# THE PUBLIC POLICY DEFENSE TO RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The public policy defense to enforcement of foreign arbitral awards has been considered the greatest single threat to the use of arbitration in international commercial disputes. Courts and commentators alike have expressed misgivings over this potential "loophole" in binding international commercial arbitration.[1] These misgivings are based on the ease with which a court might disregard a foreign arbitral award for virtually any reason, however persuasive, simply by finding that enforcement of the award would conflict with the public policy of the forum. Such action by courts would undermine the arbitral award enforcement process, and weaken international commercial arbitration as a method of dispute settlement.

The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards[2] (Convention) was the culmination of the rapid evolution of international support for the use of commerical arbitration.[3] Although the Convention was a significant step in recognition of international commercial arbitration, states nevertheless insisted on maintaining their ultimate, sovereign control over recognition and enforcement of foreign arbitral awards.[4] The bases upon which a signatory state may refuse to enforce a foreign arbitral award were enumerated in article V of the Convention, with the public policy

1. *See, e.g.*, Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier [RAKTA], 508 F.2d 969, 974 (2d Cir. 1974); Kitigawa, *Contractual Autonomy in International Commercial Arbitration*, in INTERNATIONAL ARBITRATION 132, 139 (P. Sanders ed. 1967); Comment, *United Nations Arbitral Awards Convention, United States Accession*, 2 CALIF. W. INT'L L.J. 67, 81 (1971); Straus, *Arbitration of Disputes Between Multinational Corporations*, 24 ARB. J. 228, 233-34 (1968).

2. 330 U.N.T.S. 38 (1959); 21 U.S.T. 2517; T.I.A.S. No. 6997 (1970) [hereinafter cited as Convention].

3. For a brief history of the development of international commercial arbitration, see Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049-059 (1961) [hereinafter cited as Quigley].

4. It follows from the fact that the power to enforce awards ultimately belongs to the state that, acting through the courts, the state must have authority to scrutinize at any time the lawfulness of an arbitration award. Law enforcement is no longer a private matter in any civilized community. If, acting through its agents, public authority is to enforce arbitration awards, public authority must also be in a position to check on the foundations and limitations of arbitration.

Schwab, *Legal Foundations and Limitations of Arbitration Procedures in the U.S. and Germany*, in INTERNATIONAL ARBITRATION 301, 307 (P. Sanders ed. 1967) [hereinafter cited as Schwab].

defense included as one of two defenses which may be raised *ex officio* by a court of the state requested to enforce an award.[5]

Since the United States' accession to the Convention in 1970,[6] United States courts have had to consider this "loophole" threat to the future of binding arbitration under the Convention. In doing so, the courts have measurably affected the definition, nature, and use of the public policy defense. This comment will analyze the present definition and status of the public policy defense to enforcement of foreign arbitral awards in the United States, point out some resultant problems, and briefly describe a model under which the public policy defense would assume clearer meaning and greater usefulness.

## I. DEFINITION OF THE PUBLIC POLICY DEFENSE

The first important multilateral definition[7] of the public policy defense found in formal rules governing international commercial arbitration was set forth in the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.[8] Article I of that convention provided for the recognition and enforcement of a foreign arbitral award only if the award was "not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon."[9]

In drafting a new convention on recognition and enforcement of foreign arbitral awards in 1955, the Ad Hoc Committee of the Economic and Social Council of the United Nations adopted the basic definition of the public policy defense stated in the 1927 Geneva Convention.[10] However, the 1958 New York Conference on International Commercial Arbitration[11] later modified that definition for the final Convention draft. The Conference intended that the change would strengthen

5. Convention art. V (2)(b). The other defense that can be raised by a court *ex officio* is the defense of non-arbitrable subject matter. *Id.* art. V (2)(a). See text accompanying notes 42-45 *infra*.

6. Act of July 31, 1970, Pub. L. No. 89-25, 84 Stat. 692, 9 U.S.C. § 201 (1970). The instrument of accession was filed September 30, 1970, and came into effect December 29, 1970.

7. Post-World War II bilateral Treaties of Friendship, Commerce and Navigation give only an unelucidating statement that arbitral awards will be enforced between two states "except where found contrary to public policy." See Treaties of Friendship, Commerce and Navigation with Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593 (1954); Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953); and Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057 (1951).

8. 92 L.N.T.S. 301 (1928).

9. *Id.* art. I (e) at 305.

10. 19 U.N. ESCOR (12th mtg.), U.N. Doc. No. E/AC. 42/SR. 12/7 (1955).

11. For a discussion of the New York Conference, see G. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS; U.S. DEL. REP. (1958) [hereinafter cited as HAIGHT].

international commercial arbitration by limiting "the scope of the public policy clause as far as possible."[12] Nevertheless, the Conference recognized the necessity of including the public policy clause as a "catch-all" provision which would permit varied applications of the public policy defense within the many states.[13] The final wording of the Convention stated simply that a country may refuse to recognize or enforce a foreign arbitral award if "the recognition or enforcement of the award would be contrary to the public policy of that country."[14]

The United States Court of Appeals for the Second Circuit, when first called on to interpret the Convention's provision for a public policy defense in the case of *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier [RAKTA]*[15] (*Overseas*), found that the legislative history of the provision offered no certain guidelines to its construction.[16] Instead the court examined the defense in the historical context of the Convention as a whole.[17] The court determined that "a narrow reading of the public policy defense"[18] should be applied to the factual situation of the case to reflect the general pro-enforcement bias informing the Convention,[19] and to prevent the development of a major loophole in the Convention mechanism for enforcement.[20] The opinion in *Overseas* expressed a narrow construction of the public policy defense in these words:

> Enforcement of foreign arbitral awards may be denied on this basis *only where enforcement would violate the forum state's most basic notions of morality and justice*.[21]

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12. 2 P. SANDERS, INTERNATIONAL COMMERCIAL ARBITRATION 323 (1959) [hereinafter cited as SANDERS]; Contini, *International Commercial Arbitration*, 8 AM. J. COMP. L. 283, 304, (1959); *but see* Quigley, *supra* note 3, at 1071-071; Comment, *United Nations Foreign Arbitral Awards Convention: United States Accession*, 2 CALIF. W. INT'L L.J. 67, 81 (1971).

13. HAIGHT, *supra* note 11, at 68; Aksen, *American Arbitration Accession Arives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U.L. REV. 1, 13 (1971) [hereinafter cited as Aksen]; Quigley, *supra* note 3, at 1071 n.93.

14. Convention art. V (2)(b). *See also* U.N. CHARTER art. 2(7):

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. . . .

15. 508 F.2d 969 (2d Cir. 1974).

16. *Id.* at 973. The facts and ruling of this case are treated in the text accompanying notes 31-35, 77-82 *infra*.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id* at 974.

21. *Id.* (emphasis added). It is interesting to note the similarity between the court's narrow construction of public policy, *i.e.* the "most basic notions of morality and

These definitions of the public policy defense, being of an extremely generic, unspecific nature, offer little guidance for a practical understanding or pleading of the defense. In order to obtain a clearer understanding of the public policy defense, a supplementary examination will be made of those defenses which are closely related to, but not actually part of the public policy defense.

### *A. Similar But Separate Defenses*

In addition to the public policy defense, there are several other defenses which United States courts have founded on basic considerations of morality and justice. These defenses to enforcement of arbitral awards are pleaded on a basis of: 1) procedural due process; 2) non-arbitrable subject matter; 3) manifest disregard of the law by arbitrators; 4) *forum non conveniens*; or 5) a conflict with United States national policy or domestic law. The following sections will discuss these, and note how they are considered as defenses separate from the public policy defense, or how, for practical reasons, it is unlikely that these defenses would succeed if pleaded as examples of the public policy defense.

*1. Procedural Due Process.* Public policy requirements of fundamental fairness in arbitration include "proper notice" and "opportunity to be heard."[22] Not only are these imperative elements of the United States concept of due process, but they are also required to maintain the credibility and desirability of arbitration in the eyes of businessmen.[23] This policy is reflected in article V (1)(b) of the Convention which specifically provides for refusal of recognition and enforcement of a foreign arbitral award when "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."[24] Under this separate provision, the defense of procedural due process is no longer pleaded as a protection of public policy.

An example of procedural due process being considered as separate

justice," and the Ad Hoc Committee draft definition of public policy which was rejected as too broad, *i.e.* "fundamental principles of law."

22. *See generally* M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 24.01 (1968).

23. *But see Gilbert v. Burstein*, 225 N.Y. 348, 174 N.E. 706 (1931) in which the New York Court of Appeals enforced an award against a New Yorker who had submitted to arbitration under the British Arbitration Act, even though he had not appeared or been served in the United Kingdom.

24. Convention art. V (1)(b).

from the public policy defense appeared in *Fotochrome, Inc. v. Copal Co.*[25] The litigants had submitted a commercial dispute to arbitration in Japan[26] when Fotochrome, before having presented all its witnesses, went into bankruptcy in New York. The referee in bankruptcy issued a stay which Fotochrome understood to forbid continued arbitration. However, the arbitral tribunal in Japan ruled that the stay was not effective as to its proceedings; it concluded the arbitration without Fotochrome's presence, and granted an award to the Japanese firm, Copal. When Copal presented the award as a judgment claim[27] against the debtor in the bankruptcy court, Fotochrome challenged enforcement of the award under the Convention by asserting *inter alia*[28] that it had been "unable" to present its case.

The Second Circuit Court of Appeals concluded, without reaching a "public policy" issue, that Fotochrome, in effect, had been able to present its case because the bankruptcy court stay extended to creditors of the debtor and not to the debtor itself.[29] The court also held that while Copal may have been a creditor, it was not enjoined from continuing arbitration since it did not fall under the bankruptcy court's jurisdiction.[30] In sum, the appellate court decided the matter through an analysis of procedural due process protections only, without finding it necessary to discuss the more general public policy considerations of morality and justice.

The appellant in *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier [RAKTA]*[31] also claimed that it had been "unable to present its case before an arbitral tribunal." The tribunal had refused to postpone hearings so that a witness who had a

25. 517 F.2d 512 (2d Cir. 1975).

26. For a discussion of Japanese arbitration see Doi, *International Commercial Arbitration in Japan*, in INTERNATIONAL ARBITRATION 66-77 (P. Sanders ed. 1968); Kawakami & Henderson, *Arbitration in U.S./Japanese Sales Disputes*, 42 WASH. L. REV. 541 (1967).

27. The award was not made *exequatur* in a court proceeding at which Fotochrome could have appealed the award. The arbitral award was recognized as a final and conclusive judgment under article 800 of the Japanese Code of Civil Procedure and then brought before the Bankruptcy Court. The award was not recognized as a foreign money judgment in New York under the procedure in CPLR §§ 5301-09 because of Copal's apparent belief that the Bankruptcy Court's stay prevented them from proceeding for enforcement. 517 F.2d at 515.

28. Fotochrome also pleaded that if Copal's claim were permitted before the Bankruptcy Court, foreign creditors would have an advantage over United States creditors. Also at issue was the choice of the Convention or New York law as the applicable law. See Note, *Judicial Interpretations of Foreign Arbitral Awards Under the U.N. Convention*, 8 L. & POL. INT'L BUS. 737, 749-62 (1976).

29. 517 F.2d at 516; in other words, Fotochrome was under no legal incapacity; see Quigley, *supra* note 3, at 1067.

30. 517 F.2d at 516.

31. 508 F.2d 969 (2d Cir. 1974).

conflicting speaking engagement could give oral testimony. Counsel for Overseas contended[32] that this was tantamount to rendering the company unable to present its case because critical information not emphasized in the affidavit, subsequently was found to be important, and would have been brought to the tribunal's attention if the witness had been able to give personal testimony.[33] The court pointed out that the "inability to produce one's witness before an arbitral tribunal is a risk inherent in an agreement to submit to arbitration,"[34] and that the arbitral tribunal had acted within its discretion in refusing to postpone the hearings.[35] Public policy was not expressed as a factor affecting the court's consideration of this procedural due process issue.

In *Biotronik Mess-und Therapiegeraete v. Medford Medical Instrument Co.*,[36] the respondent, in attempting to invoke article V (1)(b), argued that it had been "unable to present its case" not because it had been absent from the arbitration proceedings, but because the arbitral tribunal had given the award before the rights and liabilities of the respondent had matured under the agreement in question.[37] The court's analysis limited the requirements of article V (1)(b) to basic questions of procedural due process.[38] Under these standards the court

32. Brief for Appellant at 24-29, Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier [RAKTA], 508 F.2d 969 (2d Cir. 1974).

33. The tribunal held Overseas liable for damages after a certain date; the witness' testimony allegedly could have shown that the date set by the tribunal was not an accurate measurement of liability. *Id.* at 27.

34. 508 F.2d at 975. In the next sentence the court asserted:

> By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights—including that to subpoena witnesses—in favor of arbitration "with all its well known advantages and drawbacks." Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Co., 143 U.S. App. D.C. 210, 442 F.2d 1234, 1238 (1971).

*Id.*

35. 508 F.2d at 976. It is noteworthy that while the court treated the public policy defense separately from the procedural due process question, it nevertheless analyzed the hearing postponement in terms of "fundamental fairness to Overseas." *Id.*

36. 415 F. Supp. 133 (D.N.J. 1976).

37. By virtue of two agreements, Medford had exclusive United States distribution rights to Biotronik's products. Biotronik exercised its right to terminate the agreement at the end of its term, and appointed another firm, Concept, Inc., to be the new distributor in the United States. Medford asserted that a third agreement was made by which it would receive a percentage commission on the next two years' sales of Biotronik products, as consideration for helping Concept, Inc. become established in the United States market. Evidence of this third agreement was not introduced by Biotronik at the arbitration. Medford alleged that this resulted in an award procured by fraud. Moreover, because the arbitration was concluded before the term of the third agreement had expired, Medford argued that its rights and liabilities under the agreement could not be calculated. *Id.* at 135-36, 137.

38. *Id.* at 140.

was able to dismiss this plea by noting that the respondent had received notice of the arbitration proceedings.[39] The decision held that an interpretation of article V (1)(b) which goes beyond the basic procedural due process concerns of notice and opportunity to be heard, "misconceives the thrust of the exception."[40] The court's reasoning establishes that the procedural due process defense of article V (1)(b) has specific application and will not be treated under the more general considerations of the public policy defense.[41]

2. *Non-Arbitrable Subject Matter*. In the United States, arbitration in certain matters has been held violative of public policy, and therefore, not enforceable by the courts.[42] The Convention has provided for this same bar to arbitration, but in a defense separate from the public policy defense. Article V (2)(a) provides:

> 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.

The 1958 Conference questioned whether the addition of this section was necessary since this consideration usually fell within public policy definitions. The separate provision was mainly the historical product of like treatment in the 1927 Geneva Convention, the International Chamber of Commerce Draft, and the 1955 Ad Hoc Committee Draft.[43]

The similarity between this defense and the public policy defense is evidenced by the court's decision in *Overseas*. Even though the defenses were dealt with separately, both were given a narrow interpretation reflective of deference to international considerations[44] and the pro-enforcement bias of the Convention.[45] Although the defenses share

39. *Id.*

40. *Id.*

41. In addition, these three cases give some indication that article V (1)(b) probably will not be viewed by the courts with any more favor than is the public policy defense.

42. Examples of such subject matter are antitrust violations, *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), and patent disputes, *Belkman Institute v. Technical Development Corp.*, 433 F.2d 55 (7th Cir. 1970). *See generally* DOMKE, *supra* note 22, at ch. 13. For a comparison of non-arbitrable subject matter in France, see Evans & Ellis, *International Commercial Arbitration: A Comparison of Legal Regimes*, 8 TEXAS INT'L L.J. 17, 34 (1973).

43. SANDERS, *supra* note 12, at 323.

44. Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier [RAKTA], 508 F.2d 969, 974 (2d Cir. 1974).

45. See text accompanying notes 17-20 *supra*. The court limited "non-arbitrability" to those categories of claims having a "special national interest in judicial, rather than arbitrable, resolution of the . . . claim underlying the award." 508 F.2d at 975.

similar origins and judicial treatment, the defense of non-arbitrable subject matter now has particularized application and no longer falls under the more general rubric of public policy.

*3. "Manifest Disregard" of the Law by Arbitrators*. The United States Supreme Court in *Wilko v. Swan*,[46] stated that "interpretations of the law by arbitrators in contrast to *manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation."[47] This statement resulted in a new, freshly phrased defense to enforcement of arbitral awards called "manifest disregard of the law."

Because the Supreme Court offered no elaboration on the *Wilko* statement of "manifest disregard," it was necessary for the lower federal courts to give definitive substance to the defense. The "manifest disregard" defense was raised in *San Maritime Compania De Navegacion v. Saguenay Terminals*,[48] when the appellee attacked the arbitral tribunal's award based on activities which the appellee claimed were not in violation of the litigants' charter agreement. The court held that the tribunal's interpretation of the scope of the agreement did not constitute a manifest disregard of the law. The court noted that "manifest disregard of the law must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law;"[49] rather, "manifest disregard" is present "when arbitrators understand and correctly state the law, but proceed to disregard the same."[50]

The case of *Ludwig Honold Mfg. Co. v. Fletcher*[51] clarified another dimension of the developing concept of the "manifest disregard" defense. The decision extended the contextual application of the defense by holding that an award may be disturbed "when there is a manifest disregard of the *agreement*, totally unsupported by principles of contract construction and the law of the shop."[52] *Honold* further

46. 346 U.S. 427 (1953).

47. *Id.* at 436-37 (emphasis added).

48. 293 F.2d 796 (9th Cir. 1961).

49. *Id.* at 801.

50. *Id., accord*, Bell Aerospace v. Local 516, 356 F. Supp. 354 (W.D.N.Y. 1973); Fukaya Trading Co. v. Eastern Marine Corp., 322 F. Supp. 278 (E.D. La. 1971); Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2d Cir. 1972).

51. 405 F.2d 1123 (3d Cir. 1969).

52. *Id.* at 1128 (emphasis added). This notion of "manifest disregard of the agreement" may have been at least implicitly part of the *San Maritime* decision also since both cases drew on the authority of *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960): "[An arbitrator] may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this

established that a test of "fundamental rationality" will accompany an examination of whether an arbitrator's award represents a manifest disregard of law.[53]

In spite of the fact that the "manifest disregard" defense involves certain basic notions of morality and justice, it is doubtful that a showing of "manifest disregard" would be applied as a defense under the general definition of the public policy defense in objections to enforcement of a foreign arbitral award.[54] This is not so because the defense already has a separate definition or a specific context for its application, but rather, because it is unlikely that a defense of "manifest disregard" would be appropriate to an examination of a foreign arbitral award. There are two reasons to support such a conclusion. First, it is not known how a court would be able to determine if an arbitrator had understood and nevertheless disregarded the law, in light of the fact that an arbitrator usually is not required to state the reasoning behind his award.[55]

> Obviously, a requirement that arbitrators explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbitrated dispute. But such a rule would undermine the very purpose of arbitration, which is to provide a relatively quick, efficient and informal means of private dispute settlement. . . . [T]he primary consideration for the courts must be that the system operate expeditiously as well as fairly.[56]

Secondly, even if a court were to have insight into the arbitrator's reasoning, an examination of his decision might be considered tantamount to a review of the merits of the award.[57] Insofar as review of the merits is not allowed on domestic arbitration matters in the United States

obligation, courts have no choice but to refuse enforcement of the award." *See also* Swift Industries v. Botany Industries, 466 F.2d 1125 (3d Cir. 1972).

53. 405 F.2d at 1133. Swift Industries v. Botany Industries, 466 F.2d 1125, 1131 (3d Cir. 1972). But an allegation of irrationality does not force a court to inquire into the sufficiency of the evidence supporting the award. Diamond v. Terminal Railway Alabama State Docks, 421 F.2d 228, 233 (5th Cir. 1970).

54. In *Overseas*, the two defenses were pled together by the appellant, Brief for Appellant at 34, Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier [RAKTA], 508 F.2d 969 (2d Cir. 1974), and separately by the appellee, Brief for Appellee at 50-51, Parsons & Whittmore Overseas Co. v. Societe Generale De L'Industrie Du Papier [RAKTA], 508 F.2d 969 (2d Cir. 1974), but treated separately by the court, 508 F.2d at 973, 977.

55. For suggested solutions on rules governing requirements for giving reasons supporting an arbitral award, see Sanders, *Appeals Procedure in Arbitration*, in INTERNATIONAL COMMERCIAL ARBITRATION 112, 123-24, 126 (C. Schmitthoff ed. 1974).

56. Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1969).

57. I/S Stavborg v. Nat'l Metal Converters, Inc., 500 F.2d 424, 429 (2d Cir. 1974).

courts,[58] to the same extent the courts are prevented under the Convention[59] from reviewing the merits of a foreign arbitral award.[60]

It is improbable that a showing of "manifest disregard" would succeed under the public policy defense unless the award involved so extreme an unlikelihood as the blatant, unconcealed defiance on the part of an arbitrator for the arbitration agreement and the law. Consequently, it is unlikely that the "manifest disregard" defense will be applied at all to review of foreign arbitral awards.[61]

*4. Forum Selection Clauses and Forum Non Conveniens*. In the past, courts have looked with disfavor upon forum selection clauses. Such clauses were considered as operating to "oust the jurisdiction" of the courts, thereby violating the public policy of the forum.[62] More recently, the United States Supreme Court in *Bremen v. Zapata Off-Shore Co.*[63] took a significant step[64] in enforcing forum selection clauses by treating the "ousting the jurisdiction" argument as little more than a "vestigial legal fiction."[65]

*Bremen* was a case in which the litigants had agreed to adjudicate in London any disputes arising out of a contract to tow a drilling rig from Louisiana to Italy. Nevertheless, when a dispute did occur,[66] Zapata brought an action for damages in a United States court in Florida. The owner of the *Bremen*, Unterweser, brought an action against Zapata in London under the forum selection clause of their contract, and moved for dismissal in the United States court. The Supreme Court, disagreeing with the lower courts, refused to disregard the forum selection

58. United Steelworkers of America v. Enterprise Steel & Car Corp., 363 U.S. 593 (1960); Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956).

59. Convention art. III: "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." There are also similar provisions in bilateral treaties. *See e.g.*, Treaty of Friendship, Commerce and Navigation with Japan, art. IV par. 2, 4 U.S.T. 2063, 2068, T.I.A.S. No. 2863 (1953).

60. Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 517 (2d Cir. 1975).

61. *But see*, Recent Developments, 10 TEXAS INT'L L.J. 619, 621 (1975); *see also* the discussion in *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier [RAKTA]*, 508 F.2d 969, 977 (2d Cir. 1974).

62. For cases holding this principle, *see* Annot., 56 ALR 2d 306-20 (1957), Later Case Service (1967), (1976).

63. 407 U.S. 1 (1972).

64. *See generally* Note, *Arbitration and Forum Selection Clauses in International Business: The Supreme Court Takes an Internationalist View*, 43 FORDHAM L. REV. 424 (1974).

65. 407 U.S. at 12.

66. After the drilling rig was damaged by a storm in the Gulf of Mexico, the *Bremen* towed it to the nearest port in Tampa, Florida.

clause because it was an integral part of the contract which the parties had calculated in forming the agreement. The Court ruled "that in the light of present day commercial realities and expanding international trade . . . the forum clause should control absent a strong showing that it should be set aside."[67]

Zapata asserted that the London court was a *forum non conveniens*, and that strong reason for setting aside the forum selection clause therefore existed. The matter was remanded to determine if the London forum inconvenienced a party so as to preclude the possibility of a fair trial. Nonetheless, the Supreme Court indicated that it viewed the forum selection clause as a part of a freely negotiated contract made at arm's length and "unaffected by fraud, undue influence, or overweening bargaining power."[68]

With the increase of international commerce and greater participation of smaller companies in international markets, the possibility of adhesion bargaining situations, in which only one party determines the arbitration format, becomes more distinct. If a commercially weak party were to be forced into unreasonable or inconvenient arbitration which effectually denied that party its day in court, a deprivation of fundamental fairness and justice would be involved.[69] Should an award arising from such circumstances, therefore, be challenged by pleading the public policy defense?

One reason the public policy defense might not apply, in spite of its relation to fundamental fairness and justice, is the plausibility of raising the alternative defense of article V (1)(b) of the Convention[70] which prevents recognition and enforcement of a foreign arbitral award if a party has been "unable to present his case."[71] Discussion in the Convention Conference tends to emphasize the generally inclusive nature of this phrase.[72]

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67. 407 U.S. at 15. The Court also ruled that while the London court would enforce exculpatory clauses in the contract which a United States court would not enforce, there still was no strong showing that the forum selection clause should not control; *contra Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963), which are cases involving no international considerations.

68. 407 U.S. at 12, 17-18.

69. Bearing in mind that parties seldom negotiate a contract in terms of equal bargaining power, free choice of the procedural law of arbitration could be detrimental to the economically weaker party. It could mean choice of a law that would let the stronger harass the weaker into an unwanted arbitration.

ABA SECTION OF INTERNATIONAL AND COMPARATIVE LAW PROCEEDINGS 253 (1960).

70. See text accompanying notes 24-41 *supra*.

71. Convention art. V (1)(b).

72. Quigley, *supra* note 3, at 1067.

Another reason for exluding *forum non conveniens* from the public policy defense is that a defense of inconvenient forum, if pleaded separately, would have an easier burden of proof. A successful claim of inconvenient forum need only prove that the arbitration forum was unreasonably inconvenient;[73] it need not show that the use of the forum violated basic notions of morality and justice. If *forum non conveniens* were incorporated within the public policy defense, a claim of inconvenient forum would have to reveal a violation of basic notions of morality and justice, as well as unreasonable inconvenience.[74] Moreover, the proof of unreasonableness in a claim of *forum non conveniens* is judged in the context of the particular circumstances,[75] and not under the more general and ephemeral public policy standards of fundamental notions of morality and justice.

*5. A Conflict with United States Policy or Domestic Laws.* Courts reviewing foreign arbitral awards have been confronted on occasion with a conflict between enforcement of the foreign award and domestic governmental policies or statutes.[76]

In the *Overseas* case,[77] the Second Circuit Court of Appeals was faced with the question of whether public policy is equatable to or reflected in national governmental policies. The issue arose out of a contract between Overseas, a United States based corporation, and RAKTA, a predominantly Egyptian government-owned corporation. The contract provided for the construction and initial management by Overseas of a paper board mill in Egypt, with financing provided by an agency of the United States Department of State. The mill was almost completed when United States and Egyptian relations deteriorated on the eve of the Six Day Arab-Israeli War. Overseas was informed by the Department of State agency that financing of the project had been

73. Copperweld Steel Co. v. Demag-Mannesmann-Boehler, 354 F. Supp. 571 (W.D. Pa. 1973); *see also* Comment, *Unterweser: Choice Not Chance in Forum Clauses*, 3 CALIF. W. INT'L L.J. 397, 406-08 (1973). Note, however, that the Supreme Court considers this a heavy burden of proof. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972).

74. A review of an arbitral award involving alleged fraud has held that the advantages of arbitration require a court to find a "convincing showing [of fraud or undue influence] before upsetting an international arbitration award." Biotronik Mess-und Therapiergeraete v. Medford Medical Instrument Co., 415 F. Supp. 133, 139 (D.N.J. 1976). "The award . . . must stand unless it is made abundantly clear that it was obtained through 'corruption, fraud or undue means.' " *Id. citing* Karppinen v. Karl Kiefer Machine Co., 187 F.2d 32, 34 (2d Cir. 1951).

75. Copperweld Steel Co. v. Demag-Mannesmann-Boehler, 354 F. Supp. 571 (W.D. Pa. 1973).

76. "The nation speaks in different tongues and at different times; cases arise where the determination of 'public policy' must be a distillation of several governmental utterances." Antco Shipping Co. v. Sidermar, 417 F. Supp. 207, 213 (S.D.N.Y. 1976).

77. 508 F.2d 969 (2d Cir. 1974).

withdrawn, and that Overseas should cease its performance under the contract. Shortly thereafter, the Overseas work crew left Egypt upon indication by United States authorities that their safety was imperiled, and the Egyptian government's expullsion of most United States citizens following a complete break in diplomatic relations.

RAKTA brought a breach of contract action under an arbitration agreement contained in the contract. The arbitral tribunal, in a preliminary award, excused part of Overseas' non-performance because of the *force majeure*, but later gave a final award to RAKTA for Overseas' failure to return to Egypt within twenty days following the Arab-Israeli ceasefire.[78] When RAKTA sought to enforce the award in the United States, Overseas contended that:

> [T]he Final Award violated the public policy of the United States since the Award assessed damages against Overseas, for failing to complete its contractual services, despite the fact that Overseas had been ordered to cease performance by the United States Government.[79]

In affirming the rulings in favor of RAKTA, the court found that Overseas' plea of public policy was easily dismissed under a narrow construction of the Convention's public policy defense.[80] The equating of "national policy" with United States "public policy" was considered a mere "parochial device protective of national political interests [that] would seriously undermine the Convention's utility."[81] The court was sensitive to the possibility of creating a loophole in the Convention by enshrining "the vagaries of international politics under the rubric of policy."[82] It would appear that the court sought to avoid standards for

78. Counsel for Overseas asserted that it was still impossible for work crews to return at that time for three reasons: 1) despite the fact the ceasefire had been signed, relations were still strained between Egypt and the United States; 2) passport restrictions on travel in Egypt had not yet been removed; 3) the work crews had been broken up and scattered throughout the world such that their return was impossible on such short notice. Counsel also pointed out that Overseas had made good faith efforts to negotiate a settlement of the matter following the cessation of hostilities. Brief for Appellant at 7-11, Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier [RAKTA], 508 F.2d 969 (2d Cir. 1974).

79. *Id.* at 16.

80. 508 F.2d at 974. See also text accompanying notes 15-21 *supra*.

81. 508 F.2d at 974.

82. *Id.*

> [I]t is not a general and frequently nebulous policy underlying the public law of the forum that determines the effect and range of the statute or rule or, to put the same thing in different words, the limits of public policy. Rather is it [*sic*] the intention of the legislator or the common law that is decisive. That intention will be ascertained by the familiar process of interpretation. In pursuing it regard will be had not only to the text itself, but also to all other permissible guides such as the legislative mischief, purpose and history, the limits of legislative jurisdiction and the need for international tolerance and harmony. These are specifically legal considerations. They are peculiar to and worthy of the judicial

recognition of foreign arbitral awards which would vary according to the prevailing cordiality of relations between the United States and other governments.

Although a general national policy in conflict with particular arbitration results may not constitute a defense to recognition and enforcement of a foreign arbitral award, a closer issue of public policy is raised when a foreign arbitral award is in direct conflict with specific domestic statutory law.

Even though the "full faith and credit" clause of the United States Constitution[83] does not apply to awards recognized by a foreign sovereign, there is, nevertheless, authority for enforcing awards which could not have arisen in United States courts.[84] Therefore, a conflict with domestic law is not a *per se* violation of public policy. Should a conflict involve statutory law based on basic notions of morality and justice, however, it is conceivable that the public policy defense would be applicable.

In *Scherk v. Alberto-Culver Co.*,[85] the United States Supreme Court was faced with a conflict between an international commercial arbitration agreement and unwaiveable protections for investors under the Securities Exchange Act of 1934.[86] The litigants had agreed to arbitrate any disputes arising out of their contract. However, when Alberto-Culver alleged that Scherk had made fraudulent representations of trademark rights, the Securities Exchange Act became applicable and prevented the parties from waiving any of the Act's provisions.[87] The basic question became one of deciding whether the arbitration agreement or the statute would control settlement of the dispute.

The Supreme Court determined that because the arbitration agreement was "truly international,"[88] considerations and policies other than the Securities Exchange Act were involved, namely, the need to avoid

process. They are far removed from what may be described as political rather than legal policy.

Mann, *Conflict of Laws and Public Law*, 132 RECUEIL DES COURS 107, 124 (1971) [hereinafter cited as Mann].

83. U.S. CONST. art. IV § 1.

84. RESTATEMENT (SECOND) OF CONFLICTS § 117, Comment c (1971).

85. 417 U.S. 506 (1974). For more extensive discussion of this case, see Case Comment, *Contracts: Arbitration Clauses in International Agreements Held Enforceable*, 59 MINN. L. REV. 436 (1974); Recent Decisions, 15 VA. J. INT'L L. 467 (1975).

86. Securities Exchange Act of 1934, Ch. 404, § 10b; 48 Stat. 891, 15 U.S.C. § 78j(b) (1934); Rule 10b-5, 17 C.F.R. § 240. 10b-5.

87. *See* Wilko v. Swan, 346 U.S. 427 (1953).

88. 417 U.S. at 515. *Compare Wilko v. Swan*, 346 U.S. 427 (1953), and *Boyd v. Grand Trunk W.R. Co.*, 338 U.S. 263 (1919), in which arbitration without international ramifications was superceded by federal acts.

uncertainty in a conflict of laws situation, and also potential parochial action by courts. Together these factors might operate to frustrate the advantages of arbitration agreements.[89] These international considerations were found to outweigh the benefits intended by domestic statutory protections.[90] The decision to favor international arbitration over domestic statutory provisions was supported by citing the Convention as an indication of Congressional policy consistent with this ruling.[91] However, the decision did not use the Convention as primary authority for its holding. Thus, the Convention public policy defense was not specifically at issue in the majority opinion.[92]

Writing for the dissent,[93] Justice Douglas considered the Convention's public policy defense as a vehicle for holding the domestic statute applicable over international commercial arbitration considerations.[94] He did not consider the "invocation of the 'international contract' talisman" as justification for the court's disregard of domestic statutory protections.[95] He wrote, "If these guarantees are to be removed, it should take a legislative enactment. I would enforce our laws as they stand, unless Congress makes an exception."[96]

Even after this decision, the respondent in *Biotronik Mess-und Therapiegeraete v. Medford Medical Instrument Co.*[97] attempted to define at least one appropriate instance of the public policy defense by equating public policy with a federal arbitration statute. The respondent asserted that the opposing party had committed fraud in the arbitration,

89. 417 U.S. at 515-17.

90. "[T]he mere fact that a statute pursues a certain policy does not indicate that it sets up so fundamental a principle as to demand its universal application." Mann, *supra* note 82, at 130.

91. 417 U.S. at 520-21 n.15.

92. The opinion nevertheless intimated that the question of fraud in the facts may have been brought under the public policy defense if enforcement of an arbitral award had been at issue. *Id.* at 519 n.14.

93. Justices Brennan, White and Marshall concurred in the dissenting opinion.

94. 417 U.S. at 530.

95. *Id.* at 529.

> Neither § 29, [of the Securities Exchange Act] nor the Convention on international arbitration . . . justifies abandonment of a national public policy that securities claims be heard by a judicial forum simply because some international elements are involved in a contract.

*Id.* at 530 n.10, at 531.

96. Id. at 533. *But see Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975) where the court's decision to allow a foreign arbitral award to be enforced in this country put United States creditors at a disadvantage to foreign creditors under bankruptcy laws. The court allowed this exception to the bankruptcy laws without reaching the question of whether the Bankruptcy Act involved a public policy. *Id.* at 516.

97. 415 F. Supp. 133 (D.N.J. 1976).

thereby violating § 10(a) of the United States arbitration act.[98] Consequently, it was argued that:

> [S]ince fraudulent procurement of an arbitration award would be grounds for vacating an award in domestic arbitration under § 10(a), this is tantamount to a declaration that the enforcement of any fraudulently obtained [foreign arbitral] award is contrary to the public policy of the United States.[99]

Because the court concluded that there was no fraud involved in the case, the public policy defense was *a fortiori* inapplicable, and no examination of the "most basic notions or morality and justice" was included in the decision.[100]

The pleading of the public policy defense in this case attempted to utilize the defense as a vehicle for applying domestic arbitration law to foreign arbitration awards by equating a specific statute with public policy. Although the court did not reach consideration of this question, it is clear that the court believed a statutory violation would be insufficient to invoke the public policy defense, absent considerations of basic notions of morality and justice. This reinforces the principle of *Scherk* by holding that the weight given to a statute because it is domestic will not automatically swing the balance away from recognizing a foreign arbitral award.[101]

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98. 9 U.S.C. § 10(a) (1970).

99. Biotronik Mess-und Therapiegeraete v. Medford Medical Instrument Co., 415 F. Supp. 133, 140 (D.N.J. 1976).

100. *Id.*

101. This judicial attitude was exemplified and extended in the case of *Antco Shipping Co. v. Sidermar*, 417 F. Supp. 207 (S.D.N.Y. 1976). In *Antco*, an arbitration clause in the litigants' contract of affreightment was being challenged because it contained a phrase which excluded Israel as a port for loading and backhaul voyage. It was claimed that such an exclusion was illegal as a restrictive boycott upon a friendly country, in violation of the public policy of the United States as expressed in the federal Export Regulation Act and § 296 of the New York Executive Law which made illegal any boycotts which discriminate on the basis of national origin. Antco asserted that this part of the agreement was done as part of the blacklisting of Israel to "curry favor in the Arab world." *Id.* at 209-12, 213. The court refused to take judicial notice of this assertion. *Id.* at 213.

The court held that public policy was not violated with regard to the Export Regulation Act because the contract did not involve United States exporters or exports from the United States, *id.* at 213; nor was the applicability of the New York Executive Law sufficiently demonstrated, *id.* at 217. The court's opinion not only affirmed the limited definition and narrow construction given the public policy defense in the *Overseas* decision, it also went so far as to assert that the *Overseas* holding was itself a statement of public policy. *Id.* at 216.

It should be noted that the matter involved in *Antco* was a stay of arbitration, whereas *Overseas* concerned the enforcement of an arbitral award. The court saw no distinction between these actions when discussing public policy objections: "While the present case involves enforcement of the arbitration agreement rather than enforcement of the award,

For purposes of defining the public policy defense, it appears that situations in which a foreign arbitral award is in conflict with domestic statutes may be pleaded under the public policy defense, but the possibility for success in such a plea appears dubious. No policy yet argued has outweighed the policy favoring enforcement of foreign arbitral awards. This type of problem included in a defense of public policy will be subject to the strict construction ennunciated in *Overseas*. However, even if a conflict between an arbitral award and domestic law were pleaded separately from the public policy defense, the holding in *Scherk* indicates that deference to international commerce will require as restricted an application as that presently given to the public policy defense.

*6. Summary*. The defenses discussed in the above sections no longer lend themselves to pleading under the public policy defense. The procedural due process defense and the non-arbitrable subject matter defense now are pleaded exclusive of the public policy defense under separate provisions in the Convention; United States courts accordingly have considered them apart from the public policy defense. A defense of "manifest disregard of the law" is unlikely to be a successful public policy defense because of the difficulties in establishing an arbitrator's recognition and subsequent disregard of the law, the agreement, and fundamental rationality. Furthermore, pleading "manifest disregard of the law" may require a review of the merits of the award, which is prohibited under domestic law and the Convention. Although it is not inconceivable that a plea of *forum non conveniens* may fall within the boundaries of the public policy defense, a party probably will not plead inconvenient forum as a public policy matter, for such a plea would have a more difficult burden of proof under vague *Overseas* standards of the most basic notions of morality and justice, than under a test of reasonableness judged in light of particular circumstances. In any event, a party pleading inconvenient forum must overcome the preference for enforcement of contract forum-selection provisions which was ennun-

comparable questions of public policy arise. . . ." *Id.* at 216. Presumably, the reasoning behind such an approach concludes that a public policy defense unsuccessfully pleaded in a motion to stay arbitration will be equally unsuccessful in a challenge to enforcement of a subsequent arbitral award.

The Supreme Court, however, has drawn the distinction between public policy considerations in challenges to arbitration clauses, and challenges to enforcement of arbitral awards. In *Scherk*, the Court in dealing with a motion to stay arbitration did not apply the public policy defense, but suggested that it might have been applied to the facts if enforcement of an arbitral award had been at issue:

> 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.

417 U.S. at 519 n.14 (emphasis added).

ciated by the Supreme Court in *Bremen*. Finally, a foreign arbitral award even in direct conflict with domestic governmental policies or statutes does not appear to be a violation of public policy. This is simply the product of decisive and unmitigated deference by the courts for international considerations involved in foreign arbitration.

One result of the separation of these defenses from the public policy defense is the extension of their individual applicability in reviewing foreign arbitral awards. This extended applicability, in turn, indicates and emphasizes a greater limitation on the subject matter and situations to which the public policy defense might be applied.

## II. PROBLEMS WITH THE PRESENT INTERPRETATION OF THE PUBLIC POLICY DEFENSE: THE EFFECT UPON INTERNATIONAL COMMERCIAL ARBITRATION

The federal courts have limited the public policy defense to considerations of "the forum state's most basic notions of morality and justice." The purpose of this restricted definition is to limit the bases of public policy defenses to cardinal segments of *lex fori*. The problem in understanding this definitional limitation lies in the fact that all defenses to enforcement of arbitral awards must ultimately be reflective of basic notions of justice and morality. Were they not so, they would not be recognized by the courts. If all defenses to enforcement of arbitral awards are based on basic notions of morality and justice, how then is the public policy defense to be distinguished from the others?

Some of the defenses based on basic notions of morality and justice have evolved independently, and now have their characteristics and context of application defined to a high degree of specificity, and often have been given their own labels. The public policy defense is retained as a "catch-all" to encompass those arbitration situations in which the basic notions of morality and justice have not yet been specifically delineated.

The attitude of the United States courts towards the public policy defense is not one which recognizes the defense as a "catch-all" to protect the integrity of arbitration. Rather, the courts have considered the defense mainly as a means by which a forum might escape binding arbitration. Consequently, the courts have given the public policy defense so narrow a construction that it now must be characterized as a defense without meaningful definition. This leaves the defense pragmatically useless if not altogether nonexistent. The public policy defense suffers conceptually from being an expression of ultimate sovereign power in international commercial arbitration, which paradoxically is disfavored by the courts because of its inherently

provincial and parochial nature. The defense also suffers the pragmatic weakness of being assigned so unspecific a responsibility as the guarantee of morality and justice. For example, it will not function even to stop enforcement of an award against a business given because that business refused to disobey its government's instructions. Such was the case in *Overseas*. Even where a foreign arbitral award directly discourages a party from complying with domestic statutes, such as in *Scherk v. Alberto-Culver Co.*, the public policy defense will not prevent enforcement of the award in the United States. As a result of the conceptual and pragmatic shortcomings caused by present interpretations of the public policy defense, it will be difficult for courts, attorneys, arbitrators and businessmen to anticipate the limits on unfairness surrounding international commercial arbitration.[102]

If the courts, whether by conscious choice or unchallenged reliance on present authority, continue to deny any use of the public policy defense in situations where a foreign arbitration award conflicts with United States law or policy, the use of international commercial arbitration may mean a significant sacrifice of governmental or statutory protections. With this possibility in mind, attorneys may consider it prudent to counsel their clients to avoid an arbitration agreement altogether, especially if that client is dealing in high risk commercial situations such as those typically encountered in states which are unstable or developing.[103] American business may well decide in favor of choosing the "safety" of United States courts over the advantages of economy and speed in arbitration.[104]

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102. The presumption is made, of course, that definite limits of unfairness are ascertained and adhered to in our judicial system. But compare the language in *Oscanyan v. Arms Co.*, 103 U.S. 261, 277 (1880):

> [A] contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country,—not from any considerations of the interests of that government or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people.

with *Holzer v. Deutsche Reichsbahngesellschaft*, 277 N.Y. 474, 14 N.E.2d 798 (1938) in which a Jewish plaintiff sued a German corporation that had breached a contract because of anti-semitic Nazi decrees. The court ruled that it was not competent to review the actions of the German government in its own territory "however objectionable" it found the decree.

103. Interview with Malcolm A. Hoffman, Counsel for Overseas in *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier [RAKTA]*, 508 F.2d 969 (2d Cir. 1974) (Nov. 7, 1975).

104. It may be argued that American business can simply respond to this situation by providing as a matter of course for a United States forum for arbitration, but this, in effect, is a promotion of the parochialism that the courts have sought to avoid. "Nor is it always clear that an MNE [multinational enterprise] will find more favor in its chosen forum." Vagts, *The Multinational Enterprise and Dispute-Resolution Machinery*, in NEW

The unfortunate conclusion that may be anticipated as a result of present court decisions is that the strict limitations placed on the use of the public policy defense may actually operate as a deterrent to the use of international commercial arbitration, rather than the contribution which the courts intended.

## III. A MODEL FOR CONSTRUCTIVE USE OF THE PUBLIC POLICY DEFENSE

Courts have given the public policy defense strict construction and have circumscribed its use to avoid such problems as a loophole to enforcement,[105] uncertainty in the arbitral process,[106] and destructive retaliation on American arbitral awards in courts of other states.[107] The use of the public policy defense in the Federal Republic of Germany,[108] however, illustrates that a less restrained application of public policy does not necessarily bring about these deleterious consequences.

Germany has relatively progressive policies favoring arbitration,[109] and yet retains a broader interpretation of the public policy defense than does the United States. Public policy as applied by the German courts[110] prevents enforcement of a foreign arbitral award if it offends good morals or the objectives of German laws,[111] and especially if it causes a party to commit an act which is illegal under German law.[112] The general context for applying public policy is in the

STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 97, 101 (Sanders ed. 1971).

105. See text accompanying notes 15-21 *supra*.

106. The United States Supreme Court's concern for "certainty" in arbitration can be noted in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974), and *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972).

107. Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier [RAKTA], 508 F.2d 969, 973-74 (1974); Biotronik Mess-und Therapiegeraete v. Medford Medical Instrument Co., 415 F. Supp. 133, 139 (D.N.J. 1976). See also A. EHRENZWEIG, CONFLICT OF LAWS § 56 (1962).

108. The Federal Republic of Germany [hereinafter cited as Germany] acceded to the Convention in 1961.

109. Schwab, *supra* note 4, at 303; *see generally* 2 DIGEST OF COMMERCIAL LAWS OF THE WORLD 76-81 (1971).

110. "German law, following the doctrine of Savigny, regards public policy as an exception to exclude the operation of the normally applicable rule. . . ." Graveson, *Comparative Aspects of the General Principles of Private International Law*, 109 RECUEIL DES COURS 8, 39 (1963). Graveson's analysis characterizes a state's public policy as either being a "normal operation in decision of conflicts of law cases" or an "exception to the normal applications of both internal and private international law." *Id.* at 47. As regards the use of the public policy defense under the Convention in the United States, it is not necessary and probably undesirable to take a pre-determined stance on "normal" or "exceptional" use of public policy. Rather, the use of the public policy defense should be a reflection of the general validity of the process of arbitration in international commercial disputes.

111. *Id.* at 39.

112. German Code of Civil Procedure, ZPO § 1044; Sanders, *supra* note 12, at 57; Evans & Ellis, *supra* note 42, at 46.

framework of particular circumstances rather than the larger concepts of "morality" and "justice".[113] This approach encompasses United States standards of basic notions of morality and justice, and in addition, provides a practical contextual guideline for applying general standards of morality and justice to fact situations.

Article 1025(2) of the German Code of Civil Procedure provides that an arbitration agreement will be declared void if it is the result of a commercially strong party applying undue influence upon an economically weaker opponent.[114] A specific statutory delineation of public policy such as this serves as a general preventative solution to the potential problems of undue influence and overweening bargaining power anticipated in the *Bremen* decision but limited therein to the issues of forum selection clauses and *forum non conveniens*.

German law also has a statutory definition of public policy to prevent its excessive use and to limit its application in a conflict of laws situation to only the cardinal segments of *lex fori*.[115]

An alternative to a statutory definition of public policy would be a more developed approach to the language of a statute, both by the legislature in drafting and by the judiciary in interpretation.[116] If Congress were to indicate in some fashion those laws which it considers statements of fundamental public policy in matters involving international commerce, the courts would have less difficulty in resolving conflicts between foreign arbitration and domestic laws.[117]

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113. Graveson, *supra* note 110, at 40.

114. 1 P. SANDERS, INTERNATIONAL COMMERCIAL ARBITRATION 39 (1959).

115. ZPO § 1025(2). "[T]he German 'Vorbehaltsklausel' . . . indicates a reservation or an exception and thereby acts as a brake against excessive use of *ordre public*." Eek, *Peremptory Norms and Private International Law*, 139 RECUEIL DES COURS 1, 21 (1973).

116. The lawmaker, whether the courts or the organs exercising the constitutional legislative power of the State, should make conscious efforts to define the different categories of legal rules in the field we call private or civil law. Law-makers are accustomed to make clear whether a rule can or cannot be set aside by the parties to, for instance, a clearly domestic contract. They might for good reasons not wish to work out a detailed content of "external public order" as required for the use of the mechanism of *ordre public*. But they should make clear if certain rules or a certain set of rules are meant to apply as "peremptory" together with the rules of the *lex causae* which are applicable under the choice of law rules of the forum. The notion of public order in *this* sense should not be left to "the fantasy of individual tribunals".

*Id.* at 31-32;

It may be assumed that the lack of clear distinctions in legal writing between ordinary mandatory rules in private law, reprobation of a foreign rule, which is applicable under the choice of law rules but contrary to the forum's *ordre public*, and absolute application of certain rules of law within a given territory or by the courts of a given country, is a reason why legislators *in most countries* do not seem to take much interest in these distinctions.

*Id.* at 60.

117. The *Scherk v. Alberto-Culver Co.* decision may cause some difficulty in this

A situation in Germany to which a public policy defense has been analytically applied is in the examination of pre-arbitration agreements waiving the right to bring suit to vacate an award.[118] A pre-arbitration agreement waiving appeal of an award appears to be a strong reinforcement of the arbitral process. A deeper analysis, however, reveals that such agreements would result in awards rendered only under severe procedural inhibitions.[119] On this basis, enforcement of pre-arbitration agreements waiving appeal of an award is considered violative of public policy.[120] Application of a public policy defense in this instance does not emphasize basic notions of morality and justice, as would be required in United States courts. Nevertheless, public policy would be appropriately invoked in the context of the particular circumstances to preserve the integrity of arbitral awards. This case is a paradigm example of the public policy defense being exploited in its "catch-all" capacity, to correct an undesirable situation which probably would not have been anticipated by any express enumeration of defenses.

The status of the public policy defense in Germany reflects what flexible use of this defense can constructively accomplish: certainty as to governing guidelines of fairness; clarity in the application of laws in conflict with foreign awards; and effective limitation on the public policy defense to prevent development of loopholes in binding arbitration without rendering the public policy defense useless. Furthermore, the success of arbitration in Germany[121] demonstrates that a comparatively liberal use of the public policy defense does not result in detriment to arbitration as a means of dispute settlement or create a threat of unfortunate reciprocation by other states.

## IV. CONCLUSION

The public policy defense has been criticized as a blind, nondiscriminating substitute for analysis.[122] The almost mechanical rejection of the public policy defense by United States courts, however, reflects a similar lack of analysis.

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regard. The statute involved in that matter stated unequivocally that its provisions could not be waived by condition, stipulation or provision, yet the Court did not recognize this strong language as an express statement of public policy.

118. Schwab, *supra* note 4, at 310.

119. *Id.*

120. *Id.*

121. *Id.* at 303.

122. Paulsen & Sovern, *"Public Policy" in Conflict of Laws*, 56 COLUM. L. REV. 969, 982, 987, 1016 (1956).

Courts that seek to promote international commercial arbitration should be cognizant of the possibility that the present tenor of decisions on the public policy defense may actually be a deterrent to the use of arbitration. The problems resulting from present judicial interpretations of the public policy defense indicate a need for a more analytic evaluation of the defense of public policy. The role of the public policy defense in German arbitration suggests that a more flexible use of the public policy defense in the United States could contribute to the integrity of the arbitral process without creating loopholes in the Convention or destructive reciprocation by courts in other countries.

The public policy defense would become more meaningful if its potential utility were emphasized as much as its potential abuse. Parties to arbitration have a good faith duty not to use the public policy defense as a dilatory or evasive action following an award.[123] Similarly, they should not allege the public policy defense as a *pro forma* pleading in a defense to enforcement of an award, for meaningless use of the public policy defense would serve only to distract a court from analysis of substantive public policy considerations.

Courts should view the public policy defense not merely as an expression of parochialism in international commercial conflicts, but also as an ultimate guarantee of fairness and integrity in international commercial dispute resolution. Courts should be equally sensitive to particular circumstances of a dispute as well as basic notions of morality and justice in order to give more depth and meaning to their analyses. Their language should reflect an analytic approach to application of public policy instead of mere general assertions about basic morality and justice that provide no prescriptive direction for future arbitration. United States courts should consider re-evaluating the present interpretation of the public policy defense in order to bring their focus into line with the constructive purposes of the public policy defense and the positive effect it is intended to have on international commercial arbitration.

*Joel R. Junker*

123. South East Atlantic Shipping, Ltd. v. Garnac Grain Co., 356 F.2d 189 (2d Cir. 1966).