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THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE U.S.—A MATTER OF FEDERAL LAW

JOHN A. SPANOGLÉ*

I have two basic points to make in this presentation:

- 1) Unlike the enforcement of foreign money judgments, enforcement of foreign arbitral awards is a matter of federal law; and
- 2) A foreign arbitral award is even more likely to be enforced in the U.S. than a foreign money judgment.¹

APPLICABLE LAW

Enforcement of foreign arbitral awards is a matter of federal law, because it is a matter of treaty law under the New York Convention.² The New York Convention, in turn, has been incorporated into Part II of the Federal Arbitration Act.³ The New York Convention has been ratified or acceded to by 135 Contracting States,⁴ and the number is still growing.

Thus, an action to enforce a foreign arbitral award, when it is brought in a state court, will be subject to the Convention as federal law, under the pre-emption doctrine. If such an action is brought in a federal court, it will not be a diversity case, even though the parties would satisfy diversity requirements. Instead, it would be a federal question case, because it is being decided under both treaty law and a

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1. See John A. Spanogle, *The Enforcement of Foreign Judgments in the U.S.: a Matter of State Law in Federal Courts*, *supra*, 13 U.S.-MEX. L.J. 85 (2005).

2. Federal law compels adherence to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, which is commonly referred to as the New York Convention. *Dial 800 v. Fesbinder*, 12 Cal. Rptr. 3d 711, 722 (Cal. Ct. App. 2004)(citing *Fotochrome, Inc. v. Copal Co., Ltd.*, 517 F.2d 512, 516 (2d Cir. 1975); *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974). Title 9 of the United States Code, section 207, is part of the enabling legislation adopted to enforce the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958. *Dial 800*, 12 Cal. Rptr. 3d at 722. The Convention on Recognition and Enforcement of Foreign Arbitral Awards must be enforced according to its terms over all prior inconsistent rules of law, considering that Convention was negotiated pursuant to Constitution's treaty power and that Congress adopted enabling legislation to make the Convention the highest law of the land. *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil Co.*, 767 F.2d 1140 (5th Cir.1985); *Indocomex Fibres Pte., Ltd. v. Cotton Co. Int'l, Inc.*, 916 F.Supp. 721 (W.D. Tenn. 1996)(Goal of United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, and principal purpose underlying United States' adoption and implementation of it, is to encourage recognition and enforcement of commercial arbitration agreements in international contracts and to unify standards by which agreements to arbitrate awards are enforced.).

3. The Federal Arbitration Act, which incorporates The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention), is codified at 9 U.S.C. § 201, et seq. (West 2005). *Lander Co., Inc. v. MMP Investments, Inc.*, 107 F.3d 476 (7th Cir. 1997), *cert. denied*, 522 U.S. 811 (1997).

4. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter also "The New York Convention"), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3; available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXXII/treaty1.asp>; also available at [http://www.uncitral.org/english/status/status-e.htm#Convention%20on%20the%20Recognition%20and%20Enforcement%20of%20Foreign%20Arbitral%20Awards%20\(New%20York,%201958\)](http://www.uncitral.org/english/status/status-e.htm#Convention%20on%20the%20Recognition%20and%20Enforcement%20of%20Foreign%20Arbitral%20Awards%20(New%20York,%201958)); cf. *Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith Cogeneration International, Inc.*, 198 F.3d 88, 94 (2d Cir.1999) (Although Taiwan is not recognized as an independent state and is not a signatory to the Convention, a party need not come from a signatory state in order for the Convention to apply.).

federal statute. The *Erie* doctrine,⁵ so prominently influential in our analysis of enforcement of foreign money judgments,⁶ is not applicable to cases involving foreign arbitral awards. Thus, all arbitral award enforcement cases are to be decided according to federal, not state, law.

There are, of course, state statutes which deal with arbitration, especially international commercial arbitration.⁷ Although these state statutes are predominantly procedural, they do contain other provisions. Some of those provisions concern matters that are not expressly addressed by the New York Convention or federal law, which supplement or complement federal law. Few of them conflict directly with federal law.⁸ In the latter situations, the parties can choose state law by including a choice of law clause that expressly selects a state arbitration law over federal law.⁹

CRITERIA FOR ENFORCEMENT

The New York Convention and the Federal Arbitration Act set forth two basic requirements on U.S. courts. One is that a U.S. court must stay the proceedings, pending arbitration, if the parties have agreed to mandatory arbitration in a written agreement,¹⁰ such as an arbitration clause in a written contract.¹¹ However, the

5. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

6. In determining the issue of whether federal or state law applies in measuring the effect of a foreign judgment in a federal court sitting in diversity, the majority of cases clearly hold that this issue is governed by the *Erie* Doctrine, and that federal courts sitting in diversity should use state law to measure the preclusive effect of a foreign country's judgment. *McCord v. Jet Spray Intern. Corp.*, 874 F.Supp. 436, 438 (D. Mass. 1994) (citing *Success Motivation Inst. of Japan, Ltd. v. Success Motivation Institute, Inc.*, 966 F.2d 1007, 1009-10 (5th Cir. 1992) ("Erie applies even though some courts have found that these suits necessarily involve relations between the U.S. and foreign governments, and even though some commentators have argued that the enforceability of these judgments in the courts of the United States should be governed by reference to a general rule of federal law."); *WRIGHT, MILLER & COOPER*, § 4473 at n. 2 (1981 & Supp. 1994) (listing cases applying state law).

7. See CAL. CIV. PRO. CODE §§ 1297.11-1297.432 (West 1996); UNCITRAL Model Law on International Commercial Arbitration, CONN. GEN. STAT. ANN. §§ 50a-100 – 50a-136 (West 1994); Florida International Arbitration Act, FLA. STAT. ANN. §§ 684.01 – 684.35 (West, WESTLAW through 1996 2nd Reg. Sess.); GA. CODE ANN. §§ 9-9-30 – 9-9-43 (LEXIS through 1996 Supp.); Hawaii International Arbitration, Mediation and Conciliation Act, HAW. REV. STAT. §§ 658D-1 – 658D-9 (Supp. 1992); Maryland International Commercial Arbitration Act, MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2B-01 – 3-2B-09 (1995); North Carolina International Commercial Arbitration Act, N.C. Gen. Stat. §§ 1-567.30 – 1-567.68 (1996); OHIO REV. CODE ANN. §§ 2712.01 – 2712.91 (Banks-Baldwin, WESTLAW through 1996 portion of 121st G.A.); Oregon International Commercial Arbitration and Conciliation Act, OR. REV. STAT. §§ 36.450-36.558 (1995); TEX. CIV. PRAC. & REM. CODE ANN. §§ 172.001 – 172.310 (West Supp. 1996).

8. For a complete analysis of this intersection of competing statutes, see, Daniel A. Zeff, *The Applicability of State International Arbitration Statutes in the Absence of Significant Preemption Concerns*, 22 N.C. J. INT'L L. & COM. REG. 705, 734-780 (1997).

9. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S.Ct. 1212 (1995).

10. Under Section 3 of the Federal Arbitration Act courts must stay a lawsuit pending before it if the parties have agreed in writing to arbitrate their claims: "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such proceeding is referable to arbitration under such an agreement, shall upon application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3 (West 2005); *Acosta v. Norwegian Cruise Line, Ltd.*, 303 F.Supp.2d 1327, 1330-31 (S.D.Fla. 2003) (There must be a written arbitration agreement between the parties for the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to permit removal of lawsuit to federal court.); *Campeau Corp. v. May Dept. Stores Co.*, 723 F.Supp. 224 (S.D.N.Y. 1989) (Under the Federal Arbitration Act, if showing is made that opposing party has commenced suit on issue referable to arbitration under

clause must clearly indicate that arbitration is mandatory.¹² The other requirement is that a U.S. court must enforce an arbitral award from a foreign tribunal, as long as the award is final, international, and commercial.¹³

When is an arbitral award international? The location of the parties is irrelevant. Differences in the nationality, domicile or the places of business or incorporation of the parties will not create an international arbitral award. The crucial fact is the location of the arbitral tribunal. If the arbitral tribunal is located in a Contracting State other than the U.S. then the award of that tribunal is a foreign arbitral award under the New York Convention.¹⁴ Thus, for example, a foreign party which is a national of a non-Contracting State can obtain enforcement of an arbitral award, as long as the tribunal which made that award is located in a Contracting State.

There is an exception to this application of the Convention to awards by a foreign arbitral tribunal, regardless of location, etc., of the parties. If the dispute is between two parties from the U.S., the Convention is not applicable in U.S. courts, even if the award is from a foreign arbitral tribunal—unless there is some “reasonable relation” to that foreign state.¹⁵ Such a “reasonable relation” would exist if the dispute involved property located abroad, or if the performance of an agreement or enforcement of the award would be abroad.

When is a dispute commercial? The United States, as it was permitted to do so, made a reservation under the New York Convention that it would enforce international arbitral awards only if the underlying dispute was commercial.¹⁶ We

agreement in writing, stay pending arbitration is mandatory.); *cf.* Zimmerman v. International Companies & Consulting, Inc., 107 F.3d 344 (5th Cir. 1997)(Mandatory stay provision of Federal Arbitration Act does not apply to those who are not contractually bound by the arbitration agreement.). Some courts, however, stay cases stating they have “no jurisdiction” to decide the dispute to which the parties agreed to arbitration even though they can retain jurisdiction over non-arbitrable claims. Southern Elec. Health Fund v. Kelley, 308 F.Supp.2d 847, 852 (M.D. Tenn. 2003) (stating that “the Court finds that it is without jurisdiction to decide the cross-claims for breach of contract ... which arise out of the contracts between the two construction companies”); see also Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218, (1985) (“By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”); Liskey v. Oppenheimer & Co., 717 F.2d 314 (6th Cir. 1983) (holding that the FAA divests courts of any discretion regarding arbitration in cases containing both arbitrable and nonarbitrable claims, and instead requires that the courts compel arbitration of arbitrable claims, when asked to do so).

11. Wisch v. Freedom Yachts, Inc., No. 3:04CV347 (WWE), 2004 WL 3048759 (D.Conn. Dec. 31, 2004). In Wisch, though the plaintiff sought to avoid his contractual obligation to arbitrate by claiming the defendants’ filing of a motion to dismiss on grounds of lack of personal jurisdiction acted as a waiver of the defendants’ right to arbitrate, the court, nonetheless, enforced the arbitration clause, granting the defendant’s motion to stay to allow arbitration to proceed.

12. Article II of the New York Convention requires contracting states to “recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them.” InterGen N.V. v. Grina, 344 F.3d 134, 141 (1st Cir. 2003)(citing 21 U.S.T. at 2519, 330 U.N.T.S. at 38). Though the New York Convention relates to recognition of arbitral awards, and not the validity of arbitration agreements, Article V of the Convention states that the Convention does not apply when there is no valid arbitration agreement. A. T. Cross Co. v. Royal Selangor(s) PTE, Ltd., 217 F.Supp.2d 229 (D.R.I. 2002). If there is no arbitration agreement, a party cannot be required to submit to arbitration. AT & T Tech., Inc. v. Communications Workers, 475 U.S. 643, 648 (1986).

13. See *infra* notes 14-19 and accompanying text.

14. 9 U.S.C. § 202 (West 2005); see The New York Convention, *supra* note 4 at Article I(1).

15. 9 U.S.C. § 202.

16. See *id.* Furthermore, at the United Nations, it was the United Nations’ Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See also The New York Convention, *supra* note 4 at Article I(3).

will not accord the same dignity to awards against consumers by a foreign tribunal. The “commercialness” of a dispute is to be determined by U.S. national law.¹⁷ When is an arbitral award final? The award must be final as determined by the law of the jurisdiction where the tribunal is located.¹⁸ One major criterion requires that the tribunal’s decision cannot still be subject to appeal to the courts of the local foreign jurisdiction.¹⁹

Mandatory law issues can be made subject to a written, mandatory arbitration agreement.²⁰ That rule does not distinguish between domestic and foreign arbitral tribunals. Thus, a written arbitration agreement which requires arbitration of mandatory law issues before a foreign arbitration tribunal will be upheld.²¹ And, under the New York Convention, the decision and award of that tribunal must then be recognized and enforced as any other arbitral award, subject to the defenses discussed below.²²

DEFENSES

The New York Convention enumerates six permissible defenses: 1) the invalidity of the arbitral agreement, 2) inadequate opportunity to present a defense, 3) invalid composition or procedure of the arbitral tribunal, 4) the tribunal’s decision was outside the scope of the arbitration agreement, 5) the subject matter before the tribunal was not arbitrable, and 6) the award is contrary to the public policy of the forum.²³ The Convention also states that *only* the enumerated defenses may be used to refuse recognition and enforcement of an international arbitral award.²⁴ The list

17. 9 U.S.C. § 202; The New York Convention, *supra* note 4 at Article I(3); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 17 Fla. L. Weekly Fed. C 226 (11th Cir.(Fla.) Feb 04, 2004) (A court has jurisdiction over an action to determine whether an arbitration agreement or award meets the prerequisites of New York Convention mandating the court to compel arbitration or to confirm an award.)

18. 9 U.S.C. § 201; *Publicis Communication v. True North Communications, Inc.*, 206 F.3d 725, 729 (7th Cir. 2000) (The content of an arbitration decision, not its nomenclature, determines finality for purposes of seeking judicial confirmation of the decision under the New York Convention.)

19. *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F.Supp. 1 (S.D.N.Y.1973), *aff’d*, 489 F.2d 1313, *cert. denied*, 416 U.S. 986 (1974) (Arbitration award entered in Curacao under an agreement between a United States manufacturer and the government of Curacao was “final and definite” within this title, so as to be enforceable in proceedings in federal district court.)

20. *Sherck v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974) (noting FAA reversed “centuries of judicial hostility to arbitration”); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985) (Court has established a very strong presumption in favor of arbitration of international disputes, even where U.S. statutory claims are implicated.)

21. *Mitsubishi*, 473 U.S. at 626-27, 631 and 638-39 (Supreme Court held that “the international legal order” requires national courts to “subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.”)

22. *See* The New York Convention, *infra* at notes 24-25 and accompanying text.

23. The New York Convention, *supra* note 4, at art. V; *see also* *Iptrade Intern., S. A. v. Federal Republic of Nigeria*, 465 F.Supp. 824. (D.C.D.C.1978) (Fifth Article of the New York Convention specifies the only grounds on which recognition and enforcement of foreign arbitration award may be refused); *In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2nd Cir. 2002). There is also a lack of finality defense analyzed, *supra* note 18.

24. “Recognition and enforcement ... may be refused ... only if...” The New York Convention, *supra* note 4, at art. V (1). The New York Convention and the implementing legislation, Chapter 2 of the Federal Arbitration Act (“FAA”), provide that a secondary jurisdiction court must enforce an arbitration award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in the Convention. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004)(citing 9 U.S.C. § 207 (West 2005)). Defenses to enforcement under the New York Convention are construed narrowly, “to

does not include tribunal errors in findings of fact or interpretation or application of law—or in choice of law.

Invalidity of the arbitral agreement includes the usual suspects: incapacity, fraud and duress.²⁵ If the parties have chosen an applicable law, the validity of the agreement is to be determined according to the law chosen. If no law has been chosen, then the validity of the agreement is to be determined according to the law where the tribunal is located. There is substantial case law in the U.S. courts over whether there is a valid written agreement to arbitrate.²⁶

There can be an inadequate opportunity to present a defense if there is not sufficient notice to one of the parties, either of the appointment of the arbitrator, or of the tribunal proceedings.²⁷ It can also arise if one of the parties was not able to present its case for other reasons.

The composition of the tribunal itself can be the subject of valid defenses, as can its procedures. If the parties stipulate its composition in their written agreement, any deviation from that composition will allow a court to refuse recognition and enforcement of the award.²⁸ Thus, where an agreement provides for a three-member tribunal, an award by a single-member tribunal would be unenforceable. If the composition of the tribunal is not stipulated by the arbitral agreement, it is to be determined by the law of the location of the tribunal. The same rules apply to the arbitral procedures. Thus, if the written arbitral agreement stipulates the use of UNCITRAL procedures,²⁹ and the tribunal employs some other set of procedural rules, that will furnish a defense to enforcement of the arbitral award under the New York Convention.

The power of an arbitral tribunal is created by contract – by the parties' written agreement to arbitrate. Thus, any decision or award by the tribunal that goes beyond the terms of the arbitration contract, or clause, will be considered unauthorized, and will provide a defense to enforcement.³⁰ The defense can arise when the tribunal considers issues or subject-matter that was excluded from its consideration by the agreement. For example, such defenses can arise if the agreement limits the tribunal's authority to allow it to determine only contract issues, but the tribunal also determines related tort issues. If the contract issues can be separated, the award may be subject to recognition and enforcement as to those issues only. However, if the contract and tort issues are too interrelated, the award may not be enforceable at all.

The tribunal may also make awards that are beyond the powers authorized by the agreement. Thus, where the agreement provides only for compensatory relief, an award of penalty damages or injunctive relief would not be authorized. It would

encourage the recognition and enforcement of commercial arbitration agreements in international contracts....” Imperial Ethiopian Gov’t v. Baruch-Foster Corp., 535 F.2d 334, 335 (5th Cir. 1976); Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L’Industrie du Papier, 508 F.2d 969, 974, 976 (2d Cir.1974).

25. The New York Convention, *supra* note 4, at art. V (1)(a).

26. IAN R. MCNEIL, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT, ch. 44 (Release No. 1 1995 & Supp. 1999).

27. The New York Convention, *supra* note 4, at art. V (1)(b).

28. *Id.* at art. V(1)(d).

29. United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, June 21, 1985, 24 I.L.M. 1302, also available at www.uncitral.org/en-index.htm.

30. The New York Convention, *supra* note 4, at art. V (1)(c).

therefore provide a defense to recognition or enforcement of that part of the award that provided for penalties or injunctions.

The law of any nation may provide that certain subject-matters may not be determined by arbitrators, but must be decided by the courts of that nation.³¹ An arbitral decision which is based on an analysis of such subject-matter would contravene such a provision. If such a decision is then brought to the courts of that nation for enforcement, the courts are not bound to enforce the award.³² They may enforce it (the New York Convention does not prohibit enforcement), but the treaty does not require them to do so, and actually authorizes a refusal to enforce. It had been thought that U.S. law provided that some mandatory laws were not the proper subject of proceedings before arbitral tribunals,³³ but that concept has been struck down by the U.S. Supreme Court, on the ground that section 202 of the Federal Arbitration Act omits some of the language in Article II (1) of the New York Convention.³⁴

The final defense is the one that has caused more debate, and more confused analysis, than any of the others. Under what conditions, and under what criteria, is an international arbitral award "contrary to (United States) public policy"?³⁵ A typical case where this defense was raised successfully involved an award of a post-judgment interest rate of five percent over the maximum allowed by Georgia law. The federal district court held that such an interest award was void as against the public policy of the forum,³⁶ even though it was permitted by French law.³⁷ The court compared that additional interest to the civil law concept of penalty damage awards, and found that it was inconsistent with common law concepts of compensatory damages.

There is a potential offshoot of the public policy defense which is sometimes recognized by courts in the United States. It is the concept that an arbitral decision which shows a "manifest disregard of the law" may be refused recognition and enforcement under the New York Convention.³⁸ This judicially-created principle

31. See, e.g., *Indussa Corp. v. S. S. Ranborg*, 377 F.2d 200 (2nd Cir. 1967), overruled by *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*, 115 S.Ct. 2322 (1995); *Sun Oil Co. of Pa. v. M/T Carisle*, 771 F.2d 805, 814 (3d Cir. 1985) ("So strong is COGSA's policy to preclude clauses lessening the carrier's liability that [the Second Circuit] ... held that section 3(8) precluded a clause that required an American plaintiff to assert his claim only in a foreign court."); *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988), cert. denied, 489 U.S. 1033 (1989) (holding that clause in bill of lading choosing carrier's home forum conflicted with Carriage of Goods by Sea Act and was unenforceable when dispute arose between carrier and cargo owner over general average); *C.A. Seguros Orinoco v. Naviera Transpapel, C.A.*, 677 F.Supp. 675 (D.P.R. 1988) (Forum selection clause in bill of lading would not be given effect to oust United States court of statutory jurisdiction under Act; and dismissal on grounds of forum non conveniens would not be granted unless carrier complied with three conditions.).

32. The New York Convention, *supra* note 4, at art. V (2)(a).

33. See *Indussa Corp.*, *supra* note 32, at 203.

34. *Mitsubishi*, *supra* note 21; *M/V SKY REEFER*, *supra* note 32, at 2326-2330. For further discussion of this issue, see Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 *GW Int'l L. Rev.* 17 (2002).

35. The New York Convention, *supra* note 4, at art. V (2)(b).

36. *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1068-69 (N.D. Ga. 1980) (vacating award that applied French interest rate to international contract).

37. "In the case of a judgment, the rate of legal interest shall be increased by 5 points upon the expiration of a period of two months from the day on which the court decision has become enforceable, even if only provisionally." Law No. 75-619 of July 11, 1975, J.O., July 12, 1975 (France).

38. See *Laminoirs*, *supra* note 36, at 1068-69; see also *Wilko v. Swan*, 346 U.S. 427, 436 (1953) (On the other hand, the Federal Arbitration Act, specifically 9 U.S.C. 10, has been read to include an implied defense to

is related to, but not the same as, the public policy defense. Not all violations of public policy involve a manifest disregard of the law.³⁹ Although it is arguable that it is necessarily against public policy to disregard the law, not all courts recognize this defense.⁴⁰

The principle is especially important in cases involving arbitral tribunals' decisions concerning U.S. mandatory law, such as the antitrust issues in *Mitsubishi*.⁴¹ In that case, the U.S. Supreme Court ordered that all issues, including mandatory law issues, be heard by a foreign arbitral tribunal, and not by a federal district court. It encountered the argument that such a decision would deprive the U.S. party of the protection of the U.S. antitrust law. The Supreme Court's response to that argument was that the U.S. courts would have an opportunity to review the tribunal's decision when the award was presented to those courts for recognition and enforcement.⁴² The only possible avenue for such a review under the restrictions of the New York Convention would be through the use of the "manifest disregard" principle.⁴³

However, it is not clear that this principle is necessarily available in practice in international arbitral decisions granting awards, as they are often written. The tribunal's decision may be only conclusory, granting or denying relief, without explanation. Or, the tribunal may simply state that U.S. antitrust law is not violated, without any analysis of how it reached that conclusion. Alternatively, it may find that the parties' choice of a foreign law in their contract displaces the application of U.S. antitrust law to the contract. Is that "manifest disregard" of the mandatory nature of U.S. antitrust law,⁴⁴ or is it a recognition by the arbitrators that the U.S. courts could have insulated such issues from consideration by arbitrators under Article V (2) (a), and did not do so?

enforcement where the award is in "manifest disregard" of the law.); *Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967); *Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960); *cf. Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974) (Even assuming that the "manifest disregard" of law defense applies under the New York Convention, no such "manifest disregard" was in evidence in the instant case.)

39. *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F.Supp. 160 (S.D.N.Y. Jan 05, 1987); *contra American Const. Machinery & Equipment Corp. Ltd. v. Mechanised Const. of Pakistan Ltd.*, 659 F.Supp. 426 (S.D.N.Y. 1987) (linking the "manifest disregard" concept to the New York Convention article V(1)(a) on validity including fraud, rather than to article V(2)(b) on public policy), *aff'd*, *American Const. Machinery & Equipment Corp. Ltd. v. Mechanised Const. of Pakistan Ltd.*, 828 F.2d 117 (2d Cir. 1987), *cert. denied*, *Mechanised Const. of Pakistan Ltd. v. American Const. Machinery and Equipment Ltd.*, 484 U.S. 1064 (1988).

40. *Id.*; *see also* *Waterside Ocean Nav. Co., Inc. v. International Nav. Ltd.*, 737 F.2d 150 (2d Cir. 1984) (citing *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir.1975)); *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir.1974) (Public policy defense to confirmation under convention on recognition and enforcement of foreign arbitral awards should apply only where enforcement would violate our most basic notions of morality and justice.); *MGM Productions Group, Inc. v. Aeroflot Russian Airlines*, 91 Fed.Appx. 716, 2004 WL 234871 (2d Cir.(N.Y.) Feb 09, 2004) (holding that public policy defense did not apply to bar enforcement of an arbitral award), *cert. denied*, *Aeroflot Russian Airlines v. MGM Productions Group, Inc.*, 125 S.Ct. 409 (2004).

41. *See Mitsubishi*, 473 U.S. 614 (1985).

42. *See id.* at 622 n.19.

43. *See id.* at 634; *see also* discussion at notes 37-39.

44. The Supreme Court's *Mitsubishi* decision did not make U.S. antitrust law not mandatory. Even if a defendant cannot enforce it, the Department of Justice and the Federal Trade Commission still can. *See* *Andreas Lowenfeld, The Mitsubishi Case: Another View*, 2 ARB. INT'L 178 (1986).

PRE-JUDGMENT RELIEF

One final problem involves pre-judgment relief, such as injunctive relief and prohibitions against transfers of funds. Most arbitral tribunals do not have the power to grant such relief; it is reserved to courts. If the arbitration agreement refers "all actions" to the arbitral tribunal, can a court give such pre-judgment relief? The majority opinion is that courts cannot grant such relief because the arbitration agreement, combined with the New York Convention, require the courts to refuse jurisdiction.⁴⁵ There is one opposing opinion in which the court decided that someone should have the ability to grant such relief; and if the arbitrators had no such power, it must reside in the court system—regardless of the agreement.⁴⁶

CONCLUSION

Recognition and enforcement of foreign arbitral awards, whether it is sought in a state or a federal court, is a matter of federal law under the New York Convention. If enforcement is sought in state court, the Convention pre-empts any state law on the subject. If enforcement is sought in federal court, even if the parties satisfy diversity requirements, the Convention is part of a federal statute, and its application is a federal question.

The criteria for enforcement of a foreign arbitral award is that it must be final, international and commercial, as discussed above. There are few defenses allowed to a final international commercial arbitral award under the New York Convention. Although the U.S. Supreme Court in *Mitsubishi*⁴⁷ indicated that there is a broad power in the courts to review a foreign arbitral award for error before recognition and enforcement, a court's powers under the treaty are very limited. They are specifically enumerated in the Convention, and the Convention expressly states that the enumerated defenses are exclusive—the *only* ones permissible. Even the "public policy" defense set forth in the Convention has been very narrowly construed by the courts. There is a judicially-created defense of "manifest disregard of the law," but it is not accepted by all courts and is not available practically in analyzing most arbitral decisions.

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

46. *Carolina Power & Light Co. v. Uranex*, 451 F.Supp. 1044 (N.D.Cal. 1977).

47. See *Mitsubishi*, *supra* note 21.