an agreement in August 1984 that provided for Salen's charter of a ship from Victrix. Four months later Salen declared bankruptcy in Sweden and informed Victrix that it would not make further payments under the charter agreement.

Seeking to recover damages resulting from Salen's default, Victrix commenced arbitration proceedings in London as provided in the agreement with Salen. Salen, however, refused to participate in the arbitration and advised Victrix to file any claims with the bankruptcy estate in Sweden. Victrix followed this advice and filed a claim with the bankruptcy estate, but also pursued other avenues for recovery of its damages.

Victrix instituted an in personam admiralty action in the District Court for the Southern District of New York[1] claiming breach of the charter agreement by Salen. Victrix initiated the action by attaching Salen's New York accounts.[2] Victrix also filed an action in the New York Supreme Court, claiming breach of contract, and received an order of attachment from the state court with respect to the same accounts already attached in the federal admiralty action.[3]

Subsequently, Victrix's arbitrator, acting alone[4] in London, awarded $302,531.96 to Victrix. Shortly thereafter, the High Court, Queen's Bench

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1. Victrix S.S. Co., v. Salen Dry Cargo A.B., 65 Bankr. 466 (S.D.N.Y. 1986).
2. Brown Brothers Harriman & Co. possessed $234,291.49 of Salen's funds. *Id.* at 467.
3. *Id.*
4. Salen was notified of the arbitration hearing, but neither appointed an arbitrator nor participated in the arbitration. *Id.*

Division, entered judgment on the award.[5] Thus, Victrix possessed the London arbitration award and the British judgment against Salen.

Meanwhile, in the United States, Salen successfully removed the state action to federal court where it was consolidated with the federal admiralty action.[6] In the federal district court, Victrix moved to have the London arbitration award confirmed and the British judgment enforced. Salen sought to have the attachment vacated by arguing that the Swedish bankruptcy proceeding, already underway, stayed other creditor actions.[7]

The district court vacated the attachment, but did not rule on the enforceability of the London arbitration award and the British judgment, preferring to defer such decision to the Swedish bankruptcy court.[8] Victrix sought reversal of the district court's ruling in the Second Circuit. *Held, affirmed:* Given the general principles of comity as well as specific provisions of the Bankruptcy Code, federal courts will recognize foreign bankruptcy proceedings, provided foreign laws comport with due process and fairly treat claims of local U.S. creditors, and disallow enforcement of foreign arbitration awards and judgments obtained subsequent to such bankruptcy proceedings. *Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987).

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5. "[T]he High Court, Queen's Bench Division, entered judgment on the award under Section 26 of the British Arbitration Act, 1950." Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709, 711 (2d Cir. 1987).

6. The case was removed pursuant to 9 U.S.C. § 205 (1982), which provides:

> 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 or the defendants 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 that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Victrix, 825 F.2d at 711 n.1.

7. The parties agreed to adjourn their motions pending the Second Circuit's decision in Cunard S.S. Co. v. Salen Reefer Serv. AB, 773 F.2d 452 (2d Cir. 1985), a case concerning the same Swedish bankruptcy proceeding and related issues. *Victrix*, 825 F.2d at 712.

8. The district court based its holding on the Second Circuit's decision in *Cunard*. In *Cunard* the Second Circuit held that the trial court had been correct in granting comity to the Swedish bankruptcy and, therefore, correct in staying the creditor actions. The court vacated an attachment of Salen's assets in the United States, thus refusing to grant comity to the London arbitration proceeding, which was provided for in the parties' contract. *See infra* text accompanying notes 59–60.

The *Cunard* case was very similar to the *Victrix* case except for the fact that in *Victrix* an English judgment had been entered against Salen, while in *Cunard* the action was to compel arbitration. Victrix S.S. Co. v. Salen Dry Cargo A.B., 65 Bankr. 466, 468 (S.D.N.Y. 1986).

II. Legal Background

In coming to its conclusion in *Victrix*, the Second Circuit relied on the doctrine of international comity, as well as Section 304 of the United States Bankruptcy Code, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the court's prior reasoning in *Cunard Steamship Co. v. Salen Reefer Services B.A.*[9] The following discussion looks at each of these principles individually to provide a background for the Second Circuit's decision in *Victrix*.

A. International Comity

The doctrine of comity governs the recognition of foreign judgments in the federal courts.[10] Comity is the recognition that one nation extends within its own territory to the legislative, executive, or judicial acts of another.[11] It is not a rule of law, but one of practice, convenience, and expediency.[12] Comity is a nation's expression of understanding that demonstrates due regard for international cooperation and to the rights of individuals protected by its own laws.[13] Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.[14]

The U.S. Supreme Court established the standard governing determination of the extent and scope of comity in the 1895 opinion of *Hilton v. Guyot*.[15] When an action is brought in a court of this country by a citizen of a foreign country against an American citizen, and the foreign judgment has been rendered by a court of competent jurisdiction, the foreign judgment should be upheld and enforced, unless the defendant shows some special ground for impeaching the judgment.[16] Grounds for impeachment include showing that the judgment was affected by fraud or prejudice, or that under the supplemental principles of international law the judgment should not be given full credit and effect.[17]

9. 773 F.2d 452 (2d Cir. 1985).
10. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113 (1895); Ritchie v. McMullen, 159 U.S. 235 (1895) (comity required that a Canadian judgment be treated as conclusive when sued on in a federal court).
11. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir.), *cert. denied*, 405 U.S. 1017 (1972).
12. 453 F.2d at 440.
13. *Id.*
14. *Id.*
15. 159 U.S. 113 (1895).
16. *Id.* at 205.
17. *Id.*

In determining whether "a court of competent jurisdiction" rendered the foreign judgment, several things must be considered, all of which flow from the constitutional concept of due process.[18] Due process requires that for comity to be extended, the foreign court must abide by fundamental standards of procedural fairness.[19] Thus, the foreign court must have valid jurisdiction over the cause and parties, there must be due allegations, proof and the opportunity to defend, the court's proceedings must follow the course of a civilized jurisprudence, and, finally, such proceedings and results must be stated in a clear and formal record.[20] If these criteria are met, comity should be extended to recognize the foreign judgment.

B. Recognition of Foreign Bankruptcy Proceedings

It has long been established that foreign trustees in bankruptcy are allowed, as a matter of comity, to assert the rights of a foreign bankrupt in American courts.[21] The extension of comity to foreign bankruptcy proceedings, by staying or enjoining the commencement or continuation of an action in the United States against a debtor or its property, enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner.[22]

Section 304 of the Bankruptcy Reform Act of 1978[23] deals with the complex and important problems surrounding the legal effect U.S. courts will give to foreign bankruptcy proceedings.[24] In order to administer assets

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18. The Second Circuit, in *Cunard*, illustrated that the concept of due process is not solely an American doctrine by reference to a case from early 19th century England:

> In Buchanan v. Rucker, 9 East 192, 103 Eng. Rep. 546 (K.B. 1808), a seminal case in private international law, the plaintiff attempted to enforce in England a foreign judgment which was obtained after process was effected by having the summons nailed to the courthouse door on the Island of Tobago. The defendant had no notice of the summons and, indeed, had never set foot on the Island of Tobago. Refusing to enforce the judgment, Lord Ellenborough illustrated the practical limits of the comity doctrine with the following oft-quoted queries: "Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world sumbit to such an assumed jurisdiction?" *Id.* at 194, 103 Eng. Rep. at 547.

Cunard, 773 F.2d at 457.

19. In accordance with the language of *Hilton v. Guyot*, the essential elements of a judgment creditor's case for recognition under the common law should be: (1) a final judgment; (2) subject matter jurisdiction; (3) jurisdiction over the parties or the res; (4) timely and proper notice of the proceedings; (5) an opportunity to present a defense to an unbiased tribunal; and (6) regular proceedings conducted according to a system of civilized jurisprudence. American courts generally scrutinize the last four elements under the due process clause. Bishop, *Obtaining Recognition and Enforcement of Foreign-Country Judgments in Texas*, 45 Tex. B.J. 287, 290 (1982).

20. *See* Hilton v. Guyot, 159 U.S. 113 (1895).

21. *Cunard*, 773 F.2d at 458.

22. *Id.*

23. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101–700 (1982).

24. *Cunard*, 773 F.2d at 454; *see, e.g.*, Honsberger, *Conflict of Laws and the Bankruptcy Reform Act of 1978*, 30 Case W. Res. L. Rev. 631 (1980); Keech, *Problems in the Liquidation*

in the United States and to prevent dismemberment by local creditors of assets located here, the representative of a foreign bankrupt may commence a section 304 proceeding, rather than a full bankruptcy case in the United States.[25] Section 304 governs the situation in which foreign bankruptcy proceedings have been instituted, and creditors are attempting to seize a debtor's assets located in the United States by commencing separate proceedings unconnected to the foreign country bankruptcy.[26] Section 304 provides that American courts may enjoin actions, enjoin the enforcement of judgments against the debtor or property of the debtor, or order other appropriate relief.[27]

The guidelines provided, however, are not intended to be rigid rules.[28] They are meant to give a court maximum flexibility in addressing each particular case.[29] Principles of international comity require that the court be permitted to consider all the circumstances of each case in handing down the appropriate orders.[30] In fact, Congress subsequently amended section 304(c) before passage to expressly direct U.S. courts to consider comity when evaluating a petition under section 304.[31] The drafters of section 304 did not intend to overrule established principles of international comity in foreign bankruptcy cases.[32] Rather, section 304 evinces an express attempt to combine provisions of the Bankruptcy Code with generally accepted principles of comity.[33]

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and Reorganization of International Steamship Companies in Bankruptcy, 59 TUL. L. REV. 1239 (1985).

25. *Cunard*, 773 F.2d at 454–55; *see* S. REP. No. 989, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5821; H. REP. No. 595, 95th Cong., 2d Sess. 324–25, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6281.

26. *Cunard*, 773 F.2d at 455.

27. 11 U.S.C. § 304(b) (1982).

28. *See* sources cited *supra* note 25.

29. *Id.*

30. The text of § 304(c) specifically sets out principles to be considered by the court in fashioning decisions in this area:

> (c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—
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> (1) just treatment of all holders of claims against or interest in such estate;
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> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
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> (3) prevention of preferential or fraudulent disposition of property of such estate;
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> (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
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> (5) *comity;* and
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> (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 304(c)(1982) (emphasis added).

31. *Cunard*, 773 F.2d at 456; *see, e.g., supra* note 30; Clarkson Co. v. Shaheen, 544 F.2d 624, 629 (2d Cir. 1976); *In re* Colorado Corp., 531 F.2d 463, 468 (10th Cir. 1976).

32. *Cunard*, 773 F.2d at 456.

33. *Id.*

C. Recognition of Foreign Arbitral Proceedings

1. *Historical Treatment of Arbitral Agreements in the United States*

Traditionally, English courts held that irrevocable arbitration agreements divested the courts of jurisdiction and thus they refused to enforce such agreements.[34] American courts adopted this view as part of the common law until the adoption of the U.S. Arbitration Act in 1924.[35] The Arbitration Act, reversing centuries of judicial hostility toward arbitration agreements, allows parties to avoid the costliness and delays of litigation and place arbitration agreements upon the same footing as other contracts.[36] Accordingly, the Act provides that an arbitration agreement shall be valid, irrevocable, and enforceable, absent grounds existing at law or in equity for the revocation of the contract.[37]

2. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[38]

On June 10, 1958, a special conference of the United Nations Economic and Social Council adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention).[39] The Convention provides that each contracting state shall recognize a written agreement in which the parties agree to submit to arbitration any or all differences arising between them with regard to a defined legal relationship.[40]

In 1970, the United States consented to the treaty, and Congress implemented the Convention by passing chapter 2 of the U.S. Arbitration Act.[41] The Convention was enacted pursuant to the treaty power provided in the Constitution; therefore,[42] the Convention is the supreme law of the land and any laws inconsistent with it must be set aside.[43] Section 201

34. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974).
35. *Id.*
36. *Id.* at 510–11.
37. *Id.*
38. 9 U.S.C. § 201 (1982).
39. *Scherk*, 417 U.S. at 520 n.15.
40. 9 U.S.C.A. § 201 annot., art. II (West Supp. 1987).
41. *Scherk*, 417 U.S. at 420 n.15.
42. "The Convention was negotiated pursuant to the Constitution's Treaty power. Congress then adopted enabling legislation to make the Convention the highest law of the land. As such, the Convention must be enforced according to its terms over all prior inconsistent rules of law." Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1145 (5th Cir. 1985).
43. The Fifth Circuit unequivocally stated in *Sedco* that:

> This Convention is the *supreme law of the land*. By its ratification in 1970, the United States obligated itself to enforce arbitration agreements between foreign and domestic contracting parties. Any law or decision prior in time to this express undertaking must be construed as consistent with the Convention or set aside by it.

Sedco, 767 F.2d at 1148 (emphasis added).

provides unequivocally that the Convention shall be enforced in U.S. courts in accordance with chapter 2.[44]

The principal reasons the United States adopted and implemented the Convention reflect two main goals of the Convention: first, the Convention seeks to encourage the recognition and enforcement of commercial arbitration agreements in international contracts; second, the Convention attempts to harmonize the standards by which agreements to arbitrate are recognized and by which arbitral awards are enforced in the signatory countries.[45] The Convention does not require automatic recognition of arbitration agreements in the member countries. Article V of the Convention, however, provides the only grounds on which the recognition and enforcement of arbitral awards may be refused.[46] Thus, the overwhelming intent of the Convention is to promote the inclusion of arbitral provisions in international contracts through the assurance of their equitable enforcement in the signatory countries.[47]

The Second Circuit's decision in *Fotochrome, Inc. v. Copal Co.*[48] provides an example of the narrow application of the article V exceptions. In that case a creditor, Copal, made a claim in Fotochrome's U.S. bankruptcy proceeding based upon an arbitration award and judgment it had obtained in Japan.[49] The arbitration had begun prior to Fotochrome's filing of bankruptcy. Copal obtained the award and judgment, however, after the filing and before the discharge in bankruptcy.[50] Thus, *Fotochrome* differs factually from the present case in two respects. First, unlike Victrix in the present case,[51] Copal did not seek confirmation of the Japanese judgment in either a state or a federal court. Rather, Copal filed a proof of claim in the U.S. bankruptcy proceeding based upon the arbitral award. Second, in *Fotochrome* Copal commenced arbitration prior to the debtor's filing of bankruptcy. Conversely, in *Victrix* the arbitration did not commence until after the debtor's filing.

Regardless of the factual differences, however, *Fotochrome* is instructive in its application of the public policy exception to enforcement of arbitration awards under the Convention.[52] The Second Circuit noted that

44. 9 U.S.C. § 201 (1982).

45. *Scherk*, 417 U.S. at 520 n.15.

46. Grounds for nonrecognition include: incapacity; lack of proper notice; fraud; lack of final award; and public policy. *See* 9 U.S.C.A. § 201 annot., art. V (West Supp. 1987).

47. *See Scherk*, 417 U.S. at 520 n.15 (case cited).

48. 517 F.2d 512 (2d Cir. 1975).

49. *Id.* at 515.

50. *Id.* at 514–15.

51. *See supra* notes 1–3 and accompanying text.

52. The "public policy" exception to the enforcement of foreign arbitral awards is embodied in article V, § 2(b), of the Convention. It provides that "[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . enforcement of the award would be

the recognition and enforcement of a foreign arbitral award under the Convention may be refused when the court in which enforcement is sought finds that such recognition or enforcement would be contrary to its country's public policy.[53] The Second Circuit then approached the question of whether bankruptcy provided the type of public policy exception allowed by the Convention.[54] The court found that neither the Convention nor the arbitration statutes indicated what should be done in the event of bankruptcy of a party to an arbitration.[55] No reference discussed whether the "public policy" requiring equal treatment of creditors in bankruptcy is the kind of "public policy" that allows nonrecognition of foreign arbitral awards.[56] Thus, the court expressly stated that it did not rule on whether bankruptcy was or was not a "public policy" exception within article V.[57] The court concluded, however, that the Convention permitted attack on foreign awards only on grounds expressed in the Convention. In addition, the court held that article V exceptions must be construed narrowly and applied only when enforcement would violate the forum state's most basic notions of morality and justice.[58] Nevertheless, because the court decided that Copal must first obtain a judgment on the award in a U.S. court before making a proof of claim in bankruptcy,[59] the court concluded the enforceability of the award need not be determined.[60]

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contrary to the public policy of that country." 9 U.S.C. § 201 annot., art. V, § 2(b) (West Supp. 1987).

53. *Fotochrome*, 517 F.2d at 516.

54. *Id.*

55. *Id.* at 517.

56. *Id.* at 516.

57. The court stated: "[T]his appeal can be decided without the necessity of determining whether the Bankruptcy Act involves a 'public policy' which is contrary to enforcement of arbitral awards under the Convention." *Id.*

58. This view of the Convention and the "public policy" exception has subsequently been reiterated by the Second Circuit in Waterside Ocean Navigation Co. v. International Navigation Ltd., 737 F.2d 150 (2d Cir. 1984). There the court stated:

> [The public policy] defense must be construed in light of the overriding purpose of the Convention, which is "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. . . ." Thus, this court has unequivocally stated that the public policy defense should be construed narrowly. It should apply only where enforcement would violate our "most basic notions of morality and justice."

Id. at 152 (citations omitted).

59. The court determined that the Japanese arbitral award and judgment did not establish a "judgment" under § 63a(5) of the Bankruptcy Act, 11 U.S.C. § 103a(5) (1982). Thus, the court directed Copal to seek a judgment based upon the award in the American courts before it would be allowed to file a proof of claim in the American bankruptcy action. *Fotochrome*, 517 F.2d at 519.

60. Since Fotochrome would be allowed to assert its defenses under article V of the Convention, in Copal's subsequent action to obtain a judgment in the American courts, the Second Circuit reasoned that the question of enforceability of the award was not before the court. *Fotochrome*, 517 F.2d at 519.

Two points relevant to the Second Circuit's decision in *Victrix* may be deduced from *Fotochrome*. First, enforcement of foreign arbitral awards falling under the Convention may only be challenged on the narrow grounds for nonrecognition provided by article V. Second, the issue of whether bankruptcy proceedings, filed by the losing arbitral party, fall under the article V "public policy" exception to award recognition, remained an open question in the Second Circuit.

D. CUNARD STEAMSHIP CO. V. SALEN REEFER SERVICES AB[61]

In *Cunard* the Second Circuit dealt with litigation, similar to that in the present case, arising out of the same Swedish bankruptcy. Cunard commenced its action against Salen in the District Court for the Southern District of New York by obtaining an order of attachment against assets of Salen held by the United Brands Company. Cunard obtained the attachment under the Arbitration Act in an attempt to force the arbitration in London of an alleged debt between itself and Salen.[62] Subsequently, Salen brought a motion to have the attachment vacated due to the stay on creditors' actions imposed by the Swedish bankruptcy court.[63] The district court granted the motion.[64]

The Second Circuit sustained the district court's ruling, holding that the grant of comity to the Swedish bankruptcy court was proper; therefore, the attachment of Salen's assets in the United States must necessarily be vacated.[65] The court based its reasoning on the doctrine of international comity.[66] Noting that the extension of comity to a foreign court requires that such court recognize fundamental standards of procedural fairness,[67] the Second Circuit reasoned that this requirement had been satisfied by proof of the similarities between Swedish bankruptcy law and the U.S. Bankruptcy Code.[68] Thus, the court held that the laws and public policy

61. 773 F.2d 452 (2d Cir. 1985).

62. "Cunard based its claim on a contract of charter between Cunard and Salen. The contract provides for the arbitration in London of any dispute arising under the contract." *Id.*

63. Salen had filed for bankruptcy in Sweden about a month prior to the commencement of Cunard's action to compel arbitration.

64. Cunard S.S. Co. v. Salen Reefer Servs., 49 Bankr. 614 (S.D.N.Y. 1985).

65. *Cunard,* 773 F.2d at 461.

66. *See supra* notes 10–20 and accompanying text.

67. *Cunard,* 773 F.2d at 457.

68. In finding the bankruptcy laws of the two countries similar, the Second Circuit stated:

> The principles of Swedish bankruptcy law are not dissimilar to those of our Bankruptcy Code. Swedish law requires that upon declaration of bankruptcy, an interim trustee or administrator be appointed and notice sent to all creditors. A meeting of creditors is scheduled and legal actions by creditors are stayed. In addition, the court has the power to issue orders preventing the debtor from dissipating or absconding with assets.

Id. (citing European Insolvency Guide, Sweden § 3.1).

of the United States would in no way be violated by an extension of comity to the Swedish bankruptcy.[69] In fact, the Second Circuit reasoned that the United States' interest in the fair and efficient distribution of assets in bankruptcy would be substantially furthered by deference to the Swedish proceeding, which sought to achieve the same result.[70]

In addressing the enforcement of the contractual arbitration provision, the Second Circuit noted that strong public policy existed to support the enforcement of such provisions,[71] but under the circumstances the interests preserved in the Swedish bankruptcy court outweighed such policy.[72] Pointing out that Cunard had sought to compel the arbitration after the institution of the Swedish bankruptcy, the court characterized the action as an attempt to maintain a "captive fund" to secure any arbitral award it might receive.[73] The court refused to assist Cunard in this attempt, stating that no compelling reason existed to allow a general creditor, whose claim was subject to arbitration, to gain preference over other creditors.[74] Thus, the court stated that "[t]he road to equity is not a race course for the swiftest"[75] and, consequently, held that the district court did not err in vacating the attachment and that arbitration would not be compelled.[76]

III. The Court's Analysis—*Victrix Steamship Co. v. Salen Dry Cargo A.B.*

In *Victrix* the Second Circuit had to determine which of two strong policies relating to international comity should outweigh the other: (1) the policy supporting the recognition of foreign arbitration awards and judgments,[77] or (2) the policy extending comity to foreign bankruptcy proceedings.[78] In analyzing this problem, the court stated that under the principle of comity and the provisions of section 304 of the Bankruptcy Code, federal courts will recognize foreign bankruptcy proceedings provided the foreign laws comport with due process and fairly treat claims

69. *Id.*

70. The U.S. public policy of facilitating the orderly and systematic distribution of a bankrupt's assets would best be served by deferring to the comparable bankruptcy laws of Sweden. *Id.*

71. *See supra* note 58; Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–20 (1974).

72. *See supra* note 68 and accompanying text.

73. *Cunard*, 773 F.2d at 459.

74. *Id.*

75. *Id.* (quoting Israel-British Bank v. FDIC, 536 F.2d 509, 513 (2d Cir.), *cert. denied*, 429 U.S. 978 (1976)).

76. *Id.*

77. *See supra* text accompanying notes 38–60.

78. *See supra* text accompanying notes 21–33.

of local U.S. creditors.[79] Therefore, the court had to look at the Swedish bankruptcy laws and ensure that they met such criteria.[80] The court noted that it had scrutinized the Swedish bankruptcy law in *Cunard* and found it to be sufficiently similar to the federal Bankruptcy Code to warrant an extension of comity.[81]

Having established the validity of the Swedish bankruptcy proceeding, the court then had to determine the effect of the London arbitral award and judgment on such proceeding.[82] The court reasoned that despite the normal deference accorded a foreign arbitral award and judgment, such award and judgment could not be viewed in isolation from the particular facts of the case.[83] In light of Salen's bankruptcy, the enforcement of the arbitral award and judgment would conflict with the strong public policy of ensuring equitable and orderly distribution of local assets of a foreign bankrupt.[84] Therefore, the London arbitral award and judgment would not be enforced by attachment of assets in the United States[85] when those assets were already involved in a recognized foreign bankruptcy proceeding.[86]

In further support of its decision, the court noted that Victrix's rights under the Convention would not be impaired as a result of its decision.[87] Sweden is a signatory to the Convention, and the Swedish court could be expected to accord Victrix whatever rights to which it is entitled under the Convention.[88] Victrix would enjoy the same protections and rights as Salen's other creditors, since Victrix had already asserted its claim in the Swedish bankruptcy proceeding.[89] Thus, the court extended comity to

79. *Victrix*, 825 F.2d at 714. Note that the court also analyzed the case under New York state law. The New York law in this situation, however, also relied on the doctrine of comity, and thus led the court to the same conclusion as that reached under the application of the federal law. Therefore, the court did not feel compelled to answer the choice of law question, since the results were the same. *Id.* at 713.

80. The defendant, Salen, filed for bankruptcy in Sweden.

81. *See supra* text accompanying note 66.

82. Victrix had obtained an arbitration award and judgment in England subsequent to Salen's filing of bankruptcy. *See supra* notes 8–9 and accompanying text.

83. *Victrix*, 825 F.2d at 714.

84. *Id.*

85. The Second Circuit applied reasoning similar to that applied in *Cunard*. *See supra* notes 69–73 and accompanying text. The court stated:

> Any distribution of Salen's limited assets is likely to affect other creditors, not parties to the proceeding, who obeyed the Swedish court's stay and sought relief only in the bankruptcy proceeding. By attaching Salen's local assets after its declaration of bankruptcy, Victrix attempted to secure a "captive fund" to satisfy the anticipated arbitration award. We will not aid Victrix's efforts to evade the writ of the Swedish bankruptcy court.

Victrix, 825 F.2d at 714 (citation omitted).

86. *See supra* note 79 and accompanying text.

87. *Victrix*, 825 F.2d at 715.

88. *Id.*

89. *Id.*

the Swedish bankruptcy and deferred decision on the effect of the arbitration award and judgment to the Swedish court.[90]

IV. Practical Implications

The Second Circuit expressly stated that the Convention governed the claim for enforcement of the arbitration award.[91] It failed, however, to follow this premise in its analysis of the case.[92] The court held that *Cunard* required comity to be extended to the Swedish bankruptcy proceeding.[93] Thus, the court concluded, neither the arbitral award nor the judgment could be enforced because such enforcement would violate public policy promoting the equitable and orderly distribution of local assets of a foreign bankrupt.[94]

The court's opinion stated the Convention governed the case,[95] but the court failed to articulate how it maneuvered around the mandatory requirement of foreign arbitral award enforcement established by the Convention. *Sedco Inc. v. Petroleos Mexicanos Mexican National Oil Co.*[96] established that the Convention is the supreme law of the land.[97] *Fotochrome,* an opinion by this same court, established that one could challenge the enforcement of foreign awards only on grounds set forth in the Convention, particularly article V.[98] In this opinion, however, the Second Circuit concluded only that comity extended to the Swedish bankruptcy, and the foreign award could not be enforced because such action would violate public policy.[99] The court never stated how these circumstances resulted in the refusal to enforce the arbitral award as provided by the Convention.[100]

Thus, in the future the practitioner is left to speculate on the analysis supporting the court's decision.[101] One must conclude that the circum-

90. *Id.* at 716.

91. The Second Circuit stated:

> With respect to the claim for enforcement of the arbitration award, it is clear that federal law applies. The Convention is a treaty of the United States governing the enforcement of foreign arbitration awards. It sets forth a procedure for enforcement of foreign arbitration awards to which all signatories are expected to abide. The obligations of the United States under the Convention would be undermined if they were not determined according to a uniform body of federal law. . . . [T]he *Convention . . . leaves the entire subject of enforcement of foreign arbitration awards governed by its terms.*

Victrix, 825 F.2d at 712–13 (emphasis added).

92. *See infra* notes 97–100 and accompanying text.

93. *See supra* notes 79–81 and accompanying text.

94. *See supra* notes 83–86 and accompanying text.

95. *See supra* note 91.

96. 767 F.2d 1140 (5th Cir. 1985).

97. *See supra* notes 42–43 and accompanying text.

98. *See supra* note 58 and accompanying text.

99. *See supra* notes 83–86 and accompanying text.

100. The Second Circuit, in *Victrix,* did not attempt to justify its refusal to recognize the foreign arbitral award on grounds provided in the Convention.

101. This is a particularly difficult situation where a foreign practitioner, unfamiliar with the American common law system, is attempting to understand how the Convention is

stances of this case, as viewed by the Second Circuit, fall under one of the exceptions to enforcement of arbitral awards provided by the Convention. This assumption is necessary because, to assume otherwise, would force one to conclude that the United States has violated its Treaty obligations with approximately sixty-five nations.[102]

In surveying the available exceptions under the Convention, it becomes apparent that the one most resembling the present set of facts is the "public policy" exception found in article V.[103] This exception allows a court to refuse enforcement of an award when such enforcement would be contrary to the public policy of its country.[104] The Second Circuit based its conclusion on the assertion that enforcement of the arbitration award and judgment would "conflict with the public policy of ensuring equitable and orderly distribution of local assets of a foreign bankrupt."[105] Given this statement, it is clear that if the court sought to justify its action under the Convention, its reasoning would have fallen within the "public policy" exception of article V. Thus, the Second Circuit has arguably held by implication that the "public policy" defense in article V may be applied in the event of bankruptcy of one of the arbitral parties.

The above analysis raises a question as to the scope of the new public policy exception created by the court. Given the lack of explanation by the court on this point, one could argue for a broad exception that would allow nonenforcement whenever one of the parties to the arbitration filed for bankruptcy, regardless of time or circumstance. Two factors, however, suggest a much narrower view. First, *Fotochrome* stood for the proposition that the public policy limitation on the Convention is to be construed narrowly and applied only where enforcement would violate the forum state's most basic notions of morality and justice.[106] Second, the circumstances of this action, when taken together, support the result; therefore, the new exception to the Convention arguably should be closely limited to the facts of this case.

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applied in the United States courts. A plausible reading of *Victrix*, looking only at the court's use of the statutory law, allows the conclusion that the court has completely disregarded the operation of the Convention.

102. In prior decisions, the courts established that the Convention is the *supreme law of the land, see, e.g., supra* note 43, and any refusal to enforce foreign arbitral awards must be supported by the narrow exceptions found in the Convention itself. Thus, if one does not assume that the court in *Victrix* was applying an exception provided by the Convention, the only alternative is that the court did not allow the Convention to govern the enforcement of the award. If that is the case, the court has violated the mandatory character of the Convention and also related treaties, for a violation of the Convention is a violation of the treaties.

103. *See supra* note 52.

104. *Id.*

105. *Victrix*, 825 F.2d at 714.

106. *See supra* note 58 and accompanying text.

The relevant circumstances in *Victrix* include the following: the arbitration was commenced subsequent to the filing for bankruptcy; Victrix was not a U.S. corporation; Sweden's bankruptcy law is similar to that of the United States; and Sweden, a member of the Convention and also host to the bankruptcy, could be expected to uphold Victrix's rights under the Convention.[107] Arguably, if any of these circumstances are not present, a court may come to a different conclusion in future litigation. This question remains to be answered by future decisions on the issue.

V. Conclusion

The result reached by the Second Circuit is just and reasonable. The courts, in the interest of respecting all creditors' rights, will not condone a race to the assets of the foreign bankrupt. Accordingly, the Second Circuit has created an article V "public policy" exception in the case of bankruptcy by one of the arbitral parties. The extent to which the decision provides precedent for a bankrupt seeking to prevent enforcement of a foreign arbitral award, however, remains to be determined. Nevertheless, the strong policy supporting the recognition and enforcement of arbitration awards obtained under the Convention suggests that the holding will be closely limited to the facts of this particular case.

107. All the facts support the court's conclusion. *Victrix*, 825 F.2d at 709.