

COMMENTS

UNITED NATIONS FOREIGN ARBITRAL AWARDS CONVENTION: UNITED STATES ACCESSION

On September 30, 1970, Ambassador Richard D. Kearney¹ deposited, on behalf of the United States, the instrument of United States accession² to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.³ This action became possible due to the passage of the Foreign Arbitral Awards Convention,⁴ which was signed into law by President Nixon on July 31, 1971. The new domestic legislation subscribes to and implements the 1958 Convention. The Act became effective and the Convention went into force, for the United States, on December 29, 1970.

Accession to the Convention brings the United States into a worldwide network of arbitration facilities set up to provide uniform standards to enforce arbitration awards given throughout the world. This marks the first time that the United States has acceded to a multilateral treaty on this subject, although the United States has been a party to a number of bilateral treaties.⁵

The United States took part in the 1958 Convention, but for a number of reasons chose not to become a signatory at that time. During the succeeding twelve years, pressures of interested groups

1. U.S. member of the International Law Commission and Chairman of the Secretary of State's Advisory Committee on Private International Law.

2. U.S./U.N. press release 126 dated September 30, 1970, in DEP'T STATE BULL., Nov. 9, 1970, at 598.

3. U.N. Doc. E/Conf. 26/9 Rev.1 (1958); See *International Commercial Arbitration—The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283 (1959); Pisar, *The United Nations Convention on Foreign Arbitral Awards*, 33 S. CAL. L. REV. 14 (1959); Sultan, *The United Nations Arbitration Convention and United States Policy*, 53 AM. J. INT'L L. 807 (1959).

4. Act of July 31, 1971, 9 U.S.C. § 201.

5. U.S./U.N. press release 126, *supra* note 2.

and changes in American legal attitudes toward arbitration paved the way for United States accession.

The Convention and the new legislation deal with a problem which arises but infrequently, since most parties making arbitral contracts abide by them and accept the results of arbitration if a dispute occurs.⁶ However, immense difficulties do arise in the rare case when the parties disagree.

The Convention provides general ground rules that signatory and acceding nations must follow in the adjudication of disputes in international arbitral agreements. It deals with the following principal issues: (1) what are the procedures for the enforcement of the arbitral award; (2) did the court of original judgment have jurisdiction; (3) is the judgment enforceable where entered; (4) when there is a conflict of laws question, was the correct law applied or will the judgment subvert the laws of the contracting state where enforcement proceedings are taking place; and, (5) when will the courts specifically enforce a contract clause calling for arbitration? The implementing United States legislation deals with how United States courts will handle situations that fall under the rules of the Convention and the allowable reservations that the United States has invoked.

This Comment will focus on the Convention's relationship to the United States and the United States legislation dealing with the Convention. The long history of the Convention, while interesting in itself, has been amply covered elsewhere.⁷

I. THE SITUATION PRIOR TO U.S. ACCESSION

Before accession to the present Convention, the United States did not adhere to any international agreements concerning the enforcement and recognition of foreign arbitral awards.⁸ As a result, United States businessmen were seriously handicapped in attempting to enforce arbitral awards outside the United States.⁹ It is also

6. Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 INT'L L. 320 (1969).

7. See Domke, *The United Nations Conference on International Commercial Arbitration*, 53 AM. J. INT'L L. 414 (1959), for a summation of the events leading up to the Convention.

8. The United States was neither a signatory to the Geneva Protocol on Arbitration Clauses of Sept. 24, 1923, 27 L.N.T.S. 157; or the Geneva Convention of Sept. 26, 1927, on the Execution of Foreign Arbitral Awards, 92 L.N.T.S. 301.

9. See Domke, *American Arbitral Awards: Enforcement in Foreign Countries*, 1965 U. ILL. L. F. 399, 400 (1965).

true that foreign businessmen have had similar difficulties trying to enforce arbitral awards in the United States. Bringing an action in a foreign court has usually involved American businessmen in foreign civil codes which entailed unusual questions of jurisdiction, obscure rules of evidence, the necessity of an interpreter, a foreign lawyer, intricate conflicts of law, and the ponderous, burdensome and costly procedures that many foreign countries require for enforcing a judgment.¹⁰

II. ILLUSTRATION OF THE CONVENTION PROCEDURE APPLIED TO THE U.S.

Most of the problems prior to accession have been alleviated, as the following example will show. Assume that Mr. Charles of Los Angeles and Mr. Arthur of Amsterdam contract to ship art books from the Netherlands to the United States and incorporate into their contract an arbitration clause, which specifies that disputes are to be settled in the New York offices of the American Arbitration Association.¹¹ If a controversy arises and Mr. Charles refuses to abide by the arbitration agreement, Mr. Arthur has a choice of courts available to him. He can seek enforcement either in the Southern District Federal Court in California or in the Southern District Federal Court in New York. Similarly, if Mr. Arthur had refused to arbitrate, Mr. Charles could have brought an action in either of two forums: the Southern District Federal Court in New York or the appropriate court in the Netherlands. Since both countries are signatories or have acceded to the Convention, the simplicity of this arrangement makes it possible for the parties to know ahead of time that the same general rules of arbitration procedure will be used. In addition, any differences in the law will be more readily ascertainable. The resulting advantage in handling disputes quickly and effectively is enormous.

III. BACKGROUND EVENTS LEADING UP TO U.S. ACCESSION

The United States attended the United Nations Convention on Commercial Arbitration held in New York in May and June of

10. See Burnstein, *Arbitration of International Commercial Disputes*, 6 B.C. IND. & COM. L. REV. 569, 570 (1965).

11. Other arbitration associations include: the International Chamber of Commerce Court of International Commercial Arbitration, the London Court of Arbitration, the Japan Commercial Arbitration Association, the Canadian-

1958, but because of a somewhat antiquated distrust of arbitral agreements, was an unenthusiastic and largely inactive participant.¹² As a result, the U.S. delegation strongly recommended that the United States not become a signatory to the Convention.¹³ The U.S. delegation summarized its position as follows:¹⁴

1. The Convention, if accepted on a basis that avoids conflict with State laws and judicial procedures, will confer no meaningful advantages on the United States.
2. The Convention, if accepted on a basis that assures such advantage, will override the arbitration laws of a substantial number of states and entail changes in State and possibly Federal court proceedings.
3. The United States lacks a sufficient domestic legal basis for acceptance of an advanced international Convention on this subject matter.
4. The Convention embodies principles of arbitration law which it would not be desirable for the United States to endorse.

Some private groups¹⁵ interested in the problem were of the opinion that the advantages to be gained by accession would outweigh the changes that would be required in the state and federal systems. Thus, in May of 1960, the American Bar Association Committee on International Unification of Private Law compiled a comprehensive report¹⁶ recommending accession and certain changes deemed necessary in the Federal Arbitration Act of

American Commercial Arbitration Commission, the Commercial Arbitration Center in Bangkok, and the Foreign Trade Arbitration Commission of the Chamber of Commerce in Moscow.

12. Springer, *supra* note 6.

13. 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, 1074-1075, n. 108 (1961), and Czyzak and Sullivan, *American Arbitration and the United Nations Convention*, 13 ARB. J. 197 (1958), cited in OFFICIAL REPORT OF THE UNITED NATIONS DELEGATION TO THE UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION (Aug. 11, 1958) No. 22.

14. *Id.*, The United States was represented by a delegation consisting of W.T.M. Beale, Jr. (Chairman), Edmund F. Becker, John J. Czyzak, Seymour M. Finger, and Charles H. Sullivan.

15. Some of the groups were the American Bar Association, the American Arbitration Association, and the United States Council of the International Chamber of Commerce.

16. See generally AMER. BAR ASSOC. INTERNATIONAL AND COMPARATIVE LAW SECTION, REPORT OF THE COMMITTEE ON INTERNATIONAL UNIFICATION ON PRIVATE LAW (1960), at 194-236.

1925.¹⁷ In September of the same year, the American Bar Association House of Delegates went further by adopting a resolution strongly recommending accession and changes to the 1925 Act.¹⁸ At the same time, Mr. Clifford J. Hynning, Chairman, American

17. 9 U.S.C. §§ 1-14 (1962).

18. A.B.A. proposed amendments to Titles 9 and 28 U.S.C., in S. EXEC. E., 90th Cong. 2d Sess. at 27-28 (1968):

9 U.S.C. § 1 is amended to read as follows (new matter in italics):

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce, *or a contract which is subject to the applicable arbitration provisions of any treaty of the United States*, to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as existed in law or in equity for the revocation of any contract.

9 U.S.C. § 9 is amended to read as follows (new matter in italics):

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year, after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award is made, *or where the award was made abroad and is subject to the applicable arbitration provisions of any treaty of the United States, then such application may be made to the United States court in and for the district court which has jurisdiction over the person sought to be held or his property.* Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action, in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10 is amended to read as follows (deleted matter in capitals and new matter in italics):

In [EITHER] any of the following cases the United States court in and for the district wherein the award was made, *or the United States court in and for the district which has jurisdiction over the person sought to be held or his property under an award made abroad which is subject to the applicable arbitration provisions of any treaty of the United States*, may make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

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

(d) Where the arbitrators exceed their powers, or so imperfectly

Bar Association International and Comparative Law Section, received an impressive list of letters from concerned American industrialists favoring accession.¹⁹

IV. LEGISLATIVE BACKGROUND LEADING TO ACCESSION

In 1967, the American Arbitration Association passed a resolution adopting the same views as the American Bar Association.²⁰ This build-up of American opinion finally resulted in a breakthrough on April 24, 1968, when, at the request of Secretary of State Dean Rusk, President Lyndon Johnson asked the Senate to reconsider United States accession to the Convention.²¹ The matter was referred to the Senate Committee on Foreign Relations, which reported favorably on September 24, 1968, recommending Senate advice and consent to accession.²² The Committee noted,

executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(f) *Where an award made abroad may be refused recognition or enforcement on any other ground specified in the arbitration provisions of any treaty of the United States.*

28 U.S.C. § 1337 is amended to read as follows (new matter in italics):

The district courts shall have original jurisdiction of any civil action or proceedings arising under any act of Congress regulating commerce (*including any transaction or contract which is subject to the applicable provisions of any treaty of the United States*) or protecting trade and commerce against restraints and monopolies.

19. In reply to Mr. Hynning's letter in regard to American business' thoughts on accession to the Convention, affirmative answers were forthcoming from officers of American and Foreign Power Co., Inc.; Aluminum Co. of America; Graver Tank and Mfg. Co., Inc.; B.F. Goodrich and Co.; the President of the University of Vermont; Mr. G.W. Haight, attorney; and Mr. Arthur H. Dean among others. These letters were collected by the United States Council of the International Chamber of Commerce for presentation to the United States State Dept., in S. EXEC. E., *supra* note 18, at 28-42.

20. Resolution of the Executive Committee of the American Arbitration Association on Jan. 10, 1967; in S. EXEC. E., *supra* note 18, at 42.

21. S. EXEC. E., *supra* note 18, at 1. Enclosures: (1) President's letter; (2) Report of the Sec. of State; (3) Convention on the Recognition and Enforcement of Arbitral Awards; (4) Memorandum of the Convention articles; (5) American Bar Association Resolutions; (6) nine letters of 1958 and 1959 from prominent individuals; (7) letter of Mar. 1, 1966, from Mr. Straus of the Amer. Arb. Assoc.; (8) Resolution of the Executive Committee of the Amer. Arb. Assoc.; and (9) list of persons favoring ratification.

22. S. EXEC. REP. No. 10, 90th Cong. 2d Sess. (1968); to accompany S. EXEC. E., 90th Cong. 2d Sess. at 1 (1968). The Committee on Foreign Relations held a public hearing on the Convention on Sept. 20, 1968. Ambassador Richard D. Kearney, Office of the Legal Advisor of the U.S. Dept. of State, appeared before the Committee and testified in favor of the Convention.

however, that changes in the Federal Arbitration Act of 1925²³ would be required.²⁴ The President's letter of transmittal to the Senate also stated that United States accession should be executed only after the necessary legislation was enacted.²⁵

The Senate approved the United States becoming a party to the Convention, by a vote of 57-0, on October 4, 1968, subject to the changes needed in federal law.²⁶ However, it was not until December 19, 1969, that a new Bill (S-3274) with the proposed implementing legislation was brought before the Senate. The reason for this delay, according to a Government observer,²⁷ was that the original proposed implementing legislation, although prepared by the American Bar Association,²⁸ and considered perfectly adequate by the Office of the Legal Advisor of the U.S. Department of State,²⁹ was found to be cumbersome and tedious to work with by the Advisory Committee on Private International Law.³⁰

This latter group, composed of representatives of all the major legal organizations, was of the opinion that the proposed changes of Titles 9 and 28 of the United States Code³¹ would make it more difficult to comprehend and work within the confines of the legislation because it would create conflicts as to which sections would cover the Convention and which ones would still be applied to the 1925 Arbitration Act.³² The Committee suggested that the government abandon the original proposal and instead direct a new committee to review the proposals of the American Bar Association and place them in one separate chapter. After many long sessions the new Committee decided to put all the provisions in a new Chapter 2 of the Federal Arbitration Act of 1925.³³ These developments were the reason that

23. 9 U.S.C. §§ 1-14 (1962).

24. S. EXEC. REP. No. 10, *supra* note 22, at 1.

25. S. EXEC. E., *supra* note 18, at 1.

26. 114 CONG. REC. 29605 (1968).

27. S. REP. No. 702, 91st Cong. 2d Sess. 9 (1970). Hearing before the Committee on Foreign Relations on Feb. 9, 1970. Statement of Ambassador Richard D. Kearney, Chairman of the Sec. of State's Advisory Committee on Private International Law.

28. A.B.A. proposed amendments, *supra* note 18.

29. S. REP. No. 702, *supra* note 27, at 9.

30. *Id.*

31. 9 U.S.C.; 28 U.S.C. (1962).

32. S. REP. No. 702, *supra* note 27, at 9.

33. *Id.*

there was a sixteen month lapse in the submission of the new Bill, which was signed into law on July 31, 1970, subject to formal accession by the United States to the Convention.³⁴ The necessary instrument was filed with the United Nations on September 30, 1970, and in accordance with Article XII of the Convention,³⁵ the Convention's rules came into force ninety days thereafter. Thus, the Convention entered into force for the United States during 1970, when this country was celebrating the 25th birthday of the United Nations.

V. SECTION-BY-SECTION ANALYSIS OF THE NEW CHAPTER 2 OF THE FEDERAL ARBITRATION ACT

A. Section 201

Section 201³⁶ provides that the Convention shall be enforced in the United States in accordance with the provisions of the new chapter.

B. Section 202

Section 202³⁷ defines the agreements or awards that fall under the Convention. The Section makes it clear that an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not enforceable unless it has a reasonable relation with a foreign state. Section 202 also makes it clear that the United States is exercising the reservation allowed by Article I(3) of the Convention,³⁸ which permits a state to apply the Convention only to legal relationships that are considered commercial under the national law of that state. Officially, this reservation was said to be necessary in order not to change the tradition which gives basic jurisdiction to the individual states for domestic questions.³⁹

There was no need to provide for a definition for commerce in Section 202 because there is already a definition in Section 1 of the original Arbitration Act. That definition refers both to interstate and foreign commerce. Therefore, Section 202 only needed the limitation that the new legislation applied to foreign

34. U.S./U.N. press release 126, *supra* note 2.

35. *See* Appendix B, Art. VIII.

36. *See* Appendix A, § 201.

37. *Id.* at § 202.

38. *See* Appendix B, Art. I(3).

39. S. REP. No. 702, *supra* note 27, at 6.

commerce. Section 1 of the original Arbitration Act will continue to have control of interstate commerce regardless of the circumstances.

The "reasonable relationship criteria" of Section 202 was taken from Section 1-105 of the Uniform Commercial Code⁴⁰ which permits any other state or nation to specify that the law of that state or nation will govern their rights and duties.

C. Criticisms of Section 202

The Office of the Legal Advisor of the U.S. Department of State, speaking for the government, has said that the declaration limiting the application of the Convention to commercial matters applies both to the recognition and enforcement of arbitral awards under Article I(3) of the Convention,⁴¹ and the recognition of an agreement to arbitrate under Article II of the Convention.⁴² The United States also ratified the Convention subject to Article I(3) which allows a contracting state to declare, when acceding to the Convention, that it will only apply the Convention to awards made in the territory of another contracting state. However, nowhere in the new legislation is there any language as to how this reciprocity⁴³ clause exclusion is to be applied in United States courts. One can only assume that current public policy will dic-

40. UNIFORM COMMERCIAL CODE § 1-105.

41. See Appendix B, Art. I(3).

42. *Id.* at Art. II.

43. Reciprocity is incorporated into the Convention in two places: Art. I(3) and Art. XIV.

Indicated below are the nations who are presently parties to the Convention and the reservations, if any, applicable to them. (Department of State, *Treaties in Force*, 1971).

Austria	1
Bulgaria	3
Byelorussian Soviet Socialist Rep.	3
Cambodia	
Central African Republic	1, 2
Ceylon	
Czechoslovakia	3
Ecuador	1, 2
Finland	
France	1, 2, 5
German Fed. Rep.	1, 6
Ghana	
Greece	
Hungary	1, 2
India	1, 2

tate the results. As it now appears under Article I(3) of the Convention, it would seem that if a contracting state does not specify that it is using this reservation, the contracting state is deemed to have the Convention's rules apply to every other country in the world, regardless of whether or not those countries are contracting states.⁴⁴ The Office of the Legal Advisor of the U.S. Department of State intended the Convention to be applicable to contracting states only,⁴⁵ but why is it that nowhere in the new legislation's wording can any guidelines be found? The govern-

Israel	
Italy	
Japan	1
Madagascar	1, 2
Morocco	1
Netherlands	1, 7
Niger	
Nigeria	1, 2
Norway	1, 4
Philippines	1, 2
Poland	1, 2
Romania	2, 3
Switzerland	1
Syrian Arab Rep.	
Tanzania	1
Thailand	
Trinidad and Tobago	1, 2
Tunisia	1, 2
Ukranian Soviet Socialist Rep.	3
Union of Soviet Socialist Rep.	3
United Arab Rep.	
United States	1, 2, 8
Reservations:	

- (1) With a declaration that it will apply the Convention to the recognition and enforcement of awards only made in the territory of another Contracting State.
- (2) With a declaration that it will apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.
- (3) With a declaration concerned with the reciprocal treatment of non-Contracting States.
- (4) With a reservation stating: "We will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in Norway, or a right in or to such property."
- (5) Extended to all French territories.
- (6) Applicable to land Berlin.
- (7) Applicable to Surinam and Netherlands Antilles.
- (8) Extended to all territories for the international relations of which the United States is responsible, effective February 1, 1971.

44. Domke, *supra* note 7, at 418.

45. S. EXEC. REP. No. 10, *supra* note 22, at 9. President Johnson also

ment has been quiet on this subject, and one can only assume that it does not want to be restricted in this area. Hence, since there are no official guidelines, the government is free to act as it desires.

It would seem that a better answer would be to clarify this situation. Otherwise, needless cases will probably be brought for the purpose of explaining the ramifications of this exclusion. This would be costly and time-consuming—two of the main things that the Convention was meant to eliminate.

D. Section 203

Section 203⁴⁶ gives original jurisdiction over any action or proceeding falling under the Convention to the federal district courts of the United States, irrespective of the amount in controversy. This Section takes care of a technical problem arising between the original Arbitration Act and the Convention. Section 4 of the original Arbitration Act provides that an application for enforcement of an arbitration agreement may be made to a United States district court which “save for the agreement, would have jurisdiction under Title 28 in a civil action or in admiralty of the subject matter. . . .”⁴⁷ Therefore, a case falling under this Section would be subject to the amount-in-controversy provisions of Title 28 of the United States Code relating to actions based on a federal question or on diversity of citizenship; hence, the need for the wording of Section 203. Otherwise, some disagreements falling under the Convention would not have been allowed under federal law.

E. Section 204

Section 204⁴⁸ contains provisions relating to venue. The provisions are the same as in Chapter 1 of the original Arbitration Act except for one. When an agreement that falls under the Convention names a specific place in the United States for the arbitration meetings, the enforcement of this provision may be had in an action in the United States federal court in the specific district called for in the arbitration agreement.

recommended that this reservation be included in the legislation in S. EXEC. E., *supra* note 18, at 1.

46. See Appendix A, § 203.

47. 9 U.S.C. § 4 (1962).

48. See Appendix A, § 204.

F. Section 205

Section 205⁴⁹ permits removal of an action or proceeding from a state court to a federal district court of the United States. This was needed because the federal legislation has pre-empted the field of international arbitration making it a federal question. If the defendant makes a pre-trial motion, the court must grant the motion, if it deems it correct, and remove the action to a federal district court for proper determination under the rules of the Convention. It is not clear, however, what would happen if the defendant did not make a pre-trial motion for removal. The question may arise, should the state court complete the trial without inquiry? If the parties actually came under the conditions of the Convention the state court's decision would not be final, so there would be no valid reason for continuing the trial. It would be better for the state court to make inquiry, whether a motion is made or even without a motion, if the court feels it is necessary to determine whether the agreement comes under the Convention. There are no court rulings, as yet, on this point.

There is no language in the original Arbitration Act providing for removal to federal district courts. United States case law has not stabilized, but a fairly recent court decision seems to add meaning to Section 205. In the *Prima Paint* case,⁵⁰ the United States Supreme Court announced that the original Arbitration Act established as federal substantive law the proposition that agreements to arbitrate within its scope are valid, irrevocable, and enforceable.⁵¹ In accord with this decision, the Office of the Legal Advisor of the U.S. Department of State approved the wording of Section 205.⁵²

G. Section 206

Section 206⁵³ permits a court to direct that arbitration be held within or without the United States. It also permits the court to appoint arbitrators. The new legislation utilizes permissive language (*may*) instead of mandatory language (*shall*) as in Article II(3) of the Convention⁵⁴ with regard to court appoint-

49. *Id.* at Art. 205.

50. *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395 (1967).

51. Springer, *supra* note 6, at 326.

52. S. REP. No. 702, *supra* note 27, at 7.

53. See Appendix A, § 206.

54. See Appendix B, Art. II(3).

ment of arbitrators. Reportedly, *may* was used because case law is not clear as to whether United States district courts will order arbitration to be held outside the United States,⁵⁵ although Chapter 1 of the 1925 Arbitration Act provides that the United States district court shall direct the parties to proceed with the arbitration in accordance with the terms thereof.⁵⁶ The Office of the Legal Advisor of the U.S. Department of State, speaking for the government, apparently feels that there may be circumstances in which it would be highly desirable to direct arbitration within the district in which the action is brought rather than abroad; therefore, Section 206 was made permissive rather than mandatory.⁵⁷ Unfortunately, however, this leaves a large degree of discretion as to when and under what circumstances the courts will act to allow arbitration abroad. Undoubtedly, situations involving United States policy will arise, which the United States government would rather have arbitrated in this country. This situation might arise if the foreign country used civil law. If the arbitration were held abroad, specific performance might not be available, depending upon the subject matter. Therefore, American courts would probably decide that the arbitration should be held in the United States. This will also probably apply in situations where the United States courts feel that there are more well-trained arbitrators in the particular subject in the United States. This, of course, could well lead to dispute with foreign countries whose policies are different than those of the United States. It might alleviate the problem somewhat if the United States and other countries submitted to the United Nations, ahead of time, a general listing of issues that required resolution at home.

H. Section 207

Section 207⁵⁸ provides that within three years after an arbitral award is made, either party may apply to any court having jurisdiction for an order confirming the award. The United States government dealt with two problems before finalizing the wording of this Section. First, although the original Arbitration Act

55. See S. REP. NO. 702, *supra* note 27, at 8. There is an ambiguity here because Ambassador Kearney apparently thought (or was misquoted) that the 1925 Arbitration Act uses the word "may", while in fact it uses the word "shall" in Section 4. The paragraph makes sense when read with this correction.

56. 9 U.S.C. § 4 (1962).

57. H. REP. NO. 1181, 91st Cong. 2d Sess. 4 (1970).

58. See Appendix A, § 207.

has a statute of limitations of one year for confirmation of an arbitration award, the Convention has none. Many of the experts who worked with the United States government in preparing the new legislation felt that a one year statute was too short because the initial enforcement of most awards would probably be in a foreign country.⁵⁹ Second, there was also some dispute as to whether the grounds for refusal and referral of the recognition and enforcement of an arbitral award were under the original Arbitration Act or the Convention. Section 207, therefore, provides that the refusal and referral clauses of the Convention are controlling.

I. Section 208

Section 208⁶⁰ extends the provisions of the original Arbitration Act to actions brought under the Convention insofar as such provisions are not in conflict with the Convention or the implementing legislation. This residual clause makes the Convention and its implementing legislation supreme.

VI. BENEFITS OF ACCESSION TO THE CONVENTION⁶¹

All arbitration agreements that are valid under the new United States legislation and the Convention will be entitled to the following benefits:

(1) Any country which presently refuses to enforce or recognize United States arbitral awards, and which is a contracting state, is required to recognize United States awards falling under the Convention as valid and binding. Unfortunately, however, there is no mention in the Convention of penalties if a contracting state fails to abide by the Convention.

(2) Any contracting state, even if it previously enforced a United States arbitral award, must now use the Convention's summary procedure of enforcement. This will stabilize procedures and standardize systems of enforcement.

(3) United States businessmen going abroad to enforce awards will have a better idea of what to expect in each of the contracting states beforehand, and likewise, foreign businessmen coming to the United States will have the same benefits.

59. S. REP. No. 702, *supra* note 27, at 8.

60. See Appendix A, § 208.

61. See Quigley, *supra* note 13, at 1075, 1076; Springer, *supra* note 6, at 326, 327; Haight and Hynning, *International Commercial Arbitration*, 48 A.B.A.J. 236, 238 (1962).

(4) United States and foreign businessmen will have more flexibility and confidence in planning their foreign transactions. They can specify the substantive law that arbitrators must follow. The place of arbitration can be selected, as well as the arbitrators themselves, including if desired, a specific organization such as the International Chamber of Commerce Court of International Commercial Arbitration or the American Arbitration Association.⁶² The procedural rules used to oversee how the arbitration is to be conducted can be taken care of in advance. Thus, in theory at least, parties have a wide choice over the law to govern the proceeding. Businessmen will no longer have to tie the settlement of disputes to the laws of a country having no relationship to the parties or their business transactions.

Of course, the parties making arbitral agreements must still allow for the possibility that their award might be held invalid on general public policy grounds. This gives a wide degree of latitude to the local courts, especially when the case will have an important effect upon the national interests of the host country. It is hoped that this escape clause⁶³ will not be used indiscriminately, but the possibility remains open.⁶⁴

The parties must also keep in mind the following questions: (1) what is the capacity of the parties to contract; and, (2) is the dispute actually arbitrable? In addition it must be remembered that the assessment of what is basic due process or its equivalent, will be made under the law of the state where enforcement is sought. Thus, in determining what procedural and substantive law they wish to apply, the parties must pay careful attention to the general law in each state where award enforcement may be desired.

VII. CONCLUSION

Accession to the Convention by the United States may well be a significant step toward resolving international business disputes. This is true even though the Convention and the new United States legislation create certain problems of interpretation.

Accession to the Convention will likely mean that settlement of international business disputes will be handled more effec-

62. Other arbitration associations, *supra* note 11.

63. See Appendix B, Art. V.

64. Straus, *Arbitration of Disputes Between Multinational Corporations*, 24 *ARB. J.* 228, 234 (1969).

tively and their outcome will be more predictable. The remaining problems of which country's law will prevail, and whether a matter is procedural or substantive, will hopefully be greatly alleviated. However, it must be remembered that the benefits of the Convention will apply only to parties who draft arbitration agreements into their contracts.

Stanley L. Levine

APPENDIX A

FOREIGN ARBITRAL AWARDS CONVENTION

Public Law 91-368; 84 STAT. 692 amends Title 9, UNITED STATES CODE by adding:

Chapter 2—Convention on the Recognition and Enforcement of Foreign Arbitral Awards

§ 201 Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202 Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

§ 203 Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

§ 204 Venue

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

§ 205 Removal of causes from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal on causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

§ 206 Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

§ 207 Award of arbitrators; confirmation; jurisdiction proceeding

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

§ 208 Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the convention is ratified by the United States.

GENERAL PROVISIONS

This Act shall be effective upon the entry into force of the Convention on Recognition and Enforcement of Foreign Arbitral Awards with respect to the United States.

APPENDIX B

THE UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall 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 in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration,

unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
 - (a) The duly authenticated original award or a duly certified copy thereof; and
 - (b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of the country where the award was made; or

- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award had not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the

recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or of any other State to which an invitation has been addressed by the General Assembly of the United Nations.
2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United

Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day

following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetyeth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.
3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under article I, X, and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;

(e) **Denunciations and notifications in accordance with article XIII.**

ARTICLE XVI has been deleted because it is not applicable to this Comment.