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The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

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This paper deals with a situation that is, fortunately, rare in the arbitration of private international business disputes. Most parties to contracts providing for arbitration do not try to circumvent their agreements to arbitrate when an actual dispute arises, and accept the results of the arbitration to which they have agreed. But some do not, and sometimes judicial assistance is necessary to make private arbitration work. Obviously the availability of such assistance is an essential underpinning for effective arbitration.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards is a major effort in this area of making private agreements to arbitrate stick internationally. As those familiar with its history know, the Convention—while a short one—deals with a complex subject that has in the past been subjected to a good deal of controversy. Much could be said about the subject, but there is room here only for a relatively superficial survey of the Convention and its relationship to United States law.

It is now just a little more than ten years since the Convention was formulated at the UN Conference on Commercial Arbitration in New York in May and June of 1958. The United States—because of the then current Bricker Amendment problems, and also because of a now somewhat antiquated distrust of arbitration—was an unenthusiastic and

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largely inactive participant in the Conference. The United States delegation recommended against signature of the Convention.[1]

Interested private groups took a different view. The ABA International Law Section's Committee on International Unification of Private Law made a detailed study and recommended accession to the Convention accompanied by changes in the Federal Arbitration Act of 1925 to implement accession.[2] In September 1960, the ABA House of Delegates adopted a resolution putting forth this recommendation. In 1967, the American Arbitration Association passed a resolution also urging United States accession, and also collected an impressive list of individual supporters. In due course, these urgings and those of others in the private sector had their effect, and on April 24, 1968 the President, at the request of the Secretary of State, transmitted the Convention to the Senate for advice and consent to United States accession.[3]

The Senate has not yet acted, and the matter may have to be carried over to the next Congress, but Senate approval is expected. Implementing legislation, which is considered necessary before the United States can actually accede to the Convention, will be submitted to the Congress after the Senate consents to the Convention. There is good reason to expect that in 1969 the United States will join the 34 present members of the Convention, which include France, Germany, Japan, the Netherlands, the Philippines, India, the U.S.S.R. and much of Eastern Europe.[4] United States accession could be expected to encourage other nations to join.

The Convention is not a panacea, and it creates substantial problems of both interpretation in itself and application to United States law. Nonetheless, the Convention—if it is widely ratified—will significantly benefit international commerce by permitting the parties to international business transactions to provide more efficient and predictable means for the settlement of disputes and, to a very

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[1] The members of the U.S. delegation were W.T.M. Beale, Jr. (Chairman), Edmund F. Becker, John J. Czyzak, Seymour M. Finger, and Charles H. Sullivan.
The problems that two members of the delegation saw are reflected in Czyzak & Sullivan, *American Arbitration Law and the U.N. Convention,* 13 ARB. J. 197 (1958).

[2] The Committee's report was published in mimeographed form in May 1960.

[3] Executive E. 90th Cong., 2d Sess.

[4] The other members are Austria, Bulgaria, Cambodia, Central African Republic, Ceylon, Czechoslovakia, Ecuador, Finland, Ghana, Greece, Hungary, Israel, Madagascar, Morocco, Niger, Norway, Poland, Romania, Switzerland, Tanzania, Thailand, Trinidad and Tobago, Tunisia, United Arab Republic, and Yugoslavia.

significant extent, to agree upon the substantive and procedural law that will govern them.

I. The Provisions Of The Convention [5]

1. Coverage

The title "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" is actually a misnomer, since the Convention covers not only the enforcement of arbitral awards but also the very important matter of giving effect to agreements to arbitrate existing and future disputes. To some extent, the latter aspect of the Convention was an afterthought, a fact that shows up in the problems mentioned below about the scope and meaning of the provisions on agreements to arbitrate.

At least as to the enforcement of awards, the scope of the Convention is relatively clear: Article I states that the Convention applies to "awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." The Convention applies only to arbitration to which the parties have agreed, and not to any compulsory arbitration.

This broad coverage is subject to limitations. Article I(3) provides that a State may "declare that it will apply the Convention to . . . awards made only in the territory of another Contracting State." The President proposes to make this reservation for the United States, and the major existing adherents have also done so. Article I(3) permits a state also to "declare that it will apply the Convention only to . . . legal relationships . . . considered as commercial" under its law, and the United States, again like a substantial number of the other parties, also proposes to make this declaration. Finally, Article XIV provides for general reciprocity: a State can invoke the Convention only to the extent that it is bound by it. The final act of the Conference (but not the Convention itself) states that no further reservations are to be permitted; although the legal efficacy of this prohibition is dubious, no state has yet made additional reservations, and the United States does not propose to do so.

The limitation of coverage to matters considered "commercial" under the laws of the various states creates a potential element of

[5] For another survey of the Convention's provisions and related problems, see 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 (1961).

uncertainty; in particular, it creates a problem in drafting implementing legislation for the United States, discussed below.

2. *Enforcement of Awards*

Article III of the Convention requires contracting states to enforce foreign arbitral awards that come within the scope of Article I "in accordance with (their) . . . rules of procedure." Article IV makes it explicit that in order to obtain enforcement, the victor in the arbitration has only the burden of introducing authentic copies of the award and the agreement under which it was made, translated if necessary. He need not prove that the award is final or binding where it was made, or make any other affirmative showing of any kind. Enforcement will be denied only if the losing party meets the burden of showing defects in the award or in the processes leading up to it, or if the court finds that the dispute was not arbitrable, or that enforcement would violate its public policy.

Articles III and IV thus require the contracting states to have reasonably straightforward procedures for enforcement. The procedure in each country need not be identical with that applied to domestic awards, but may not be "substantially more onerous." On the other hand, it is not enough merely not to discriminate against foreign awards. It is clear that the references to the enforcing forum's own "rules of procedure" and to its "public policy" do not give it any basis to nullify the basic obligation to have straightforward procedures for enforcement of foreign awards.

3. *Grounds for Refusal of Enforcement*

As has been pointed out, a jurisdiction can refuse enforcement of an award on limited public policy grounds, or if it considers the subject matter involved not arbitrable. Otherwise, enforcement can be refused if the opponent of enforcement pleads and proves any one of the following:

(1) That the agreement to arbitrate is invalid. This determination is generally made under the law by which the parties have agreed to be governed; or, if they have not agreed, under the law of the place where the award was made. Here, the parties are given explicit autonomy to choose the law by which their agreement is to be judged, and only the question of the parties' capacity to contract need be decided pursuant to normal conflict of laws rules.

(2) That the matter decided in the arbitration goes beyond the scope of what the parties agreed to arbitrate. No choice of law principle is stated here, but it seems clear that a court should allow the parties' choice of law to govern, as with respect to the related matter of the validity of the arbitration clause itself.

(3) That the arbitration was not conducted properly. Two subsections of Article V cover this: one relating to notice of the arbitration and the ability of the losing party to present his case, and the other relating to the composition of the arbitral body and the procedure followed by it. As to the second, the agreement of the parties governs; they may thus either refer to the law of a chosen jurisdiction or make up their own rules of procedure if they are not illegal under the otherwise applicable law. If there is no agreement on this subject, the law of the place of arbitration governs. The first subsection, relating to notice and ability to participate, states no choice of law rules. The parties should be able to make their own rules on this as on other matters of procedure, subject to the public policy of any enforcing jurisdiction as to basic due process, but the applicable rule remains a question for the courts.

(4) The last in this category of defenses to be pleaded and proved by the opponent is the defense that the award "has not yet become binding on the parties," or has been set aside either in the country where the award was made *or* in the country under whose law the arbitration took place. Article VI further provides that if such a proceeding to set aside the award is pending in either of those other jurisdictions, the court asked to enforce the award may defer action upon the giving of proper security. The meaning of the phrase "has not yet become binding" is nowhere specified; the one thing that is clear is that it means something less than "finality" and in particular does not permit the losing party to insist on reduction of the award to judgment in the country where the award is rendered. It is likely that a provision in the agreement between the parties that any arbitral award would be binding when rendered would guard against any possible defense of this nature in an enforcement proceeding.

There is no limitation on the grounds on which the state where the award is made or the state under whose law is made (as distinguished from a third state where enforcement is sought) can set aside an award.

4. Recognition of Agreements to Arbitrate

Article II is the portion of the Convention relating to agreements to arbitrate as distinguished from awards already made. It states that

each party "shall recognize an (arbitration) agreement in writing," provided that it concerns "a subject matter capable of settlement by arbitration." It goes on to provide specifically that in any litigation concerning a matter that is covered by an arbitration agreement, a 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." This Article is not up to the standard of relative precision that characterizes the rest of the convention, in several respects:

First, the scope of the agreements covered by Article II is not clear. The statement of the scope of the Convention in Article I talks specifically of "awards" and not of agreements to arbitrate, with the exception of the provision for a reservation limiting coverage to commercial matters, which is more generally stated and appears to apply here. In fact, with the exception of the limitation to commercial matters, there seems to be no easy or sensible way to relate the coverage of this Article very precisely to the award coverage. Perhaps the best principle to be applied is that the Article covers any agreement where there is international diversity of citizenship or residence, since any such agreement could lead to an award-enforcement problem.

The second ambiguity in Article II relates to what, if anything, a state is required to do, by way of granting the "recognition" of an agreement specified in Article II(1), other than to respond to a lawsuit brought by one of the parties with a referral to arbitration, as specified in Article II(3). There is no provision that "recognition" includes specific performance in the form of a direction to arbitrate apart from a lawsuit begun on a dispute. But a party seeking enforcement of an agreement to arbitrate a dispute might begin a lawsuit on that dispute and then ask the court to refer it to arbitration under Article II(3). The apparent availability of such a rather strange procedure suggests that "recognition" should perhaps be read to include straightforward specific performance.

Finally, unlike Article V with respect to *awards,* Article II gives no guidance with respect to the law to be applied in determining the validity of the agreement sought to be enforced. In the award-enforcement context this question (except as to capacity) is decided under the law chosen by the parties. It can be hoped that courts will similarly respect the autonomy of the parties in enforcing agreements to arbitrate, but there is no ground for certainty that they will.

II. Benefits of the Convention

Assuming that the parties to an international business contract within the scope of the Convention wish the maximum freedom in agreeing on an arbitration clause that is certain to be effective, what will the regime established by a general acceptance of the United Nations Convention offer them?

First, they can be sure that if their agreement to arbitrate is valid as a contract, and covers matters that are arbitrable under the laws of the countries involved in their transactions, it will be honored in those countries, at least to the extent that the courts will decline to entertain competing litigation. There is a fair chance that any country having jurisdiction will compel a recalcitrant party to go to arbitration. With respect to such enforcement of their *agreement,* they cannot count on choosing the law that will govern, but they can be sure that they will not be confronted with outright hostility to arbitration or unduly complex procedures.

Second, the parties to the contract can go a long way toward establishing in advance the rules that will govern the arbitration itself. They can, of course, specify the substantive law that the arbitrators will follow, and no court will retry the substance of the dispute after an award is made by the arbitrators. They can choose the place of arbitration and the procedural rules to govern such matters as the composition of the arbitral panel and the manner in which the arbitration is to be conducted. They also have significant liberty to choose the law to govern any proceeding to enforce the award. The Convention does not, however, give the parties absolute freedom to make their own law: they must allow for the possibility that the capacity of the parties to contract, the scope of the matters submitted to arbitration, the arbitrability of any dispute and the basic due process of the proceeding will be assessed under its own law by any state where enforcement of the award may be sought. And the award may be refused enforcement on general public policy grounds. Thus, in agreeing upon procedure and substantive law, the parties must still give heed to the basic general principles of arbitration in each jurisdiction where enforcement of an award may be desired.

Third, the parties can be sure that any arbitration award will be readily enforced, without discrimination, in any jurisdiction where it meets the general qualifications just stated. While the Convention does not govern enforcement in the place where the award is made (assuming it is considered as "domestic" there), the parties are, of course, free to

choose a place of arbitration where domestic awards are readily enforced.

III. United States Implementation Of The Convention

The principal obstacle to ratification that the delegation to the 1958 Conference saw was a difficulty in fitting it into existing United States law. Many states do not treat arbitration agreements as enforceable, and the Federal Arbitration Act of 1925 (Title 9,U.S.C.) has somewhat limited coverage both substantively and jurisdictionally. Accordingly, it was felt in 1958 that the United States did not have an adequate legislative basis to carry out the obligations it would be undertaking in signing the Convention. Especially in the context of then existing Bricker Amendment problems, it was considered inadvisable to attempt to ratify the treaty on the basis that it would be treated as self-executing.

The government still considers that it would be inappropriate to accede to the Convention on a self-executing basis, and this association has agreed. However, the fear existing in 1958 that joining the Convention, even with appropriate federal implementing legislation, would be an excessive intrusion into matters of state concern has been largely dissipated by further development of federal arbitration law in the interim. It is now well established by such decisions as those in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.* in the Second Circuit[6] and the *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), that the Federal Act establishes as federal substantive law the proposition that agreements to arbitrate within its scope are valid, irrevocable and enforceable. *Prima Paint* also goes far toward expanding the arbitrators' jurisdiction at the expense of the courts, and thus in effect allowing the arbitrators to decide virtually all legal questions without judicial review. Thus, the federal-state problems seem less extreme now than they did previously, and judicial distrust of arbitration generally has substantially subsided. Therefore, while legislation is still considered a necessary prerequisite to United States accession, it now appears more readily acceptable.

Implementing legislation, in the form of amendments to the Federal Arbitration Act of 1925, is being prepared in the government and will be submitted to the Congress after the Senate consents to accession to the Convention.

[6] 271 F.2d 402 (2d. Cir. 1959), *cert granted*, 362 U.S. 909, *dismissed*, 364 U.S. 801 (1960).

Some Questions and Suggestions

The major effect of the legislation upon state law would be what is in effect a prohibition against state litigation of any dispute covered by the Convention that the parties have agreed to submit to arbitration. The Federal Arbitration Act provides only (in § 3) that such litigation in avoidance of arbitration cannot be conducted in the federal courts. It is contemplated that this aspect of the Convention will be implemented by a simple provision that any action begun on a dispute arbitrable under the Convention may be removed to a federal court, which will then issue the appropriate stay. Along this same line, it is also contemplated that the implementing statute would establish federal-question jurisdiction over all cases relating to rights under the Convention, without regard to jurisdictional amount, thereby eliminating the problem that the existing statute requires independent federal jurisdiction for any action to enforce an arbitration clause.

Other changes are required in the procedural provisions of the Federal Arbitration Act. With respect to enforcement of awards, section 9 of the Act provides that, unless the parties have specified an enforcing court, enforcement is available only in the district where the award was made, and must be given there unless the award has been set aside pursuant to section 10 in the district where it was made. Foreign awards have, therefore, frequently been enforceable only in common law actions, which may be somewhat cumbersome. Section 9 would be amended so as to provide that an award made abroad subject to the Convention could be enforced in any district court with appropriate jurisdiction over the person sought to be held or his property. Similarly, any such district court would be given authority to refuse enforcement —if the award is made abroad and is covered by the Convention—on any of the grounds specified in the Convention.

A further change that seems to be desirable would be an amendment of Section 4 of the Act to empower a United States court to order arbitration abroad. Section 4 as it now reads permits arbitration to be ordered only in the court's own district—which can result in a substantial departure from the parties' original desire. Although the Convention does not expressly require any such specific performance of an agreement to arbitrate, the writer thinks it should be so interpreted.

One matter that requires further consideration is the requirements of personal jurisdiction and venue that should be applied to suits to enforce foreign awards and to direct arbitration abroad. Should the

party seeking enforcement be required to sue in a jurisdiction where the defendant can be found, or should he be able to have nationwide service of process—or even possibly worldwide service if the defendant is doing business in the United States? The latter seems a desirable approach.

Finally, a major question remains as to what, if anything, should be done in the implementing legislation to tailor the scope of the Federal Arbitration Act to that of the Convention. The coverage of the Act is limited to "maritime transactions" and "contracts evidencing transactions involving commerce." The former category, in the area of international transactions, is further defined quite broadly as including "matters in foreign commerce which . . . would be embraced within admiralty jurisdiction." "Commerce" is defined as "commerce among the several States or with foreign nations," but there is an explicit exception for "contracts of employment . . . of workers."

The scope of the formula—"transaction involving commerce"—presents some problems, and its meaning has not been definitively established in the courts. In its *Prima Paint* decision in 1967, a majority of the Supreme Court rejected the argument of three dissenters that such "commerce" means only "contracts between merchants for the interstate shipment of goods," and held that it covered a consulting contract relating to the sale of a business in interstate commerce which would involve movement of its operations from one state to another. But the Court did not have to consider the further possible ramifications of "commerce," particularly in the international context. It is not yet established that "commerce" in the Act is as broad as "commerce" in the Constitution (although *Prima Paint* points strongly that way), and one cannot ignore altogether lower court decisions which have limited the Act's coverage quite stringently in both the domestic and international areas.[7] Although there is substantial contrary authority,[8] it remains true that our Act does not beyond doubt cover all transactions involved in the international business of Americans as ordinarily understood.

The decision has been definitely made that the United States should, in acceding to the Convention, make the permitted reservation limiting its application to "relationships . . . considered as commercial"

[7] *E.g.*, McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964); The Volsinio, 32 F.2d 357 (E.D.N.Y. 1929)

[8] *E.g.*, Reynolds Jamaica Mines v. La Societe Navale Caennaise, 239 F.2d 689 (4th Cir. 1956); International Refugee Organization v. Republic S.S. Corp., 93 F. Supp. 798 (D. Md. 1950).

under our national law. The President has formally transmitted the Convention to the Senate on that basis, with the explanation that the reservation "would be consistent with the policy expressed" in the Federal Arbitration Act. It would indeed be somewhat anomalous if the United States were to enforce arbitration with a foreign element significantly more broadly than it enforces domestic arbitration. The problem remains, however, of defining what is the meaning of "commercial matters" in this context under United States law.

It is the personal feeling of the writer that it would be most logical to define the United States reservation to the Convention in terms of the existing Federal Arbitration Act, with the resulting coverage including both maritime transactions and "transactions involving commerce" as defined therein. In the process, pains should be taken to make it clear that, for this purpose at least, the fact that a contract is wholly performed outside the United States does not destroy its involvement in commerce if the parties are of diverse nationalities and there is substantial contact with the United States. This could be accomplished by an explicit statement in the document effecting United States accession or as a part of the legislative history of the Senate advice and consent. It might, however, be preferable to amend the definition of "commerce" in section 1 of the Act to make this explicit there. It is certainly desirable to define from the beginning, with all feasible precision based on as much practical knowledge as is available, what the scope of the United States accession is.

There remains one further question as to the scope the Convention should have in the United States. It appears to have been understood among the draftsmen of the Convention that a state could decline to have the Convention apply to disputes between two of its own citizens. The United States in acceding, should make a statement to this effect; otherwise, two residents of the same state within the United States could probably avoid the law of their state with respect to a contract involving interstate commerce merely by providing for arbitration abroad. A treaty permitting them to do so would be an unnecessary and undesirable irritant to the states. Similarly, the arbitration of disputes even between residents of different states of the United States should probably be regarded as a domestic matter—to be governed by the general federal arbitration law unaffected by any treaty—even if international transactions are involved and they agree on arbitration abroad.

Conclusion

Although the United Nations Convention on Arbitration is a very substantial stride forward, it does not reach the end of the road as a great many people see it. It might well be desirable to go on even further in the future toward an international regime of arbitration governed more broadly by the autonomous will of the parties and less tied to national law. Perhaps also an ideal regime would cover subject matter broader than what would be encompassed in the proposed United States accession to the Convention. However, the Convention goes about as far as the United States can go, consistent with the principles of arbitration now accepted in our law. Further steps in international recognition of arbitral agreements and awards can be taken only in harmony with further steps along the same line in our domestic law.

This is an area where the American Bar Association and other interested private organizations should continue to play a major role in studying the problems involved and initiating action to resolve them. Arbitration of private disputes is obviously an area where no one in the Government is like to have the comprehensive knowledge and practical experience of those in the private sector who work in the area day by day. It is also an important truth that it is hard for responsible people in the Government to find the time to focus upon problems of such theoretical and practical complexity. In such areas of primarily private concern, private interests must take upon themselves the burden not only of urging governmental action in general terms, but also of providing detailed analysis and advice to those in the Government who are in a position to act.