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The Application in United States Courts of the Public Policy Provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Håkan Berglin*

I. Introduction

Fifteen years have elapsed since the United States acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention or New York Convention).1 The Convention was the culmination of attempts made since the early 1950's to negotiate a multi-lateral solution to the problems surrounding the enforcement of foreign arbitral awards — a solution it was hoped would be more effective than that provided by the earlier Geneva treaties.2

The United States was not a party to the Geneva treaties, nor did the United States sign the Convention when it was opened for signature in 1958.3 A substantial movement in favor of accession to

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1. June 10, 1958, 330 U.N.T.S. 38 (1959) [hereinafter cited as Convention]. The United States implementing legislation is embodied in 9 U.S.C. §§ 201-08 (1970). The accession was made with the reservations that the United States would apply the Convention only to awards made in the territory of another contracting state and only to differences arising out of legal relationships which were "considered as commercial under the national law of the United States." 21 U.S.T. 2566, T.I.A.S. No. 6997, 330 U.N.T.S. 38.


the Convention emerged in the United States in the late 1950's and early 1960's, however, and the Johnson Administration ultimately urged the Senate in 1968 to consent to accession. Once the necessary implementing legislation was enacted, the United States deposited the instrument of accession with the Secretary-General of the United Nations on September 30, 1970.

The Convention provides for the recognition and enforcement of foreign arbitral awards, and enumerates the grounds on which enforcement may be refused. One of these grounds provides that enforcement of the award will be refused if such enforcement "would be contrary to the public policy" of the country in which enforcement is sought.

The legislative history gives little guidance as to the interpretation of this public policy provision, and the provision was early considered by commentators as the strongest impediment to widespread enforcement of foreign awards.

Although the case law regarding the interpretation of the public policy defense still is sparse, United States courts undoubtedly have expressed a willingness to construe the provision narrowly. Thus, it has been said that a foreign award made in accordance with the Convention is "treated much like a judgment under the Full Faith and Credit Clause of the United States Constitution," and that enforcement should be denied "only where enforcement would violate the forum state's most basic notions of morality and justice."

on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years, 5 GA. J. INT'L & COMP. L. 471, 486 (1975); Quigley, supra note 2, at 1074-75 n.108.


Id. at 1.


Convention, supra note 1, at Art. III.

Id. at Art. V.

Id. at Art. V(2)(b).

For a brief explanation of the legislative history, see Contini, supra note 2, at 304; Quigley, supra note 2, at 1070-71. See also infra note 102.


In analyzing the cases decided thus far, commentators generally have read the decisions as persuasive evidence for a very narrow construction of the public policy provision. In fact, it has been said by some that "the courts have given the public policy defense so narrow a construction that it now must be characterized as a defense without meaningful definition [and consequently leaves] the defense pragmatically useless if not altogether nonexistent."  

Although the United States federal courts’ decisions can admittedly be read as precedents for a narrow construction of the Convention’s public policy provision, it is also possible to interpret them as being confined to the particular facts in each case. The limited scope of the holdings and the courts’ explicit and implicit suggestions as to possible future uses of the public policy defense indicate that under different fact situations the courts may not construe the Convention’s public policy provision as restrictively.

It will be the purpose of this article to analyze some of the cases decided to date and, in particular, to emphasize the possible confinement of these cases to their facts. As will be seen, this will lead to the conclusion that while the courts have undoubtedly indicated a narrow construction of the public policy defense, the facts of the cases have hardly presented a real test of how far the courts are prepared to go in enforcing foreign arbitral awards in situations where such enforcement would be in substantial conflict with fundamental domestic legal or moral concepts or with statutes embodying such concepts. To phrase it in another way: while the courts have construed the notion of “public policy” as corresponding to “the most basic notions of morality and justice,” there are still many issues to be decided before it can be authoritatively concluded what the courts ultimately will consider to be these most basic notions of morality and justice.

1976 (where it was alleged an arbitration award was fraudulently obtained therefore rendering it contrary to the public policy of the forum country).


16. Comment, supra note 12, at 245. See also Harnik, supra note 15, at 704. Harnik concludes that the courts have “built a bastion against the public policy defense” and that “it is becoming more and more apparent that our courts . . . will reject, wherever possible, public policy defenses. Note, supra note 15, at 747-48. Herein the author thinks that such severe limitations have been placed on the public policy defense that “it is possible that the only major area in which [it] might still be applicable is that of claims involving antitrust violations.”
II. Analysis of Cases

Except for a few rather specific situations that will be addressed at the end of this article, most of the cases where the public policy defense has been invoked have involved what might be broadly described as at least a potential conflict between the pro-enforcement policy of the Convention and a domestic governmental policy, frequently represented by a federal legislative act. To date every such conflict has been solved in favor of the Convention.

*In Re Fotochrome*\(^{17}\) presented a potential conflict between the Convention policy favoring enforcement of foreign awards and the policy of the United States Bankruptcy Act\(^{18}\) of insuring equal treatment of creditors. Therein, a dispute arose out of a contract between a New York and a Japanese corporation. In accordance with a provision of the contract, the dispute was referred to arbitration in Japan. In the course of the arbitration proceedings, the New York corporation filed for an arrangement under chapter XI of the Bankruptcy Act\(^{19}\) in New York. Soon thereafter, the federal bankruptcy judge issued an order staying all proceedings by creditors, including pending arbitrations. Notwithstanding this order, the arbitration proceeded, and an award was rendered in favor of the Japanese corporation. Judgment was entered on the award in Japan, and the award was filed in the bankruptcy proceedings as proof of claim. The bankruptcy judge ruled that because of his restraining order, he was not bound by the decision of the arbitrators, but had power to reconsider the merits of the underlying dispute. By holding that the bankruptcy judge lacked jurisdiction over the Japanese corporation, and in recognizing that under both the Treaty with Japan on Friendship, Commerce and Navigation\(^{20}\) and the Convention\(^{21}\) the award was to be granted the same finality in the United States courts as it had been allowed in the Japanese courts, the United States District Court for the Eastern District of New York reversed the ruling of the bankruptcy judge.\(^{22}\) The decision of the District Court was affirmed by the Second Circuit Court of Appeals.\(^{23}\)

Although technically the District Court and Court of Appeals were not faced with the question of enforcing the award,\(^{24}\) they


\(^{19}\) Id. at 1101.


\(^{21}\) Convention, supra note 1.


\(^{23}\) Id.

\(^{24}\) The ruling of the bankruptcy judge was reversed in order to give the Japanese
clearly expressed a strong policy in favor of international arbitration and a narrow construction of the public policy provision. The holdings, however, were clearly based on narrow jurisdictional grounds. Both courts reached the conclusion that the bankruptcy judge lacked personal jurisdiction over the Japanese corporation and that therefore the order to stay the arbitration proceedings did not operate against it.

The two courts did differ on their approach to one particular issue, however. While the opinion of the District Court might well be read as going beyond the jurisdictional limitations question and covering also a real conflict between the Convention and the policy underlying the Bankruptcy Act, the Court of Appeals explicitly limited the scope of its holding to the jurisdictional facts. Thus, after having dealt with the question of the jurisdiction of the bankruptcy judge, the District Court went on to discuss the impact of the Treaty of Friendship, Commerce and Navigation and the Convention, saying inter alia:

Recognition of . . . foreign . . . awards are mandated under the [Convention]. They are treated much like a judgment under the Full Faith and Credit Clause of the United States Constitution . . . . The two treaties compel us to grant the same finality to the award . . . as it has been allowed in Japanese courts . . . . American corporations facing imminently unfavorable arbitrations abroad may not file for Chapter XI arrangements here to avoid final and binding arbitral judgment abroad . . . . International commerce has grown too large and the world too small for American courts to disregard the law of nations, even in favor of the Bankruptcy Act.

The Court of Appeals, on the other hand, explicitly pointed out that the case could be decided “without the necessity of determining whether the Bankruptcy Act [involved] a ‘public policy’ which [was] contrary to enforcement of arbitral awards under the Convention.”

The Second Circuit therefore avoided the public policy issue it would have had to decide had the bankruptcy judge had jurisdiction over

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25. The district court thought that foreign awards in the Convention were “treated much like a judgment under the Full Faith and Credit Clause of the United States Constitution.” In Re Fotochrome, 377 F. Supp. at 30. The Second Circuit Court of Appeals, in citing Parsons & Whittomere, Overseas Co. v. Societe Gehele de L'Industrie du Papier (RATKA), 508 F.2d 969 (2d Cir. 1974), stated that the public policy provision of the Convention should be applied “only where enforcement would violate the forum state's most basic notions of morality and justice.” Fotochrome, 517 F.2d at 516.


27. In Re Fotochrome, 377 F. Supp. at 30, 32.

28. Fotochrome, 517 F.2d at 516.
the Japanese corporation.29

Admittedly, the differences in the courts' opinions might be incidental. On the other hand, there is nothing that contradicts an assumption that the Court of Appeals thought that the District Court had gone too far in its seemingly unreserved indication of the supremacy of the Convention over the Bankruptcy Act and, therefore, felt compelled to underscore the limited scope of its own decision. Be that as it may, it still remains to be seen whether a foreign award would be enforced in a situation where enforcement would be in direct and substantial conflict with the policies underlying the Bankruptcy Act.

Being the only case decided by the United States Supreme Court in which questions of public policy were involved, Scherk v. Alberto-Culver Co.30 naturally is of particular interest. Under the contract involved in the case, an American manufacturer purchased from a German citizen three enterprises organized under the laws of Germany and Liechtenstein together with all the trademark rights of those enterprises. The sales contract, which was negotiated in the United States as well as abroad and was signed and closed abroad, contained express warranties that the trademarks were unencumbered. The contract also contained an arbitration clause providing for arbitration in Paris. After allegedly discovering that the trade-

29. Id. at 520. In explaining the anomaly that a foreign award should be accorded more respect than its American counterpart, the District Court said:

The anomaly can be explained by the force of the Supremacy Clause of the Constitution. A treaty, under that clause, is the 'supreme' law of the land . . . . Here the . . . Treaty with Japan and the . . . Convention have superseded in small measure the . . . Bankruptcy law.

In re Fotochrome, 377 F.Supp. at 30-31. In explaining the same anomaly, the Court of Appeals said:

The result is not quite as anomalous as appears, however. For in a converse situation an American company might procure an arbitral award in the United States against a Japanese firm in financial trouble whose Japanese creditors might be under a stay from a Japanese court.

Fotochrome, 517 F.2d at 519-20.

30. 417 U.S. 506 (1974). Subsequent to the completion of this article, the Supreme Court had decided the case of Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346 (1985). This case also concerned the enforcement of an arbitration clause in the context of an international transaction. The principle issue in the case was the arbitrability, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-14, and the Convention of claims arising under the Sherman Act, 15 U.S.C. §§ 1-7, and encompassed within a valid contractual arbitration clause.

Although enforcing the arbitral agreement, the Court, as in the Scherk case, left a number of questions unanswered and also indicated and even explicitly pointed out a number of situations which would raise issues that were not present in this case. In particular, the Court observed that under the public policy provision of the Convention "the national courts of the United States [would] have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws [had] been addressed." 105 S.Ct. at 3360. In short, the Mitsubishi decision throws no further light on the question of how far United States courts will ultimately be willing to go in enforcing foreign arbitral awards in situations where such enforcement would be in substantial conflict with vital domestic interests.
marks were subject to encumbrances, the buyer brought suit in the United States contending that the fraudulent representations concerning the trademark rights violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. The seller invoked the arbitration clause in a motion to stay the action pending arbitration. Based on a finding that the transaction in issue involved securities within the purview of Regulation 10b-5, and in relying on the Supreme Court’s decision in an earlier case, Wilko v. Swan, the District Court and the Court of Appeals for the Seventh Circuit denied the motion. In considering the “truly international” character of the underlying contract as the factor distinguishing the Scherk case from Wilko, the Supreme Court in Scherk, in a close five to four decision, reversed and held enforceable the agreement to arbitrate.

Despite the apparently strong bias in favor of arbitration of international disputes, the Supreme Court’s holding in Scherk is in several ways limited. First, the Court particularly emphasized the significantly international character of the underlying contract, and pointed out that the only contacts with the United States were the fact that the buyer was an American corporation and that “some — but by no means the greater part — of the pre-contract negotiations” occurred in this country. The Court even explicitly stated that another outcome would be feasible in a situation where the contacts with foreign countries were less significant: “Concededly, situations may arise where the contacts with foreign countries are so insignificant or attenuated that the holding in Wilko would meaningfully apply. Judicial response to such situations can and should await future litigation in concrete cases.”

33. 346 U.S. 427 (1953). Wilko was an entirely domestic action brought by a customer against a securities brokerage firm to recover damages under the civil liabilities provisions of § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77I(2) (1981), for alleged misrepresentation in the sales of securities. Under the Act, any “stipulation” waiving compliance with any “provision” of the act is void. Id. at § 14, 15 U.S.C. § 77n. The United States Supreme Court, in declining to enforce an invoked agreement to arbitrate, held that the arrangement to arbitrate was such a “stipulation” and that the right to select the judicial forum was the kind of “provision” that could not be waived under the Act. Wilko, 346 U.S. at 434-35.
34. See Alberto-Culver Co. v. Scherk, 484 F.2d 611 (7th Cir. 1973).
35. As to the “truly international agreement” the Court said: Such a contract involves considerations and policies significantly different from those found controlling in Wilko . . . . The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and commerce in world markets . . . . exclusively on our terms, governed by our laws, and resolved in our courts. Scherk v. Alberto-Culver Co., 417 U.S. 506, 515, 519 (1974).
36. Id. at 515, 517 n.11.
37. Id. at 517 n.11. See supra note 33.
Second, since the Court disposed of the case on other grounds, it did not consider a contention that the holding of Wilko should be limited to situations where the parties exhibit a disparity of bargaining power. The decision in Wilko was based in part on the assumption that the 1933 Securities Act was enacted to protect relatively uninformed, individual investors when dealing with more sophisticated and well-informed issuers of and dealers in securities. While there seems to be no reason to believe that such a protection would have been considered necessary in Scherk, situations might well arise where the motives underlying the 1934 Securities Exchange Act as compared to the policy favoring arbitration would have to be given considerably more weight than in Scherk.

The third way in which the Scherk decision is limited is illustrated by the fact that the Supreme Court's holding did not involve a finding of a violation of the securities laws or even, as opposed to the decision in the lower courts, that the transaction in question was a security transaction within the meaning of those laws. To the contrary, the Court explicitly pointed out the absence of these issues:

Our decision . . . has no bearing on the scope of the substantive provisions of the federal securities laws . . . . We do not reach, or imply any opinion as to, the question whether the acquisition of Scherk's business was a security transaction . . . . Although this important question was considered by the District Court and the Court of Appeals, and although the dissenting opinion . . . . seems to consider it controlling, the petitioner did not assign the adverse ruling on the question as error and it was not briefed and argued in this court.

Consequently the Court found no reason to address the policies un-

38. Id. at 512-13 n.6.
39. 346 U.S. at 435. The Wilko Court stated:

... [I]t is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers . . . . When the security buyer . . . waives his right to sue in courts, he gives up more than would a participant in other business transactions.

The contract in Wilko was concluded between a private customer and a securities brokerage firm, and the arbitration clause was contained in a standard form margin contract. Id. at 428-29.

40. The buyer in Scherk was an American corporation doing business in the United States as well as abroad. Scherk, 417 U.S. at 508. The contract was said to have been negotiated over a number of years by knowledgeable and sophisticated business and legal experts. Id. at 513 n.6.

41. See also Justice Stevens' dissenting opinion in Alberto-Culver, 484 F.2d at 617, when dealing with situations where "quite obviously the rationale of Wilko . . . would preclude the enforceability," and concluding: "For in such situations the same kind of disparity in either information or bargaining power is likely to be present, and there is no more reason to favor arbitration than in disputes arising under the 1933 Act."

42. See Scherk, 417 U.S. at 518 n.12, 415 n.8.
derling the securities regulations or to speculate on their interaction with the public policy provision of the Convention. Without suggesting any conclusion, it might be pointed out that the narrow, not to say dubious, procedural reasons given for not addressing what had been one of the key issues in the courts below seem to be all but convincing, particularly since questions of public policy undoubtedly may be taken into consideration irrespective of whether raised by the parties or not.

Fourth, the Scherk case presented the question of the enforcement of an agreement to arbitrate rather than enforcement of an award rendered under such an agreement. While historically the courts seem to have been more favorable to enforcement of awards than agreements to arbitrate, the Court in Scherk seems to suggest that although it enforced the agreement to arbitrate, the circumstances presented might well be sufficient to render an award unenforceable under the Convention's public policy provision: "Although we do not decide the question, presumably the type of fraud alleged here could be raised, under Art. V of the Convention . . ., in challenging the enforcement of whatever arbitral award is produced through arbitration.

As for the final limitation, although the decision was not based on this fact, the Court at the outset pointed out the possibility of distinguishing Scherk from Wilko by the difference in the protection for investors provided for in the 1933 Securities Act as compared to the 1934 Securities Exchange Act. The Court pointed out that the "special right" of a private remedy for a civil liability contained in the 1933 Act and which the Court in Wilko had found significant, had no statutory counterpart in the 1934 Act. Also, certain of the "provisions" of the 1933 Act which the Court in Wilko had held

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43. See Alberto-Culver, 484 F.2d at 615.
44. See also Justice Douglas' dissenting opinion in Scherk, 417 U.S. at 525.
45. See Convention, supra note 1, at arts. II(3) and V(2) as compared to art. V(1), under which enforcement may be refused at the request of the party against whom an award is invoked.
47. Scherk, 417 U.S. at 519 n.14.
48. Id. at 513.
49. Id. Section 12(2) of the 1933 Act provides a defrauded purchaser with a special right to recover for misrepresentation which differs substantially from the common law action in that under the Act the seller is made to assume the burden of proving lack of scienter. Wilko, 346 U.S. at 431. The 1934 Act, on the other hand, does not in itself establish such a "special right," although courts have construed it as creating an implied cause of action. Scherk, 417 U.S. at 513-14.
could not be waived were not contained in the 1934 Act. 50

Scherk has been said to set a precedent for a narrow construction of the public policy defense. 51 This position might be well taken in view of the fact that the Court, although not basing its decision on the Convention, 52 undoubtedly expressed a strong policy in favor of arbitration and also clearly recognized the particular considerations and policies involved in what the Court described as truly international agreements. 53 However, as has been seen, almost every crucial set of facts to be considered in determining the question of enforcement in this case occurred in a configuration clearly favoring enforcement. In addition, a number of questions obviously were left unanswered by the Court. 54 It is therefore arguable that the facts in Scherk did not present a real test of how narrow a construction of the public policy provision the Court would have been willing to adopt and that this can be clarified only by awaiting further and more severe tests.

In Antco Shipping 55 and Parsons & Whittemore 56 the question of public policy was raised on the ground that enforcement of the agreement to arbitrate and arbitration award, respectively, would have been contrary to United States foreign policy considerations. Antco Shipping was an action brought to enforce an agreement to arbitrate. The agreement was contained in a contract for ocean carriage of petroleum products from Mediterranean ports, "excluding Israel." 57 The enforcement was challenged on the ground, inter alia, that the exclusion of Israeli loading ports was a boycott or blacklist of Israel, a nation friendly to the United States, and therefore a violation of the public policy of the United States as expressed in the Export Regulation Act 58 and the regulations promulgated thereun-

50. In particular, the Court noted that while the jurisdictional provisions of the 1933 Act allowed a plaintiff to bring suit in any federal or state court of competent jurisdiction, the 1934 Act provided for suit only in the federal district court that had "exclusive jurisdiction," thus "significantly restricting the plaintiff's choice of forum." Scherk, 417 U.S. at 514.

51. See, e.g., Ehrenhaft, supra note 15, at 1215; Note, supra note 15, at 742, 748; Comment, supra note 12, at 246, where it is said that in light of the Scherk decision "even where a foreign arbitral award directly discourages a party from complying with domestic statutes, ... the public policy defense will not prevent enforcement," and that "it will be difficult . . . to anticipate the limits on unfairness surrounding international commercial arbitration." But see, e.g., Dunham/Schuster, Recent Developments, 5 GA. J. INT'L & COMP. L. 257, 263 (1975); Comment, Greater Certainty in International Transactions Through Choices of Forum, 69 AM. J. INT'L L. 366, 371, 374 (1975).

52. The Court, while not reaching the issue of whether enforcement would have been required under the Convention, thought that the United States accession to the Convention provided "strongly persuasive evidence of congressional policy consistent with" the decision in this case. Scherk, 417 U.S. at 520 n.15.

53. Id. at 515.

54. See supra text accompanying notes 38, 42 and 47.


56. 508 F.2d 969.

57. 417 F. Supp. at 209.

The Congressional declaration of policy underlying the Export Regulation Act is set forth in Section 2402. Particular reliance was placed upon Section 2402(5), which reads in part: "It is the policy of the United States . . . to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States . . . ."^{59} In recognizing that the public policy provision of the Convention required a narrow construction, the court had no difficulty in reaching the conclusion that the agreement to arbitrate was entitled to enforcement.^{61} However, and even if the court in dicta suggests that violations of the Export Regulation Act would bar enforcement only in cases where performance is expressly forbidden under the Act,^{62} the holding is based narrowly on the particular facts of the case. The court found and explicitly based its decision on the fact that the policy expressed in the Act related solely to exports from the United States and that the contract in question did not involve exports "in any meaningful sense."^{63} In other words, the court did not reach the issue of a direct and significant conflict between the policy favoring arbitration and the policy under the Act of non-participation in trade restrictions or boycotts imposed by other countries on countries friendly with the United States. Furthermore, none of the parties were American citizens and the only relation with the United States seems to have been the mere fact that the charterer had been given an option to use one or two American ports as an alternative to Caribbean discharging ports. Finally, since the decision was based on the fact that the contract did not involve exports from the United States, the court explicitly avoided the question of whether the provision excluding Israel was inserted in the contract for the purpose of boycotting or blacklisting Israel rather than for legitimate safety reasons as alleged by the

59. 15 C.F.R. 369 (1984). It was also alleged that the exclusion of Israeli ports rendered the contract illegal under § 296 of the New York Executive Law, which forbids boycott or blacklisting because of national origin. As to this allegation, the court said that the applicability of the statute to the contract was not sufficiently demonstrated and that, in any event, the declaration of policy of the statute had "to yield to the public policy of the United States, as expressed in the adherence to the Convention." Antco Shipping, 417 F. Supp. at 212, 217.


61. Although faced with the question of the enforcement of an agreement to arbitrate under art. II(3) of the Convention, supra note 1, rather than an award, the court analyzed the public policy provision of art. V(2)(b) because the rationale for a narrow construction of this provision was thought to apply "with equal force to considerations, within the context of enforcement of the arbitration agreement itself, of whether the contract in question is 'null and void' under Art. II(3) of the Convention." Antco Shipping, 417 F. Supp. at 216.

62. The Court stated: "[A]ssuming arguendo that the exclusion in some manner contravenes public policy as expressed in the Export Regulation Act, it still falls far short of entirely forbidding . . . performance under the contract." Id. at 215-16.

63. Id. at 213.

64. Art. 5 of the contract read: "Discharging one (1) or two (2) safe port(s) Bahamas or other Caribbean port(s) excluding Cuba, or at Charterer's option one (1) or two (2) United States Atlantic Coast." Id. at 210.
plaintiff Sidermar. 65

A more explicit distinction between the concept of public policy under the Convention on one hand, and national foreign political interests on the other, was made by the Second Circuit Court of Appeals in Parsons & Whittemore. 66 An American corporation in the Parsons & Whittemore case had agreed to construct a paperboard mill in Egypt. Financial support for the project was to be provided by the Agency for International Development (AID), a branch of the United States State Department. Before completion of construction and with the Arab-Israeli Six Day War on the horizon, the Egyptian government broke off diplomatic relations with the United States and ordered all Americans, except those who could apply and qualify for special visas, expelled from Egypt. As a consequence, AID withdrew its financial support, and the project was abandoned by the American company. 67 In the ensuing arbitration the company was held in breach of the contract. In challenging the enforcement of the award, the American corporation argued that various actions by United States officials, and most particularly AID's withdrawal of financial support, required it, as a loyal American citizen, to abandon the project. In enforcing the award after tracing the legislative history of the public policy provision of the Convention and concluding that enforcement should be denied only "where enforcement would violate the forum state's most basic notions of morality and justice," 68 the court made a clear distinction between public policy and national foreign political interests:

In equating 'national' policy with United States 'public policy,' the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supra-national emphasis. 69

In addition to this obviously plain language, the court, like the court

65. Id. at 213.
67. Although not made explicit in the court's opinion in this case, in an account of Parsons & Whittemore case in Antco Shipping, it is stated that the State Department instructed the American company to cease performance of the contract in accordance with the provisions of 22 U.S.C. § 2370f, (q), and (5), which prohibited the furnishing of assistance to the United Arab Republic subsequent to the cessation of diplomatic relations with that country. Antco Shipping, 417 F. Supp. at 216.
68. Parsons & Whittemore, 508 F.2d at 974.
69. Id.
in *Antco Shipping*, indicated that enforcement would be refused only where the conflicting national policy would forbid performance of the contract.

While the inevitable conclusion to be drawn from the court's reasoning in *Parsons & Whittemore* is that enforcement, in principle, should be granted even where it would conflict with national foreign policy interests, the facts presented in the case fell far short of putting this principle to a real test. Far from being a declared, well-established congressional policy, the circumstances relied on by the American corporation were of quite a temporary character. The court also considered the alleged policy conflict incidental rather than substantial and the outcome of the dispute between the parties as being of no vital interest to the United States.

The cases dealt with so far have involved what in the beginning of this article was broadly described as at least a potential conflict between the pro-enforcement policy of the Convention and a domestic governmental policy frequently represented by a federal legislative act. Without pretending to be exhaustive, a few more specific situations will be mentioned in the following portion of this article in which the public policy defense has been raised, sometimes successfully, and also situations in which the defense will most likely continue to be invoked in the future. Because few cases to date have dealt with this issue, however, the decisions do not yet indicate any clear trends. Any positive conclusion as to whether, and if so to what extent, the public policy provision will be a useful defense in these situations must still await future judicial decisions.

B. Cases Involving Specific Conflicts

In *Laminoirs-Trefileries-Cableries de Lens S.A. v. Southwire*

70. See supra note 62 and accompanying text.

71. After having concluded that a narrow construction of the public policy defense required enforcement of the award, the court added: "Moreover, the facts here fail to demonstrate that considered government policy forbids completion of the contract itself by a private party." 508 F.2d at 974 n.5.

72. The arbitration tribunal held the non-performance of the American company excusable on the ground of *force majeure* for a period of about one month, but felt that for the time thereafter the corporation "had made no more than a perfunctory effort to secure" the special visas, necessary for its workers to return to Egypt. 508 F.2d at 972.

73. In disposing of an argument that "United States foreign policy issues" could not be arbitrated and that, therefore, enforcement should be refused under art. V(2)(a) of the Convention, the court said, *inter alia*:

    The mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute not arbitrable .... Overseas [the corporation] grossly exaggerates the magnitude of the national interest involved in the resolution of its particular claim. Simply because acts of the United States are somehow implicated in a case one cannot conclude that the United States is vitally interested in its outcome."

*Id.* at 975.
Co.\textsuperscript{74} the Federal District Court for the Northern District of Georgia was faced with the question of enforcing an award which granted, in addition to compensatory damages, what the court considered to be punitive damages.\textsuperscript{76} The award, arising out of a purchase agreement between a French manufacturer and a Georgia corporation, provided for interest on the sum awarded to rates of ten and a half percent and nine and a half percent (depending upon the date of maturity of an underpaid invoice), "increasing to fifteen and a half percent and fourteen and a half percent respectively after two months from the date of notification of the award."\textsuperscript{77} The imposition of the additional five percent interest seems to have been in accordance with French law, which was applied by the arbitrators.\textsuperscript{77} While recognizing that the public policy provision of the Convention should be applied only "where enforcement would violate the forum country's most basic notions of morality and justice,"\textsuperscript{78} the United States District Court concluded that the imposition of the additional five percent interest was "penal rather than compensatory" and bore "no reasonable relation to any damage resulting from delay in recovery," and that therefore that portion of the award could not be enforced.\textsuperscript{79}

In view of the strong language in favor of the enforcement of foreign awards contained in virtually every judicial decision subsequent to the United States accession to the Convention,\textsuperscript{80} the outcome in \textit{Laminoirs} is somewhat surprising. Admittedly, it might be argued that the court indicated a well-defined and recognized principle in support of its decision by holding that the additional five percent interest awarded in accordance with French law was penal in nature and that "a foreign law [would] not be enforced if it [were] penal only and [related] to the punishing of public wrongs as contrasted from the redressing of private injuries."\textsuperscript{81} However, this argument does not seem to be convincing since the provision on

\begin{itemize}
\item 74. 484 F. Supp. 1063 (1980).
\item 76. \textit{Laminoirs}, 484 F. Supp. at 1068.
\item 77. \textit{Id.} at 1069.
\item 78. \textit{Id.} at 1068.
\item 79. \textit{Id.} at 1069.
\item 80. The United States acceded to the Convention in 1968. \textit{See supra} note 1 and accompanying text.
\item 81. \textit{Laminoirs}, 484 F. Supp. at 1069.
\end{itemize}
interest rates seems to have been applied only as a result of the interpretation given by the arbitrators to a contractual choice of law clause agreed upon between the parties. Furthermore, the court in dicta explicitly stated that "agreements to pay fixed sums as damages plainly without reasonable relation to any probable damage which may follow [would] not be enforced." Whatever the true motives underlying the decision might have been, the court in Lamin noirs must have found them significant enough to place them within the category of "the most basic notions of morality and justice."

A policy favoring arbitration and making every presumption in favor of the validity of a duly rendered award necessarily must be founded on an assumption that the award is unaffected by any inappropriate behavior of the parties and constitutes the honest judgment of the arbitrators. Consequently, it seems to have been generally recognized that domestic awards should be set aside when procured or influenced by the fraud or misconduct of a party, or when one or more of the arbitrators were guilty of fraud, misconduct, corruption, or partiality. In view of the obvious significance of the rationales underlying this policy, it seems quite likely that they would apply with considerable force also to considerations of whether enforcement of a foreign award would be against public policy.

The only case in which misbehavior of this kind was asserted to be a proper defense under the public policy provision of the Convention is Biotronik Mess. Since the court found that the alleged be-

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82. The purchase agreement between the parties contained a governing law clause stating that the agreement was to be governed by Georgia law to the extent that it was in accordance with French law. Id. at 1067.
83. Id. at 1069.
84. Under the Federal Arbitration Act, one of the grounds on which an award may be set aside is "where the award was procured by corruption, fraud or undue means," 9 U.S.C. § 10(a) (1970). Most state statutes contain identical or similar provisions, see, e.g., CAL. CIV. PROC. CODE § 1286.2 (West 1982); MICH. COMP. LAWS §§ 645.9 (1948); 1923 N.J. LAWS 134, § 9; NEW YORK CIV. PRAC. LAW § 1457 (Consol. 1921). As to judicial decisions, see, e.g., Smith v. Home Inc., 178 S.C. 436, 183 S.E. 166 (1936); see also 6 C.J.S. Arbitration § 152 (1975); 5 Am. Jur. 2d Arbitration and Award § 175 (1962).
85. Under the Federal Arbitration Act, one of the grounds on which an award may be set aside is "where there was evident partiality or corruption in the arbitrators, or either of them," 9 U.S.C. § 10(b) (1970). Most state statutes contain identical or similar provisions; see e.g., supra note 84. As to judicial decisions, see e.g., Tejas Development Co. v. McGough Bros., 165 F.2d 276 (5th Cir. 1947); Twin Lakes Reservoir & Canal Co. v. Platt Rogers Inc., 105 Colo. 49, 94 P.2d 1090 (1939); Skinner v. Smith, 120 Ga. App. 35, 169 S.E.2d 365 (1969); see also 6 C.J.S. Arbitration § 153 (1975); 5 Am. Jur. 2d Arbitration and Award §§ 173, 177 (1962).
86. Misbehavior of the kind involved here might well be such as to make applicable one or more of the more specific provisions of art. V(1) of the Convention, under which enforcement may be refused. Nevertheless, due to the relatively limited scope of these provisions, situations might easily be imagined where the only possible provision under which enforcement could be denied would be the public policy clause.
87. 415 F. Supp. 133. The contention of fraud was based on the alleged fact that Biotronik, when it appeared alone at the arbitration hearing, knowingly withheld certain evidence in a calculated attempt to mislead the arbitrators. Id. at 137.
behavior did not constitute fraud, it did not express any opinion as to whether the public policy provision would have been applicable had the award been affected by inappropriate behavior of substantial character. Nevertheless, by disposing of the defense on the ground that fraud was not shown rather than on an assumption that such fraud would not have been an effective defense under the public policy provision, the court, if not expressly indicating an answer in the affirmative, at least left unanswered the question of whether fraud should be a proper defense under the public policy provision. Other courts, although not faced with this precise issue, have stated that this kind of misbehavior or bias might render unenforceable agreements to arbitrate disputes arising out of international commercial transactions as well as awards rendered under such agreements.

Finally, still another situation will briefly be pointed out in which further judicial decisions are necessary in order to clarify whether, and if so to what extent, the public policy provision would be a proper defense against the enforcement of foreign awards. The situation arises when, under the law where enforcement is sought, the underlying agreement would be on an entirely illegal subject matter or would require for its completion the performance of an illegal act. To the extent the pertinent law would reflect a well-established national policy, nothing needs to be added to what already has been discussed above. However, since a state penal statute, for example, does not necessarily reflect such a policy, the question of illegality as a defense against enforcement of a foreign arbitral award requires further consideration.

As to purely domestic awards, enforcement generally has been denied when rendered upon submission to arbitration of claims arising out of illegal transactions. No case has been decided subsequent to the United States accession to the Convention in which the enforcement of a foreign award has been denied on the basis of ille-
gality in the underlying agreement or its performance. The defense was invoked against the enforcement of an agreement to arbitrate in *Antco Shipping* on the ground that the underlying contract was allegedly illegal under New York law. Since the court did not find the statute in question applicable to the contract, it did not reach the issue of illegality. However, in reviewing earlier New York law on the point, the court found, as to agreements to arbitrate, that non-enforcement has been limited “to the situation in which public policy as embodied in a statute forbids the performance which is the subject of dispute.” Furthermore, the court explicitly recognized that the phrase “null and void” contained in Article II(3) of the Convention, “opens the door to an argument of nonenforcement based on illegality,” although it construed the phrase to “require a showing . . . that the essence of the obligation . . . is prohibited by a pertinent statute or other declaration of public policy.” In light of this analysis the court finally stated that even if the New York statute invoked had been found applicable, the statute would have had to “yield to the public policy of the United States, as expressed in the adherence to the Convention.” Even though the court was faced with the question of enforcing an agreement to arbitrate rather than an award, it was of the opinion that the two situations would present “comparable questions of public policy.”

In summary, and as the court in *Antco Shipping* explicitly recognized, the door is undoubtedly open to an argument for non-enforcement based on illegality. However, in view of the analysis made in this case, and the frequently reiterated reference of the court in *Parsons & Whittemore* to the “most basic notions of morality and justice,” illegality would most likely have to be significant in character in order to bar enforcement.

III. Conclusion

By repeatedly declaring that enforcement should be denied only where enforcement would violate the “most basic notions of morality and justice,” United States federal courts undoubtedly have indicated a firm willingness to give the public policy provision of the

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92. 417 F. Supp. 207.
93. For the facts of the case, see supra text accompanying notes 55-59; as to the alleged illegality under the New York law, see supra note 59.
95. *Id.*
96. *Id.*
97. *Id.* at 217.
98. *Id.* at 216. See also supra note 61.
100. *Parsons & Whittemore*, 508 F.2d at 974.
101. See supra note 14 and accompanying text.
New York Convention the narrow construction that seems to have been intended by its framers. In fact, it is striking to note the similarity between this phrase and the one employed by the Ad Hoc Committee of the Economic and Social Council of the United Nations during the preparatory work for the Convention when declaring its intent to limit the application of the public policy clause to situations in which enforcement would be "distinctly contrary to the basic principles of the legal system of the country where the award was invoked."\footnote{102}

The case law, however, is still sparse. As yet it is still quite possible to argue that the facts of the cases decided so far may not have really tested how far the courts would be willing to go to enforce foreign awards in situations where such enforcement would be in direct and substantial conflict with fundamental domestic legal or moral concepts or with statutes embodying such concepts. Moreover, not only have the courts, and most particularly the United States Supreme Court in its only decision on this point,\footnote{103} left a number of questions unanswered, they have also indicated and even explicitly pointed out situations in which the question of enforcement would require considerations other than those that have been necessary in the cases decided to date. Consequently, it can fairly be inferred that many issues still remain to be decided before it can be authoritatively concluded when the courts will deny enforcement of a foreign arbitral award on the basis of the public policy provision of the New York Convention and, underlying that, what the courts ultimately will consider to be the "most basic notions of morality and justice."

\footnote{102}{See Committee's report of March 28, 1955, U.N. Doc. E/2704. Under the public policy clause proposed by the Committee, enforcement could be refused if enforcement "would be clearly incompatible with public policy or with fundamental principles of the law ("ordre public") of the country in which the award [was] sought to be relied upon." (art. IV(h) of the Committee's Draft Convention, reproduced in an annex to the said Committee report). The clause was identical to the one embodied in the Geneva Convention, Art. 1e, except for the fact that the Committee had added the words "clearly" and "fundamental" in order to limit the application of the clause to situations where enforcement "would be distinctly contrary to the basic principles of the legal system of the country where the award [was] invoked" (see said Committee report, F. 49, at 13). As a result of the comments and suggestions made on the Draft Convention by governments and non-governmental organizations, the reference to "fundamental principles of the law" was later omitted on the ground that the concept of public policy was considered to be "a sufficiently broad criterion and that the additional requirements of compatibility with fundamental principles of the law [could] give rise to difficulties of interpretation and open the question of a revision of the award as to its substance." (U.N. Doc. E/CONF 26/2, at 6-7).}

\footnote{103}{Scherk v. Alberto-Culver Co., 417 U.S. 506. See also supra note 30 and accompanying text.}