INTERNATIONAL COMMERCIAL ARBITRATION: DOMESTIC RECOGNITION AND ENFORCEMENT OF THE INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

I. INTRODUCTION

The pending United States ratification of the 1975 Inter-American Convention on International Commercial Arbitration[1] represents a growing willingness by this country to recognize international commercial agreements. Essentially duplicating the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (U.N. Convention),[2] the Inter-American Convention aims to facilitate the settlement of international commercial disputes[3] by binding arbitration.[4] The Convention, therefore, endeavors to promote uniform recognition and enforcement of foreign arbitral agreements and awards by members of the Organization of American States (O.A.S.).[5]

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1. Inter-American Convention on International Commercial Arbitration, *done* Jan. 30, 1975, OAS/Ser. A/20 (SEPF); 14 I.L.M. 336 (1975); S. Treaty Doc. No. 97-12, 97th Cong., 1st Sess. 8-19 (1981); S. 1658, 98th Cong., 1st Sess. (1983) (enacted by 9 U.S.C.A. §§ 301-307 (West Supp. 1984)) [hereinafter cited as Inter-American Convention].

2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* Sept. 30, 1970, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (effective Dec. 29, 1970) (enacted by 9 U.S.C. §§ 201-208 (1982)) [hereinafter cited as U.N. Convention].

3. Inter-American Convention, *supra* note 1, at 1. There is little doubt that arbitration proceedings in the international arena have increased in both scope and frequency. The arbitral process has its roots in the commercial law developed by the trading countries of the West. Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 846 (1961). This process has expanded steadily throughout the contemporary international commercial area. Wetter, *The Legal Framework of International Arbitral Tribunals-Five Tentative Markings*, *in* INT'L CONT. 271, 274 (1981). At present, international commercial arbitration is perceived "as a panacea for the ills of court procedural delays, uncertainties, expense, and publicity." De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 43 (1982). Thus, international commercial arbitration is increasingly utilized by parties unwilling to submit to the "vagaries of [domestic] judicial systems." Ehrenhaft, *Effective International Commercial Arbitration*, 9 L. & POL'Y INT'L BUS. 1191, 1191 (1977). *See* Lew, *The Arbitration Act of 1975*, 24 INT'L & COMP. L.Q. 870, 878 (1975). For example, the American Arbitration Association has been asked to administer 101 international arbitral proceedings involving 34 foreign countries in 1980 alone. Hoellering, N.Y.L.J. *Arbitration*, Aug. 13, 1981, § 1, at 1, col. 1.

4. *See* Inter-American Convention, *supra* note 1, at 21-27.

5. The need to expand the application of the U.N. Convention's primary stipulations had become evident by the reluctance of some O.A.S. countries to join this pact. As of January 1, 1983, only Chile, Colombia, Cuba, Ecuador, Mexico, and Trinidad and Tobago

The judicial policy favoring an expansive construction of the U.N. Convention[6] will similarly characterize domestic application of the Inter-American Convention.[7] Legal interpretation of the U.N. Convention has somewhat restrained the freedom previously allocated to American Multinational Corporations (MNC) in favor of a nascent uniform legal regime.[8] Court decisions, and their concomitant business implications, suggest that the judicial application of the Inter-American Convention is not likely to display the Convention's most significant benefits.[9] Rather, the freedom given to the contracting parties to stipulate their choice of law and procedure, as well as the merely deterrent aspects of domestic judicial enforcement of foreign arbitral agreements and awards, are the Convention's most significant assets.[10] In order to deter reciprocal biases abroad, judicial policies[11] have exhibited sen-

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have become party to the U.N. Convention. *List of Contracting States*, 8 Y.B. COM. ARB. 335 (1983).

6. Although construed narrowly, there are, however, at least three restrictions on the application on the U.N. Convention in American Courts: Where the agreement is with a party from a State that has not signed the Convention and the arbitration is to take place in that State; where the site of the arbitration is a non-signing State even though both parties may be from signatory States; and where the subject of the arbitration is not commercial in nature. *See* Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 948 (S. D. Ohio 1981).

7. American courts have significantly limited the prospects for viable defenses to domestic enforcement of valid arbitration agreements and awards. *See infra* notes 129-274 and accompanying text.

8. Even in the presence of a specific treaty, domestic judicial interpretations may present American commercial enterprises with unfavorable circumstances. Divergent international legal doctrines frequently interject into even the most precise legal instruments. In this respect, unfavorable awards are more likely to receive domestic judicial recognition than favorable awards will be enforced abroad. *See generally* A. BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 *passim* (1981) (discussing the problems associated with the disparate enforcement of the U.N. Convention abroad).

9. "Arbitration is an institution resorted to by businessmen not wishing to go before national courts of law." Lew, *supra* note 3, at 878. *See* Ehrenhaft, *supra* note 3, at 1191. But, in terms of the parties' autonomy to delineate the applicable law, common law States, in direct contradiction to civil law States, qualify the parties' capacity to choose the binding substantive and procedural rules. In general, common law countries subject the freedom of the parties to certain qualifications as expressed by the conflict of laws rules of the *lex fori*. *See* Croff, *The Applicable Law in an International Commercial Arbitration: Is it still a Conflict of Laws Problem?*, 16 INT'L LAW. 613, 614-23 (1982).

10. *See* Quilling, *The Recognition and Enforcement of Foreign Country Judgments and Arbitral Awards: A North-South Perspective*, 11 GA. J. INT'L & COMP. L. 635, 647 (1981). Approximately ninety percent of the arbitral awards rendered by the International Chamber of Commerce (I.C.C.) Court of Arbitration are complied with voluntarily. Mirabito, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years*, 5 GA. J. INT'L & COMP. L. 471, 481 (1975).

11. Substantial judicial discretion has evolved from the significant latitude permitted by the U.N. Convention's implementing legislation which modified the 1925 Arbitration Act

sitivity to the problems associated with a rapid abandonment of the status quo when developing legal parameters that are measured by the transnational enforcement of commercial treaties and by the contracting parties' actual and presumed intentions.[12]

The United States will soon ratify the Inter-American Convention not merely because this Convention presumes to offer a slightly more precise legal regime: American ratification will be consummated because the Convention is an influential political tool for merging the O.A.S. into the mainstream of codified international business regulations In this respect, the common bond and "family" feeling among the American countries will receive a potent boost by domestic application of this ostensibly duplicative treaty.[13]

This Note will examine the current application of the U.N. Convention in the United States. Some emphasis will be placed on the implications of past judicial policies upon present transnational commercial intercourse. The Note will advocate that the significant benefits derived from the uniform judicial enforcement of the U.N. Convention, in respect to transnational business transactions, militate in favor of a uniform application of the Inter-American Convention.

II. THE HISTORICAL PERSPECTIVE

A. UNITED STATES

1. A Dormant Regime

American isolationist spirit strained the legitimacy of post-

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by a new Chapter-2. Pub. L. No. 91-368, 84 Stat. 692, (codified as amended at 9 U.S.C. §§ 201-208 (1982)). The implementing legislation was the product of congressional abandonment of domestic resistance to the process of international codification of a more substantive commercial and legal regime. By establishing a relatively effective and stable method of both solving transnational business disputes, and domestically enforcing foreign arbitral agreements and awards, it was hoped that new business horizons would be opened for American corporations abroad. One of the chief goals of international commercial arbitration conventions, therefore, has been the mitigation of north-south business tensions. *See*, Lynch, *Conflict of Laws in Arbitration Agreements Between Developed and Developing Countries*, 11 GA. J. INT'L & COMP. L. 669, 670-71 (1981).

12. Although Latin American countries have developed domestic systems for recognition and enforcement of foreign arbitration awards, previously these States have consistently resisted any foreign endeavors to have them join international arbitration conventions. Note, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L.J. 131, 134-40 (1976).

13. *The Inter-American Convention on International Commercial Arbitration*, 9 LAW. AM. 43, 53 (1977) [hereinafter cited as *International Commercial Arbitration*].

World War II foreign attempts to establish a codified legal regime that would regulate international commercial transactions.[14] Diverse national laws could not be effectively reconciled in favor of a practical legal framework, and international law had not sufficiently matured to deter "questionable" commercial practices abroad. Divergent national laws indirectly promoted effective commercial practices which succeeded in circumventing the enforcement mechanisms of unfavorable arbitral awards.[15] Attempts to expedite the codification of a more precise legal framework that would govern international commercial arbitration were basically relegated to bilateral agreements or unilateral declarations.[16] Realistically, the international legal system could do no more without definitive American support.

American unwillingness to assume an active role in the codification of legal mechanisms to enforce arbitral agreements and awards was essentially the product of judicial aversion to commer-

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14. The United States was disillusioned with the prospects of rapid unification of national laws on commercial arbitration by the treaty process. In the past, countries tended to regard arbitration rules as solely within the competence of national legislatures. States were not willing to commit to any obligations which went beyond a mere declaration of existing national law. Sullivan, *United States Treaty Policy on Commercial Arbitration—1920-1946*, in INTERNATIONAL TRADE ARBITRATION 35 *passim* (M. Domke ed. 1958). This non-committal approach slowly eroded in favor of a belief that an identifiable customary international arbitration procedure must precede codification. Domke, *On the Enforcement Abroad of American Arbitration Awards*, 17 L. & CONTEMP. PROBS. 545, 547-48 (1952). By the end of the Second World War, the European countries finally endeavored to facilitate the development of international arbitration regulations by attempting to codify multinational treaties. Walker, *United States Treaty Policy on Commerical Arbitration—1946-1957*, in INTERNATIONAL TRADE ARBITRATION 49 (M. Domke ed. 1958). The United States remained unconvinced that diverse national laws could be incorporated into a legitimate international regime. *See* Walker, *Commercial Arbitration in United States Treaties*, 11 ARB. J. (n.s.) 68, 82-83 (1956).

15. European economic integration produced, *inter alia*, an unprecedented increase in international commercial disputes. As a consequence, many parties found it difficult to obtain effective remedies in the courts. Cohn, *Economic Integration and International Commercial Arbitration*, in INTERNATIONAL TRADE ARBITRATION 19, 25-26 (M. Domke ed. 1958). With the absence of readily available relief, transnational corporations were free to perform activities unabridged by legal and equitable principles.

16. Articles expediting transnational commercial arbitration have been incorporated into treaties of Friendship, Commerce, and Navigation (FCN). Such treaties have been utilized as "broad, general-purpose instrument[s] which deal in a comprehensive way, on a bilateral and reciprocal basis, with the rights of . . . trade, business, and shipping abroad." Walker, *Commercial Arbitration in United States Treaties*, 11 ARB. J. (n.s.) 68, 69 (1956). While the goal of this bilateral approach has been a uniform procedure between disparate judicial systems, "equally applicable to foreign and domestic agreement and awards," the end result has been no more than a "declaration of non-discrimination against foreign awards." 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, 1051 (1961).

cial arbitration as a whole.[17] American courts, as a matter of public policy, declined to unconditionally enforce arbitration clauses in otherwise valid contractual agreements.[18] The pervasive American legal principle that the parties may not "oust the court of jurisdiction"[19] contradicted common law principles recognizing arbitration stipulations.[20] This contradiction was finally resolved by a legislative decree. In 1925, Congress determined that arbitration provisions were valid *per se*.[21] Private trade organizations similarly added strong support for a more definitive American role in global business transactions.[22] The judiciary subsequently resolved that valid arbitration stipulations should be incorporated into the legal policy favoring the fulfillment of the contracting parties' reasonable expectations.[23]

Uniform domestic application of foreign arbitral awards could not mature until inherent domestic conflict of laws problems ceased to present significant obstacles. The Department of State did in fact briefly consider American accession to the 1923 Geneva Protocol on Arbitration Clauses in 1925.[24] But, in the absence of significant support from the Commerce Department in favor of this protocol and its companion agreement, the Geneva Convention on the Execution of Foreign Arbitral Awards,[25] the Department of State did not recommend accession to these Conventions.[26] The federal

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17. Quigley, *supra* note 16, at 1049.

18. Corbin, *Enforceability of Contractual Agreements for Dispute Settlement Abroad*, in INTERNATIONAL TRADE ARBITRATION 251, 251 (M. Domke ed. 1958).

19. *Id.* "Yet, most of the court so protective of their jurisdiction, have enforced provisions that *future* disputes shall be resolved only by arbitration in a foreign state or country." *Id.* at 252 (emphasis added).

20. *See* Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120-22 (1924); Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982-84 (2d Cir. 1942); Tobey v. County of Bristol, 23 F. Cas. 1313, 1320-21 (C.C.D. Mass. 1845) (No. 14,065).

21. Federal Arbitration Act of 1925, 9 U.S.C. §§ 1-14 (1982).

22. Sullivan, *supra* note 14, at 35-38.

23. Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967).

24. 27 L.N.T.S. 157 (1924). *See* Sullivan, *supra* note 14, at 42.

25. 92 L.N.T.S. 301 (1929-1930).

26. Sullivan, *supra* note 14, at 45; Firth, *The Finality of a Foreign Arbitral Award*, 25 ARB. J. (n.s.) 1, 2 (1970). The legitimacy of these Conventions was strained by the difficulty of compelling a recalcitrant party in another country to adhere to an agreement to arbitrate differences. The lack of uniformity in national implementing legislation, as well as ambiguities inherent in the treaties themselves, were additional factors militating against American ratification. Evans & Ellis, *International Commercial Arbitration: A Comparison of Legal Regimes*, 8 TEX. INT'L L.J. 17, 52-53 (1973). These Conventions "did not live up to the expectations of those who had viewed them as a decisive step in the progress of international commercial arbitration." Contini, *International Commerical Arbitration: The United*

legislative organs were similarly unwilling to extend their foreign policy powers into local jurisdictions.[27] Perplexing domestic conflict of laws contradictions, emanating from disparate jurisdictional policies, frustrated any prospects for a coherent and cohesive foreign commercial policy.

2. America and the New International Order

In light of increasing world economic integration, the era immediately following the Second World War evinced the need for a definitive international legal regime.[28] Myriad problems emanating from differing domestic judicial interpretations of foreign commercial contracts prompted a desire on the federal level to "remove the negative recognition of international arbitration agreements from the jurisdiction of local courts."[29] State courts simply could not enforce a uniform legal policy which governed transnational commercial intercourse.[30]

Abroad, national courts and legislatures began to appreciate the scope of the confusion. Governmental organs initiated significant pressure on international associations to devise a more manageable system. As a result, the International Chamber of Commerce proposed to the United Nations Economic and Social Council the codification of a mechanism for uniform international enforcement of arbitral awards.[31] The Council established an Ad Hoc Committee, which later submitted a draft convention to those parties interested in international commercial arbitration.[32] In June 1958,

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Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 8 AM. J. COMP. L. 283, 289-90 (1959).

27. "Federalism" concerns militated in favor of states' absolute sovereignty rights to determine procedural rules under their legal control. Solicitor's office memorandum, Dec. 16, 1927, DEPT. STATE 710.C2/265 2/6, *cited in* Sullivan, *supra* note 14, at 42-43 n.28.

28. De Vries, *supra* note 3, at 45.

29. Aksen, *American Arbitration Accession Arrives 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, 3 (1971).

30. The primary difficulty arising out of diverse local laws is the absence of a "legal impact . . . to enforce either the arbitration agreement or the resultant award." *Id.*

31. Enforcement of International Awards, Report and Preliminary Draft Convention, Brochure No. 174, U.N. Doc. E/c.2/373 (1953).

32. U.N. Doc. E/AC 42/SR.10/3 (1955). *See* Recognition and Enforcement of Foreign Arbitral Awards – Report by the Secretary-General, U.N. Doc. E/2822 (1956); *id. addenda* at 1-6 (for the comments of these parties as submitted by the U.N. Secretary General to the Economic and Social Council).

forty-five states, and several interested intergovernmental organizations, met in New York and codified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[33]

The United States was a relatively inactive participant in the codification process. Distrust of arbitral agreements,[34] and the problems presented by the Bricker Amendment proposals,[35] were unyielding obstacles to more active American participation.[36] Members of the American delegation to the United Nations recommended opposition to the U.N. Convention.[37] The American delegation was convinced that the U.N. Convention did not offer benefits sufficient to negate the costs of ratification incurred through a drastic change in the domestic legal procedure.[38] American inactivity in the codification process, therefore, was born out of resistence to a rather rapid wholesale alteration of the domestic legal system. The time was not yet ripe for a definitive American international commitment.

The relatively successful application abroad of the U.N. Convention slowly began to provide an incentive for American recognition and enforcement of foreign awards. Although only nineteen states recognized arbitration agreements by 1958, a majority of

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33. U.N. Doc. E/Conf. 26/9/Rev. 1, (1958). *See also* U.N. Doc. E/Conf. 26/SR.25, at 2 (1958) (for the comments given by both the president of the codification conference and the participating States).

34. Comment, *United Nations Foreign Arbitral Awards Convention: United States Accession*, 2 CAL. W. INT'L L.J. 67, 69-70 (1971).

35. The Bricker Amendment proposals attempted to further restrict the treaty-making power of the Executive. The Amendment aimed to "impose limits on the subject-matter of international agreements, stress the subordination of treaties and executive agreements to the Constitution and, finally, assert Congressional control over all agreements with foreign countries not approved by the Senate as treaties." Whitton & Fowler, *Bricker Amendment—Fallacies and Dangers*, 48 AM. J. INT'L L. 23, 23 (Supp. 1954). By 1957, interest in the "need" to curb the treaty-making power apparently declined gradually. *See* W. BISHOP, JR., INTERNATIONAL LAW: CASES AND MATERIALS 110-12 (1971).

36. Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 INT'L LAW. 320, 320-21 (1969).

37. *See* De Vries, *supra* note 3, at 56.

38. The American delegates were persuaded that the Federal Arbitration Act was "insufficient as a domestic legal basis for even limited adherence to the U.N. Convention." Czyzak & Sullivan, *American Arbitration Law and the U.N. Convention*, 13 ARB. J. 197, 211 (1958). The limitations inherent in the domestic statute militated against ratification of a broader international treaty. *Id.* at 212. In this respect, the delegates recommended material changes in the Federal Arbitration Act which "would involve considerations of policy as well as of law", as a prerequisite to effective application of the U.N. Convention. *Id.* at 213.

twenty-eight states enforced such covenants by 1968.[39] The Supreme Court similarly followed this trend by declaring that the 1925 Arbitration Act is federal substantive law.[40] The Court held that it is "clear beyond dispute that the Federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'"[41] In the international sphere, America was party to eighteen Friendship, Commerce and Navigation (FCN) treaties which contained provisions for enforcement of arbitration agreements.[42] By 1968, therefore, the path toward formal accession to the U.N. Convention had already been constructed.[43]

Mounting pressure from private interest groups representing the business community[44] ultimately persuaded Secretary of State

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39. They were Alaska, Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, Washington, Wisconsin and Wyoming. Aksen, *supra* note 29, at 5 nn.21-22. Of these, twenty-five states and the District of Columbia have enacted the Uniform Arbitration Act, 7 U.L.A. 1 (1956 & Supp. 1983), which is modeled after N.Y. Arbitration Law §§ 7501-7601 (McKinney 1980). Similarly, twelve states have enacted the Foreign Money-Judgments Recognition Act, 13 U.L.A. 417 (1962 & Supp. 1983). For an analysis of the Act's provisions, see Kulzer, *Recognition of Foreign Country Judgments in New York: The Uniform Foreign Money-Judgments Recognition Act*, 18 BUFFALO L. REV. 1 (1968); Scoles & Aarnas, *The Recognition and Enforcement of Foreign Nation Judgments: California, Oregon and Washington*, 57 ORE. L. REV. 377 (1978); Note, *Foreign Nation Judgments: Recognition and Enforcement of Foreign Judgments in Florida and the Status of Florida Judgments Abroad*, 31 U. FLA. L. REV. 588 (1979).

40. Prima Paint v. Flood & Conklin, 388 U.S. 395, 405 (1967). In this manner, the most significant objection of the American delegation to the U.N. Convention Codification Conference was removed by the Supreme Court as a bar to accession to the U.N. Convention. *See supra* note 38 and accompanying text. It therefore became unnecessary to revise the 1925 Federal Arbitration Act.

41. 338 U.S. at 405, (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924)); *id.*, (quoting S. REP. NO. 536, 68th Cong., 1st Sess. 3 (1924)).

42. Quigley, *supra* note 16, at 1051-54. While FCN treaties remain a prominent feature of American international commercial transactions the "treaties have limited use for U.S. parties . . . because they have no specific implementing legislation conferring a basis for U.S. jurisdiction independently of the contract itself." Note, *Enforcing International Commerical Arbitration Agreements and Awards Not Subject to the New York Convention*, 23 VA. J. INT'L L. 75, 86-87 (1982). Nevertheless, the United States currently has FCN Treaties that include enforcement provisions with: Belgium, Denmark, France, Germany, Greece, Iran, Ireland, Israel, Italy, Japan, Korea, Luxembourg, the Netherlands, Nicaragua, Pakistan, Surinam, Taiwan, Thailand and Togo. *Id.* at 86 n.48.

43. The American Bar Association's Committee on International Unification of Private Law and its House of Delegates have also strongly urged accession to the U.N. Convention. Springer, *supra* note 36, at 321; S. EXEC. E., 90th Cong., 2d Sess. at 27-28 (1968).

44. The business community opined that the advantage gained by accession would outweigh the changes that would be required in the state and federal systems. *See* Comment, *supra* note 34, at 702 n.15.

Dean Rusk to request President Lyndon Johnson to submit the U.N. Convention to the Senate for consideration.[45] The U.N. Convention was referred to the Senate Foreign Relations Committee, which recommended Senate advice and consent to accession.[46] On July 31, 1970, a new Chapter-2 of the Federal Arbitration Act of 1925 was passed by the U.S. Senate.[47] Thereafter, on September 30, 1970, Ambassador R. D. Kearney deposited the American accession with the United Nations.[48]

B. LATIN AMERICA

1. The Background

Prior to 1975, Latin American countries were generally unreceptive to participation in international commercial arbitration conventions. This behavior apparently contradicted the express provisions of national codes which both permit arbitration of disputes and provide for enforcement of foreign awards.[49] The domestic civil procedure laws, however, also contain provisions which limit the availability and effectiveness of arbitration proceedings.[50] Some of these impediments apply to recognition of both domestic and international arbitrations,[51] while others apply solely to en-

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45. *Id.* at 72.

46. S. EXEC. REP. NO. 10, 90th Cong., 2d Sess. (1968); to accompany S. EXEC. E. 90th Cong., 2d Sess. at 1 (1968).

47. S. REP. NO. 702, 91st Cong., 2nd Sess. 9 (1970). Act of July 31, 1970, 9 U.S.C. § 201 (1982). The Senate first recommended accession subject to the changes needed in federal law. 114 CONG. REC. S29605 (daily ed. Oct. 4, 1968). *Cf. supra* note 38 and accompanying text (for the recommendations of the American delegation to the U.N. Convention codification conference).

48. U.S./U.N. press release 126 dated Sept. 30, 1970, in DEPT. STATE BULL. Nov. 9, 1970, at 598.

49. In general, all commercial issues are arbitrable. However, in El Salvador, Bolivia, Paraguay and Peru, state property and financial interests cannot be arbitrated. *See* Codigo de Procedimiento Civil §§ 56-79 (1947) (El Salvador); Procedimiento Civil Boliviano § 13 (1959) (Bolivia); Codigo de Procedimientos Civiles §§ 548-582 (1942) (Peru).

50. *See supra* note 49. In addition, prohibitions on non-national arbitration of State contracts have appeared in the constitutions of El Salvador, Mexico, Nicaragua, Peru and Venezuela, and in the statutes of Colombia, Chile and Argentina. *See* Wesley, *The Procedural Malaise of Foreign Investment Disputes in Latin America: From Local Tribunals to Factfinding*, 7 L. & POL'Y INT'L BUS. 813, 820-24 (1975).

51. Judicial review of arbitration proceedings is generally limited to questions regarding: the fairness of the proceedings, G. ROMERO, COMMERCIAL LAWS OF PERU 14 (1972); the arbitrability of issues under domestic law, C. AGUIRE, COMMERCIAL LAWS OF BOLIVIA 13 (1972); and the parameters of arbitration. Note, *supra* note 12, at 132. The most significant obstacles to absolute judicial recognition of arbitration agreements is that few Latin American domestic laws expressly provide direct enforcement of settlement of future disputes through arbitration. *International Commercial Arbitration*, *supra* note 13, at 46.

forcement of awards made abroad.[52] These domestic limitations have thus prevented extensive participation in conventions regulating commercial arbitration.

In 1889, the Montevideo Treaty on International Procedural Law was ratified only by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay.[53] "Notably, it obviated the necessity of reciprocity with its attendant problems of interpretation and burden of proof."[54] Thereafter, only Brazil ratified the 1923 Geneva Protocol on Arbitration Clauses,[55] while no Latin American State ratified the 1927 Geneva Convention on the execution of Foreign Arbitral Awards.[56] Limited Latin American support also characterized accession and ratification of the U.N. Convention.[57] In addition, no Latin countries are parties to the 1965 World Bank Convention on the Settlement of Investment Disputes between States and Nationals of Other States,[58] by which parties may voluntarily submit their differences for binding arbitration.[59]

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52. Domestic enforcement of foreign arbitral awards is generally limited to awards which are consistent with public order and domestic law, and only to the extent where reciprocity applies. Where a treaty exists, its procedures govern the weight of the foreign award. Absent a treaty, the courts of the forum Latin American State would only enforce such awards if the rendering State would likewise enforce such awards. Note, *supra* note 12, at 134. Argentina enforces foreign judgments even in the absence of reciprocity. A. SIPERMAN & E. WEINSCHEBAUM, COMMERCIAL LAWS OF ARGENTINA 15 (1972). Normally no real statutory distinction exists between the effects of awards and judgments. In Latin American courts, however, judges are more confident of the "official" nature of a foreign award if such an award was of a judicial nature in the country of origin. Mihm, *International Commerical Arbitration in Latin America*, 15 ARB. J. 17, 21 (1960).

53. Text in VITA, COMPARATIVE STUDY OF AMERICAN LEGISLATION GOVERNING COMMERCIAL ARBITRATION (Inter-American High Commission, U.S. Section) 59 (1928); translation in J. EDER, AMERICAN-COLOMBIAN PRIVATE INTERNATIONAL LAW, (Parker School of Foreign and Comparative Law, Bilateral Studies, No. 5, 1956).

54. Goldman, *Arbitration in Inter-American Trade Relations: Regional Market Aspects*, 7 INTER-AM. L.R. 67, 83 (1965).

55. Geneva Protocol on Arbitration Clauses, *done* Sept. 24, 1923, 27 L.N.T.S. 157 (effective July 28, 1924).

56. Geneva Convention on the Execution of Foreign Arbitral Awards, *done* Sept. 26, 1927, 92 L.N.T.S. 301 (effective July 25, 1929).

57. *See supra* note 4 and accompanying text.

58. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *done at* Washington, Mar. 18, 1965, [1966] 1 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, [hereinafter cited as CSID].

59. Arbitration proceedings are handled by the International Centre for Settlement of Investment Disputes (ICSID) at World Bank Headquarters in Washington, D.C.. *See* Broches, *The 'Additional Facility' of the International Centre for Settlement of Investment Disputes* (ICSID), IV Y.B. COM. ARB. 373 (1979). Although the CSID does not require use of the ICSID, those parties voluntarily submitting their disputes to the Centre are bound by its decisions. CSID, *supra* note 58, at arts. 53(1), 54(1). The ICSID has been used rather spar-

Latin American resistance to international arbitration conventions seems to stem from regional distrust of arbitrations between foreign private parties and Latin American States.[60] Such arbitration agreements are usually perceived as extraterritorial pressure which strain local sovereignty.[61] Latin nations, in this respect, normally demand that arbitration proceedings conform to local law. This attitude is derived from Latin interpretation of the Calvo Doctrine.[62] Because most investment contracts between Latin States and foreign nationals contain a Calvo Clause,[63] aliens are brought within the narrow parameters of local regulations, even if the domestic rules violate international law.[64] This policy has had a significant negative impact on foreign investment in Latin America.[65]

Calvo Doctrine objections to private-state arbitration should not have applied to the U.N. Convention. Although Latin American States "find ratification of the majority of arbitration conven-

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ingly. Some experts believe that this fact is an "eloquent demonstration of the strong inducement toward amicable settlement provided by binding arbitration agreements." Broches, *supra*, at 374. *See generally* Comment, *A Courageous Course for Latin America: Urging the Ratification of the ICSID*, 5 HOUS. J. INT'L L. 157 (1982) (arguing that Latin American ratification of the ICSID will insure the growth of private foreign investment in the OAS and solidify the concomitant domestic economic stability).

60. Note, *Conflict of Laws in Arbitration Agreements Between Developed and Developing Countries*, 11 GA. J. INT'L & COMP. L. 669, 674 (1981).

61. Even though Latin American States have ratified some international arbitration conventions the "existence of an apparently pertinent text does not guarantee that a legal settlement will be forthcoming." Summers, *Arbitration and Latin America*, 3 CAL. W. INT'L L.J. 1, 14 (1972). In addition, regional biases have been responsible for the difficulties Atlantic States have encountered in persuading Latin American nations to submit to arbitration. Even by the early 1970's, the economic gap between the developed and developing world did not sufficiently decrease to alleviate regional distrust of foreign commercial enterprises. *See* Note, *Creating a Framework for the Re-Introduction of International Law to Controversies over Compensation for Expropriation of Foreign Investments*, 9 SYR. J. INT'L L. & COM. 163, 166 (1982).

62. The Doctrine was adopted by Latin American States in the 19th century in order to curb military interventions by the United States and European powers in the name of diplomatic protection of their citizens. *See* D. SHEA, THE CALVO CLAUSE 9-15 (1955).

63. Note, *supra* note 60, at 675.

64. The Clause is recognized internationally as legally valid only in cases where it does not bind the foreign party in violation of international law. *See* North American Dredging Company of Texas case (U.S. v. Mex.), United States and Mexican General Claims Commission 15, 4 R. INT'L ARB. AWARDS 26 (1926). The developed nations are strongly in favor of application of international law to this area. Because *nemo judex in re sua*, no one should judge their own cause, settlement of disputes by binding arbitration outside the scope of any particular judicial system is favored by most large multinational enterprises.

65. *See* Note, *The Future of Arbitration in Latin America; A Study of its Regional Development*, 8 CASE W. RES. J. INT'L L. 480, 481 & n.5 (1976).

tions unpalatable,"[66] the U.N. Convention does not circumvent local law. The foreign arbitral forum, the potential choice of foreign law, and the power of judicial review, all inherent in the U.N. Convention, do not seem to challenge the sovereignty of national courts of law.[67] Indeed, submission of commercial disputes to arbitration should allay the concerns of all developing States.

Regional inaction can be best explained by Latin American resistance to submit local laws to international scrutiny, rather than by their criticism of the substantive portions of the U.N. Convention.[68] Such scrutiny is an inevitable product of membership to international conventions. In reality, the U.N. Convention does not prescribe the actual parameters of public policy for signatory States.[69] Nevertheless, the Convention exerts some pressure against excessive deviation from commonly adopted international standards.[70] Latin American States seem to be concerned with the apparent frailty of their nascent legal regimes in light of the international application of the U.N. Convention. This concern has strained the rapid development of a more manageable legal system which would ultimately attract new foreign investment.[71]

2. *The Codification Process*

In 1967, the Inter-American Judicial Committee initiated the

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66. Note, *supra* note 60, at 676.

67. The U.N. Convention permits States to refuse recognition and enforcement of foreign arbitral awards purely on public policy reasons or conflicts with domestic arbitration laws. *See infra* notes 235-74 and accompanying text. The Convention also empowers arbitrators to conduct arbitration along the same lines as local rules. In this manner, foreign arbitration awards may be subject to the same substantive review as domestic awards are under Latin American codes of procedure.

68. Note, *supra* note 60, at 676. Most developing States seem to project some resistance to compliance with legal precepts which were formulated prior to their existence. In general, the majority of developing nations did not participate in the formation of classical international law. Garcia-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AM. 1, 6 (1980).

69. *See infra* notes 143-55 & 234-73 and accompanying text.

70. *See id.*

71. *See Inter-American Commercial Arbitration Commission, Report of the Third Inter-American Conference on Commercial Arbitration* (1971); Norberg, *Inter-American Commercial Arbitration*, 1 LAW. AM. 25 (1969). In order to attract foreign investment, so as to foster intrastate development, developing States must insure "[f]air treatment, [relative] economic stability, and an opportunity to realize a fair return on capital invested" as a minimum prerequisite to substantial and effective foreign investment. Raman, *Transnational Corporations, International Law, and the New International Economic Order*, 6 SYR. J. INT'L L. & COM. 17, 38 (1978).

codification of the Inter-American Convention.[72] The Judicial Committee had the opportunity to study the Inter-American Model Arbitration Law, which no country had adopted, and the U.N. Convention, which only two O.A.S. countries had ratified. The Committee reported the Draft Inter-American Convention on International Arbitration.[73] The Draft recognized the validity of arbitration clauses for existing and future disputes and provided that the rules of the Inter-American Commercial Arbitration Commission (IACAC)[74] would govern arbitration proceedings, in cases where the parties did not stipulate any procedural rules. The Draft also gave the arbitration award the force of a final judgment. The Draft Convention was forwarded by the O.A.S. to its member nations as background for the Inter-American Specialized Conference on Private International Law.[75] The Conference was convened in Panama in January 1975 where the Inter-American Convention was subsequently approved.[76] The Convention, as approved, combined elements of both the U.N. Convention, and the Inter-American Judicial Committee's 1967 Draft Convention.[77]

III. INTER-AMERICAN CONVENTION

A. THE EXPRESS PROVISIONS

The Inter-American Convention, signed by the United States on June 9, 1978,[78] was transmitted to the Senate by President Reagan on June 15, 1981.[79] The Convention consists of thirteen articles.[80]

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72. For a more detailed study of the codification process, see Norberg, *supra* note 71.

73. REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON THE DRAFT CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION, OAS/SER. I.VI.1, Feb. 19, 1968.

74. The Inter-American Commercial Arbitration Commission was "originally established in 1934 as the result of Resolution XLI of the Seventh International Conference of the American States at its meeting in Montevideo, Uruguay in December, 1933." INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION, RULES OF PROCEDURE 3 (1982).

75. *See* Norberg, *Inter-American Commercial Arbitration Revisited*, 7 LAW. AM. 275, 280 (1975).

76. *Id.* at 275.

77. *Id.* at 276.

78. S. TREATY DOC. NO. 97-12, 97th Cong., 1st Sess. 1 (1981), *signed* June 9, 1978.

79. *Id.*

80. The Governments of the Member States of the Organization of American States, desirous of concluding a convention of international commercial arbitration, have agreed as follows:

Article 1

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is

Article one does not expressly define the "commercial transaction" relationship to arbitration. Judicial interpretation of the

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valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.

Article 2

Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridicial person.
Arbitrators may be nationals or Foreigners.

Article 3

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

Article 4

An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

Article 5

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:
   a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or
   b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or
   c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or
   d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or
   e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.
2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:
   a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or
   b. That the recognition or execution of the decision would be contrary to the public policy ("ordre public") of that State.

domestic implementing legislation should, nevertheless, incor-

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Article 6

If the competent authority mentioned in Article 5.1.e has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems it appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guaranties.

Article 7

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 8

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 9

This Convention shall remain open for accession by any other State. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 10

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

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

Article 11

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 12

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 13

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the declarations referred to in Article 11 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January, one thousand nine hundred and seventy-five.

Inter-American Convention, *supra* note 1.

porate the U.N. Convention's broad definition.[81] Commercial transactions are presently defined as any dealings which naturally evolve from a legal relationship of the parties.[82] This relationship is not limited to a contractual agreement, but must be of an international character.[83]

Article two constructively implies that arbitrators may be foreigners or nationals of the forum State.[84] The parties' stipulated choice of arbitrator, in this respect, may not be altered by domestic regulations.[85]

In contrast to the Federal Arbitration Act and the U.N. Convention,[86] article three of the Inter-American Convention provides more certainty and greater uniformity through the application of back-up rules. In the event that the contracting parties fail to stipulate their choice of procedure, the Inter-American Commercial Arbitration Commission (IACAC),[87] a private non-governmental body, will substitute its rule for the *lex loci arbitri*.[88]

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81. 9 U.S.C. § 202 (1982).

82. *See* 9 U.S.C. § 1 (1982).

83. "[T]he foreign arbitration agreement must be recognized as a private contract even though the [forum] State may refuse to enforce the award." Comment, *Recognition and Enforcement of Foreign Arbitral Awards*, 14 AM. J. COMP. L. 658, 671 (1966); *cf.* U.C.C. § 1-105 (1977). This article attempts to incorporate conflicting domestic rules into a uniform system. *See International Commercial Arbitration*, *supra* note 13, at 44.

84. *See* S. TREATY DOC. NO. 97-12, *supra* note 78, at 9.

85. Some nations objected to the parties' rights to select alien arbitrators. These nations felt that " 'arbitration involves taking part in some way in the administration of justice, which should be reserved for nationals only.' " Norberg, *supra* note 75, at 282 (quoting GAOAS Res. AG/Res. 48 (I-0171) at 52 (1971). The Inter-American Juridical Committee rapporteur opined that " 'arbitration is aimed at ending a conflict between private interests . . . [and] no sovereign prerogative is affected. . . . On the contrary, on occasions the differences between the parties in commercial operations reflect technical points, for the comprehension of which experts in the subject are more indicated than are jurists. . . .' " *Id.*

86. The U.N. Convention and its implementing legislation do not provide the judiciary with a clear choice of procedural rules in cases where parties have neglected to stipulate their rules of decision and procedure. *See* 9 U.S.C. § 201 (1982). Indeed, even where the parties were diligent in specifying their choice of law, their expectations, as expressed in their agreements, may be frustrated by conflicting provisions in national laws and by inherent restrictions on their choice of applicable procedural and substantive law. *See* United Nations Commission on International Trade Law, Report by the Secretary-General, U.N. Doc. A/CN.9/207 (1981). Thus, the United Nations has deemed it appropriate to charge a working group with the task of drafting a model law of international commercial arbitration. 16 U.N.L. Rep. 40 (1982).

87. The Inter-American Commercial Arbitration Commission (IACAC) was established at the Second Conference on Inter-American Commercial Arbitration in Mexico City. Norberg, *supra* note 75, at 280.

88. *See* INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION, RULES OF PROCEDURE (1982). The United States Department of State Legal Advisor recommended that American

The domestic enforcement procedural rules in article four, when applied to foreign arbitration awards, may not be more "onerous" than laws dealing with local awards.[89] In addition, article four does not expressly limit enforcement of foreign awards to those awards made in the territory of another contracting State. The Convention, however, impliedly permits signatory States some discretion to exercise a reciprocity exclusion, similar to that specified in the U.N. Convention.[90]

Article five's remedies have been incorporated into the Inter-American Convention almost verbatim from the U.N. Convention.[91] The Inter-American Convention essentially gives *res judicata* effect only to awards that are no longer appealable in their entirety under applicable laws or procedures,[92] provided that such awards are not tainted by any of the enumerated deficiencies.[93] Public policy justifications, in addition, may even negate an otherwise valid arbitration award.[94] Nonetheless, allegations of arbitrator error in law or fact may not be entertained by the country of execution.

B. THE IMPLEMENTING LEGISLATION

The American implementing legislation endeavors to clarify this country's application of the Inter-American Convention. The domestic legislation expressly delineates which Convention the

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ratification of the Inter-American Convention should stipulate adherence only to those IACAC rules in effect at the date of ratification. S. TREATY DOC. NO. 97-12, *supra* note 78, at 4.

89. *See* U.N. Convention, *supra* note 2, art. IV.

90. *Id.* at art. I(3). The United States has effectively exercised this exclusion despite the fact that the U.N. Convention implementing legislation does not expressly reflect this reservation. *See* S. EXEC. REP. NO. 10, 90th Cong., 2d Sess. at 9 (1968); to accompany S. EXEC. E., 90th Cong., 2d Sess. at 1 (1968). "This issue will indeed be resolved less in a theoretical concept but more by the discretional function of courts in evaluating the prevailing features of the business transaction." Domke, *The United States Implementation of the United Nations Arbitral Convention*, 19 AM. J. COMP. L. 575, 578 (1971). Apparently disagreeing with wide latitude for judicial discretion, the Department of State recommended more specific language in the implementing legislation of the Inter-American Convention. *See* S. TREATY DOC. NO. 97-12, *supra* note 78, at 4.

91. *See* 9 U.S.C. § 201 (1982).

92. *See* Inter-American Convention, *supra* note 80, art. 4.

93. S. TREATY DOC. NO. 97-12, *supra* note 78, at 9-10.

94. The United States and Brazil strongly opposed other States' desires to limit the defenses to enforcement to public policy justifications. *See* Norberg, *supra* note 75, at 284. American Courts have narrowly construed the "public policy" defense to refer only to "the most basic notions of morality and justice." Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974).

courts are to apply in cases where conflicts are a possibility.[95] Proceedings falling under the Inter-American Convention are granted concurrent federal jurisdiction, amounts in controversy notwithstanding.[96] Normal venue requirements should not interfere with the autonomous intentions of the parties to select a place of arbitration.[97] Enforcement of arbitration provisions should be considered only in the federal court in the specific district where the arbitration proceedings are intended to be executed,[98] or in the district most reasonably related to the commercial transactions involved.[99] Defendants are permitted to relocate judicial proceedings from the

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95. The United States Department of State recommended that the implementing legislation:

> [w]ould provide that, here both conventions were applicable to a particular case, the United States would be bound by and apply the provisions of the Inter-American Convention if a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to this Convention and are Member States of the Organization of American States. In other cases, the United States will be bound by and apply the provisions of the New York Convention.

S. TREATY DOC. NO. 97-12, *supra* note 78, at 6. This recommendation has been codified in 9 U.S.C.A. § 305 (1),(2) (West Supp. 1984).

96. 9 U.S.C. § 203 (1982) is incorporated by 9 U.S.C.A. § 302 (West Supp. 1984). Federal Court jurisdiction shall be based upon U.S. CONST. art. III, § 2. Other requirements for federal jurisdiction are therefore inapplicable. The jurisdictional grant is "original" and not "exclusive," permitting state courts to adjudicate actions falling under the Convention subject to the removal provision, 9 U.S.C. § 205 (1982). 9 U.S.C.A. § 302 (West Supp. 1984). *See* Island Territory of Curacao v. Solitron Devices, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

97. 9 U.S.C.A. § 302 (West Supp. 1984) *incorporates* 9 U.S.C. § 204 (1982).

98. *Id.*

99. Even if the venue, partly predicated upon substantive law or diversity of citizenship pursuant to 28 U.S.C. § 1391 (1976), is in contradiction with the parties' express choice of venue, the parties' intentions should prevail. *Cf.* 9 U.S.C.A. § 303 (West Supp. 1984) ("a court . . . *may* direct that arbitration be held in accordance with the agreement . . . [and] *may* also appoint arbitrators in accordance with the provisions of the agreement") (emphasis added). Where the parties have not indicated their choice of venue and there is no federal jurisdiction of the underlying controversy (e.g. where both parties are foreigners, yet the losing party has some assets in the United States), it is uncertain whether or not the enforcing party has recourse in United States courts. *Cf.* Metropolitan World Tanker, Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional, 427 F. Supp. 2 (S.D.N.Y. 1975) (a pre-arbitration attachment case involving two foreign parties where the court stated in dicta that the plaintiff may have recourse to American courts for attachment proceedings). On the other hand, in light of the complexity of present-day corporate structure and operation, a "minimum contact" approach would suffice to make a foreign multinational corporation amenable to domestic judicial jurisdiction. In such instances, the court must order that "arbitration shall be held and the arbitrators be appointed in accordance with" the rules of procedure of the Inter-American Commercial Arbitration Commission only in cases where the parties failed to stipulate the place of arbitration or the method of appointing arbitrators. 9 U.S.C.A. § 303 (West Supp. 1984).

plaintiff-selected state court to a federal court presiding in the same jurisdiction.[100] Lastly, because laches may prove insufficient as a legal bar to unjustifiably delayed enforcement of foreign arbitration awards, a statute of limitations is established.[101] Having clarified domestic application of the Inter-American Convention, the implementing legislation, therefore, will promote the Convention's uniformity and consistency goals.

C. *AREAS FOR CONCERN*

The Inter-American Convention, like the U.N. Convention, is not primarily designed to instantly formulate new domestic procedural devices to regulate arbitration. Inherent impediments in Latin American codes of procedure are simply too entrenched to be receptive to a viable and rapid amelioration of the laws.[102] Modern commentators, however, opine that the obstacles and delays in arbitration proceedings are normally substantially less than is the case in ordinary litigation.[103] Nevertheless, global resistance to arbitration procedures has hitherto impeded the application of both the Inter-American and the U.N. Conventions.[104] Sensitive to this pervasive impediment, the United Nations Conference of 1958 and the Economic and Social Council jointly adopted reso-

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100. 9 U.S.C.A. § 302 (West Supp. 1984) *incorporating* 9 U.S.C. § 205 (1982). The power to remove should be based upon 28 U.S.C. § 1446 (1970), where judgment on arbitration may be sought in either a state or a federal forum, Fuller Co. v. Compagnie des Bauxites, 421 F. Supp. 938 (W.D. Pa. 1976), providing that the defendant is permitted to remove *at any time before trial. See* Dale Metals Corp. v. KIWA Chem. Indus. Co., 442 F. Supp. 78 (S.D.N.Y. 1977).

101. 9 U.S.C.A. § 302 (West Supp. 1984) *incorporating* 9 U.S.C. § 207 (1982); I.T.A.D. Assoc. Inc. v. Podar Bros., 636 F.2d 75 (4th Cir. 1981) (concluding that a three and one-half year wait is not sufficient evidence of waiver of the duty to arbitrate under a valid agreement).

102. Latin American legislatures are normally either indifferent or vehemently opposed to perceivable change. "Further, arbitration uniformity is linked to basic questions of procedure and conflict of laws—areas traditionally difficult to modify" in Latin America. Goldman, *supra* note 54, at 82.

103. *International Commercial Arbitration*, *supra* note 13, at 58-59.

104. *See* Contini, *supra* note 26, at 287. Raman has pointed out:

> Despite growing awareness of the tremendous interdependencies conditioning the choices available to people everywhere, the global community, still operating on the basis of the outmoded nation-state system and suddenly exposed to the task of facing problems that have defied effective management on such a basis, presently is confronted with a challenge to devise new structures for collaboration and new inclusive policies for cooperation, which, are capable of nurturing perceived interdependencies.

Raman, *supra* note 71, at 18 (footnote omitted).

lutions advocating a greater diffusion of information which favors arbitration as a means of achieving both a more uniform legal system, and greater business efficiency.[105] Voluntary private support for enforcement of foreign arbitration awards is a more viable mechanism for achieving uniformity of laws than forceful statutory compilations.[106] In this respect, the Inter-American Convention merely attempts to relieve some of the inconsistencies inherent in the enforcement of arbitral awards by disparate legal systems, but does not aim to drastically alter the existing domestic legal mechanisms.

The Inter-American Convention does not expressly concern itself with possible uncertainty arising from conflicts presented by accession to other international agreements. The United States and a number of Latin American States are parties to other multinational and bilateral agreements relating to arbitration.[107] Although the U.N. Convention recognizes prior international obligations,[108] and establishes a limited means of dealing with subsequent treaties,[109] the Inter-American Convention does not clearly resolve such possible conflicts of obligations.[110] Legal conflicts may be particularly significant in a proceeding where the country of enforcement and the country of arbitration are parties to both the U.N. and the Inter-American Conventions. For example, article II(1) of the U.N. Convention permits a court to direct arbitration only if the subject matter of the dispute is "capable of settlement by arbitration."[111] The Inter-American Convention contains no such limitation. Furthermore, in the event the parties fail to stipulate their preferred arbitral procedure, the U.N. Convention does not ex-

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105. United Nations Conference on International Commercial Arbitration, Final Act, U.N. Sales No. 58.V.6 (1958).

106. Nadelmann, *Uniform Legislation vs. International Conventions*, in INTERNATIONAL TRADE ARBITRATION 167, 179 (M. Domke ed. 1958). The United Nations Commission on International Trade Law (UNCITRAL) has opined that conciliation may be more efficient than arbitration because conciliation is a purely self-enforced procedure. UNCITRAL, 12th Session (221st meeting), U.N. Doc. A/CN.9/SR.221 (1979). "[I]ts success depend[s] wholly on the desire of the parties to settle their disputes amicably, whereas arbitration is adversarial and not based on amicable settlement." Dore, *Peaceful Settlement of International Trade Disputes: Analysis of the Scope of Application of the UNCITRAL Conciliation Rules*, 21 COLUM. J. TRANSNAT'L L. 339, 341 (1983). This remains to be proven.

107. *See supra* notes 5 & 16 and accompanying text.

108. U.N. Convention, 9 U.S.C. § 201, art. VII(1) (1982).

109. *Id.*

110. *Cf.* S. TREATY DOC. NO. 97-12, *supra* note 78, at 9, art. 4 ("provisions of international treaties").

111. 9 U.S.C. §§ 201, art II(1), 206 (1982). *See infra* notes 136-39.

pressly mandate the application of any particular rules,[112] while the Inter-American Convention stipulates that the IACAC rules shall apply.[113] Thus, in order to alleviate possible problems that may arise from divergent interpretations of different international obligations, the parties are well advised to clearly define the scope and procedural mechanisms of their arbitral process.[114]

The implementing legislation[115] expressly delineates the American reciprocity reservation[116] to the Inter-American Convention. This modification endangers the pervasive legal policy of enforcing and promoting the parties' original contractual intentions, in cases where a written agreement to arbitrate has been incorporated into the contract governing the subject matter in dispute.[117] Although reciprocity reservations commonly denote that "in relations between two States each State gives the subject of the other State certain privileges on the condition that its own subjects shall enjoy similar privileges in the other State,"[118] reservations based

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112. *See supra* note 86 and accompanying text.

113. *See supra* note 87 and accompanying text. This conflict may be substantially alleviated by application of the United Nations Commission on International Law (UNCITRAL) arbitration rules. For the text to the 1976 UNCITRAL Arbitration Rules, see UNCITRAL, Report on the Work of its Ninth Session, 31 U.N. GAOR Supp. (No. 17) at 34-50, U.N. Doc. A/31/17 (1976). *See* Report of the Secretary-General, U.N. Doc. A/CN.9/168 (1979); Norberg, *supra* note 75, at 277. Indeed, the Inter-American Commercial Arbitration Commission has modified its Rules of Procedure to incorporate important UNCITRAL Arbitration Rules so as to formulate a uniform international procedure for settlement of commercial disputes. INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION; RULES OF PROCEDURE 3-4 (1982).

114. *See Inter-American Convention*, *supra* note 13, at 66. *See also* Ehrenhaft, *supra* note 3, at 1205 (discussing the necessary clauses in an effective arbitration agreement).

115. 9 U.S.C.A. § 304 (West Supp. 1984) states that "[a]rbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention."

116. Under article 3 of the Inter-American Convention, the IACAC rules of procedure shall govern the proceedings in the absence "of an express agreement by the parties." IACAC article 16 delineates that the arbitral tribunal shall determine the place of arbitration "having regard to the circumstances of the arbitration." INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION. RULES OF PROCEDURE 10, art 16, §§ 1-4 (1982). The *situs* of the arbitration, therefore, may be a State that has not ratified or acceded to the Inter-American Convention in contrast to section 304's mandate. *See id.*

117. In general, reservations modify a State's rights and obligations under an existing multilateral treaty. This doctrine has been recently codified in the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *reprinted in* 8 I.L.M. 679 (1969). *See also* Comment, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L.J. 71 (1982) (for a more detailed discussion of the applicability and validity of reservation to multilateral conventions).

118. A. BERG, *supra* note 8, at 14.

on reciprocity considerations aimed at the *situs* of the arbitral proceedings do not apply to international arbitration.

Arbitral proceedings have developed as an alternative to national judicial system. The concomitant arbitration agreements and awards do not derive their judicial validity from a particular State but from the private arrangement between the contracting parties.[119] The Inter-American Convention's field of applicability, in addition, does not flow from the nationality of the parties.[120] Thus, under the Inter-American Convention, the binding effect of a foreign arbitration agreement or award in the United States should not be predicated upon the *lex loci arbitri*.[121] Domestic enforceability of a foreign arbitral agreement or award should be weighed against reciprocity considerations which attach to the *lex arbitri*—the substantive law governing the arbitration proceedings.[122]

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119. Parties to an international commercial dispute should have the privacy for which they have bargained. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 513 (1974). Indeed, the parties may in fact stipulate that the arbitration rules promulgated by an international organization (e.g. ICC, UNICTRAL, AAA, etc.) shall govern the procedural aspects of their dispute. In this manner, the contracting parties may remove themselves from the supervision and control of any national judicial system.

The distinguished arbitration lawyer, Jan Paulsson, has concluded that even where the parties do not specifically announce their choice of law, "the binding force of an international award may be derived . . . without a specific . . . legal system serving as its foundation." Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358, 368 (1981). Paulsson has argued that an arbitration award not only "floats" (i.e. has binding effect in a foreign jurisdiction even when based on a different legal system), but also may "drift, that is to say enjoy[s] a potential for recognition in one or more enforcement jurisdictions without being ultimately anchored in the national legal system of the country where it was rendered." *Id.* at 358.

120. *Cf.* Convention for the Execution of Foreign Arbitral Awards, *signed at* Geneva, Sept. 26, 1927, 92 L.N.T.S. 302 (requiring that parties be subject to the jurisdiction of different contracting States).

121. For example, in cases where the parties stipulate their preference for arbitration rules of an international organization, "it is assumed that the whole world is a possible *situs*." Paulsson, *Delocalisation of International Commercial Arbitration: When and Why it Matters*, 32 INT'L & COMP. L.Q. 53, 55 (1983). The *lex arbitri* is derived from the rules of the organization itself and may be supplemented only by non-conflicting rules of the local *situs* of the arbitration proceedings. Similarly, while the parties may elect as the *situs* a particular State chosen "either fortuitously or for reasons of neutrality having nothing to do with the parties' attachment to local rules of arbitration," *id.* at 54, they may actually apply the laws of another State more closely connected with the subject of the dispute. Under these circumstances, the underlying considerations which militate in favor of a reciprocity reservation are more applicable to the entity whose laws control the arbitration proceedings, rather than the merely convenient *situs*.

122. Contemporary arbitration proceedings have indicated that the law of the arbitration itself is not necessarily the law of the place of arbitration: the *lex arbitri* is not the *lex*

IV. THE PROSPECTS FOR RECOGNITION AND ENFORCEMENT

The real value of American ratification of the Inter-American Convention will not be fully realized until the judiciary has had ample opportunity to scrutinize the Convention's stipulations. American jurisprudence will most likely follow the standards established in its review of the U.N. Convention.[123] Such standards reflect a public policy concern to maintain the neutrality of the international arbitral process.[124]

Judicial interpretation of the U.N. Convention has basically been derived from three distinct sources of law: (1) the substantive terms found in the Convention; (2) the implementing legislation; and (3) the instrument of accession.[125] It seem apparent, then,

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fori. The traditional role of the *lex fori* or the *lex loci arbitri* has eroded as arbitration proceedings have increasingly become delocalized. *See* Fragistas, *Arbitrage Étranger et Arbitrage International en Droit Privé*, REVUE ENTRIQUE DE DROIT INTERNATIONAL PRIVÉ 14 (1960) *cited in* Paulsson, *supra* note 119, at 362. *Cf.* A. BERG, *supra* note 8, at 29-34 (discussing the relationship between "denationalized" arbitration proceedings and codified enforcement procedures). An a-national arbitral award "accomodates international business transactions in which the parties' divergent nationalities create a special need for a neutral forum for dispute resolution." Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21, 24 (1983). For these reasons, local judicial intervention may encompass a greater hazard to the settlement of commercial disputes than the parties contemplated when choosing a forum for mere convenience and not out of admiration for any legal principle. Local judicial intervention is only necessary when the arbitration proceeding directly implicates national or third party interests. *See id.* at 30. Thus, absent cogent justifications for local judicial intervention, a reciprocity reservation aimed at the *lex loci arbitri* does not effectively sustain this country's intention to promote and enforce uniform application of international commercial laws in light of the separate and distinct nature of the local forum as opposed to the law actually governing the arbitral proceeding. Under the Inter-American Convention, awards emanating from an arbitration proceeding conducted under the law of a contracting State or under IACAC rules of procedure should not be invalidated because the convenient forum is not party to the Convention. Nevertheless, the contracting parties may supplant ostensibly threatening judicial consideration of the arbitration award by conducting arbitration proceedings in the most convenient forum but ensuring that the actual award is rendered in a State that is party to the Inter-American Convention.

123. Courts must first decide whether they possess subject matter jurisdiction over an arbitrable dispute. For an excellent discussion of the legislative history and intent of this issue, see Bergesen v. Joseph Muller Corp., 548 F. Supp. 650 (S.D.N.Y. 1982).

124. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974). "[T]he principal purpose underlying American adoption and implementation of [the U.N. Convention], was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries." *Id.* at 520 n.15.

125. The United States instrument of accession to the U.N. Convention expressed reservations of "reciprocity" and "commercial" disputes. S. EXEC. E., 90th Cong., 2d Sess. at

that domestic adherence to the recognition and enforcement of the arbitral process, as delineated in the Inter-American Convention,[126] will proximately follow the interpretations previously given to Chapter-2 of the United States Arbitration Act[127] and article II(3) of the U.N. Convention.[128] Unbiased enforcement of international arbitral agreements and awards, therefore, is a requisite factor in promoting the efficacy of international commercial transactions.

A. *Recognition of the Agreement*

The Inter-American Convention itself does not include a procedural mechanism to compel parties to arbitrate.[129] In order to establish a more precise and efficient legal regime, the implementing legislation incorporates many of the U.N. Convention's domestic legislative rules.[130] The Inter-American Convention's implementing legislation, however, endeavors to remove some of the ambiguities associated with its U.N. Convention counterpart.[131]

Section 206 of the U.N. Convention's implementing legislation[132] obstensibly permits more domestic judicial latitude than the Convention's article II(3).[133] But the thrust of section 206, as interpreted by the courts, is not to allow for judicial discretion to control the arbitration proceedings.[134] Conversely, the Convention's article II(3) does not intend that a court is absolutely prevented from trying the merits of the dispute when the arbitration pro-

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1 (1968). Whereas courts have recognized the need for a commercial relationship between the parties as a prerequisite to recognition of the arbitration agreement, Metropolitan World Tanker, Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional, 427 F. Supp. 2 (S.D.N.Y. 1975), at least one court has determined that the reciprocity reservation applies to recognition and enforcement of arbitration awards only. Fuller Co. v. Compagnie Des Bauxites, 421 F. Supp. 938, *passim* (W.D. Pa. 1976).

126. *See supra* note 80, art. 1.

127. *See* 9 U.S.C. § 206 (1982).

128. 9 U.S.C. § 201 (1982).

129. Article 4 of the Inter-American Convention allows for recognition and enforcement of arbitral *awards*. *See supra* note 80.

130. *See* 9 U.S.C.A. § 302 (West Supp. 1984). Generally, implementing legislation is sensitive to custom and usage of its subject matter. Strong emphasis is given to judicial interpretation of the parties' intentions through an analysis of the relevant customs and usages because they form an integral part of the contract in dispute. *See* J. Lew, Applicable Law in International Commercial Arbitration 465 (1978).

131. *See, e.g., supra* note 90; *infra* notes 155 & 157.

132. 9 U.S.C. § 206 (1982) (the court "*may* . . . direct arbitration") (emphasis added).

133. U.N. Convention, *supra* note 2, art. II(3) (the court "*shall* . . . refer the parties to arbitration") (emphasis added).

134. 9 U.S.C. § 206 (1982). *See* I.T.A.D. Assocs., Inc. v. Poder Bros., 636 F.2d 75, 77 (4th Cir. 1981).

ceeding is invoked.[135] Rather, the court may decide whether the dispute is capable of settlement by arbitration,[136] and whether the arbitration agreement is null and void,[137] inoperative,[138] or incapable of being performed.[139] Once arbitration has begun, the court's role is supplanted by the arbitrator(s), but the court is empowered to order provisional remedies at the arbitrator(s)' request, thus adding legitimacy to the arbitration process.[140] Although the Inter-American Convention does not expressly permit judicial evaluation of the arbitration agreement,[141] public policy notions of equity and "fair-play," inherent in our system of justice, must undoubtedly be read into the Convention by American courts.[142]

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135. Although the question as to whether the referral to arbitration affects the competence or jurisdiction of the court depends on the law of the forum, it has no real consequence in actual practice. Gaja, *Introduction*, in NEW YORK CONVENTION (G. Gaja ed. 1978-1980).

136. U.N. Convention, *supra* note 2, art. V(2)(a). *See* Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39 (3d Cir. 1978). It must be presumed that the *lex fori*, the law of the country where enforcement is sought, governs the enforcement procedure of the arbitration *agreement*. In general, American courts have presumed that domestic law applies to issues of arbitration. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); *In re* Ferrara, 441 F. Supp. 778, 780-81 (S.D.N.Y. 1977), *aff'd mem. sub nom.* Ferrara, S.p.A. v. United Grain Growers Ltd., 580 F.2d 1044 (2d Cir. 1978). Under the IACAC rules of procedure, the "arbitral tribunal shall apply the law designated by the parties," or, where the parties have not stipulated their choice of procedure, the tribunal shall apply the "conflict of law rules which it considers applicable." INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION, RULES OF PROCEDURE 15-16, art. 33 § 1 (1982).

137. U.N. Convention, *supra* note 2, art. II(3). "Null and void" applies to those cases where the arbitration agreement is initially affected by some invalidity. Misrepresentation, fraud, or undue influence are all considered justifications for a "null and void" arbitration agreement. Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313, 1320 (2d Cir. 1973), *cert. denied* 416 U.S. 986 (1974).

138. U.N. Convention, *supra* note 2, art. II(3). "Inoperative" applies to those instances where the arbitration agreement has ceased to have effect. Revocation by mutual consent or failure of the arbitrators to render an award may justify an "inoperative" arbitration agreement. For a discussion of the right to waive the arbitration agreement, see I.T.A.D. Assocs., Inc. v. Poder Bros., 636 F.2d 75 (4th Cir. 1981).

139. U.N. Convention, *supra* note 2, art. II(3). "Incapable of being performed" applies to those cases where the arbitration cannot be effectively set into motion. For the issues courts must resolve when deciding whether a dispute is arbitrable, see Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir. 1982).

140. De Vries, *supra* note 3, at 47 & n.21.

141. In cases where the arbitration agreement stipulates the place of arbitration or the appointment of arbitrators, the relevant domestic legislation of the Inter-American Convention virtually mirrors that of the U.N. Convention. *See* 9 U.S.C.A. § 303 (West Supp. 1984); 9 U.S.C. § 206 (1982).

142. Although actual judicial involvement with the arbitration process is somewhat diminished in cases falling under the Inter-American Convention because of the application of IACAC procedure in instances where the parties fail to stipulate their choice of procedure,

The most extensive American judicial treatment of public policy standards vis-à-vis enforcement of the arbitration agreement was conducted in *Antco Shipping Co., Ltd. v. Sidermar, S.p.A.* (*Antco*).[143] In *Antco*, a charter for the transport of crude oil contained a clause which excluded Israeli ports as points of loading. Antco, the charterer, ceased performance of the contract. As a consequence, Sidemar petitioned the court for an order to compel arbitration pursuant to an arbitral clause in the contract.[144] Antco petitioned for a stay of arbitration on the grounds that the contractual exclusion of Israeli ports constituted a restrictive boycott against a friendly State.[145] This action allegedly violated the public policy of the United States, as expressed in the Export Administration Act of 1969[146] and the New York Executive Law.[147] Sidermar cross-petitioned the court to order arbitration based upon American accession to the U.N. Convention.[148]

The court resolved that public policy violations must be in the entire "performance which is the subject of the dispute."[149] In this respect, the restrictive provision was not sufficient cause to excuse Antco's entire obligations under the contract.[150] Therefore, public policy defenses to enforcement of an arbitration agreement and the subsequent award[151] must be construed narrowly.[152] Such

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9 U.S.C.A. § 303 (West Supp. 1984), courts are advised to promote an expansive construction of the arbitration agreement so long as it complies with the minimum requirements of international public policy, *ordre public réellement international*. *See* J. LEW, *supra* note 130, at 540.

143. Antco Shipping Co. v. Sidermar, S.p.A., 417 F. Supp. 207 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d. 93 (2d Cir. 1977).

144. *Id.* at 210. Sidermar demanded arbitration with Antco and Nepco, its corporate parent and guarantor. Sidermar named an arbitrator and alleged $14,000,000 as damages arising from Antco's breach and repudiation of the contract. *See id.*

145. *Id.* at 210-11.

146. 50 U.S.C. App. §§ 2401-2413 (Supp. V 1981).

147. 417 F. Supp. at 211-12 (construing N.Y. EXEC. LAW § 296(13) (McKinney 1982)). Antco claimed that: (1) The exclusion of Israeli ports, as an act aimed to win favor with Arab nations, constituted a restrictive boycott; (2) the contract dealt with both exports and imports to the United States; (3) the restrictive provision contravenes U.S. public policy; and (4) the entire contract is illegal and unenforceable. *Id.* at 210-11.

148. 417 F. Supp. at 212. Sidermar responded that: (1) The restrictive provision did not constitute a boycott; (2) the contract does not involve exports from the United States; and (3) that American public policy favors enforceability of arbitration agreements. *Id.* at 212-13.

149. *Id.* at 215.

150. *Id.* at 216.

151. *See* Parsons & Whittemore Overseas Co., v. Société Générale de L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974).

152. 417 F. Supp. at 216.

assertions should not be equated with United States national policy.[153] Although acknowledging that the arbitration agreement could be declared "null and void" if enforcement "would violate the most basic notions of morality and justice,"[154] the court held that enforcement of the arbitration agreement in this case "would not contravene the public policy of the United States."[155]

The *Antco* case exemplifies judicial uniformity in enforcing the arbitration agreement.[156] Such consistency, however, has not

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153. *Id.* at 216-17.

154. *Id.* at 216.

155. *Id.* at 217.

156. American judicial decisions have reflected a narrow construction of the grounds for non-recognition of the arbitration clause in commercial contracts between private parties. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Antco Shipping Co., Ltd. v. Sidermar S.p.A., 417 F. Supp. 207 (S.D.N.Y. 1976). In contracts where one of the parties is a foreign State, however, American courts have invoked the act of state doctrine and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (1976), as a bar to compelling arbitration. "[T]he presence of a state as a party to the dispute gives a particular coloration to the arbitration process." Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784, 785 (1981). American Courts have observed that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Underhill v. Herandez, 168 U.S. 250, 252 (1897).

Courts have normally declined to separate the arbitration clause from the entire contract when determining that the sovereign immunity doctrine supplants subsequent judicial scrutiny of the contract. *See* B.V. Bureau Wisjsmuller v. United States, 1976 A.M.C. 2514 (S.D.N.Y. 1976). For example, in Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya (LIAMCO), 482 F. Supp. 1175 (D.D.C. 1980), a federal district court reasoned that the act of state doctrine is a legal bar to enforcement of an otherwise valid arbitration clause which was invoked in the dispute involving Libyan nationalization of Libyan American Oil Co.'s assets. *Id.* at 1179. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the Court stated that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . even if the complaint alleges that the taking violates customary international law." *Id.* at 429. *Cf.* Sanchez v. Banco Central De Nicar, 515 F. Supp. 900 (E.D. La. 1981) (permitting judicial intervention under the exceptions to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(1)(3) (1976)). In this respect, the Second Circuit has distinguished the act of state doctrine from sovereign immunity. "Sovereign immunity implicates a court's *jurisdictional* power over foreign governments" whereas the act of state doctrine implicates a rule to be applied as a matter of our own substantive law. Empresa Cubana Exportadora, Inc. v. Lamborn & Co., 652 F.2d 231, 238-39 (2d Cir. 1981).

Recent domestic judicial decisions suggest that courts are more inclined to enforce arbitration agreements than awards based solely on the contracting parties' agreement when dealing with a suit involving a *state qua state* action. *See* Note, *International Arbitration and the Inapplicability of the Act of State Doctrine*, 14 N.Y.U.J. INT'L L. & POL. 65 (1981) [hereinafter cited as Note, *International Arbitration*]. Embracing the "restrictive theory" of sovereign immunity, RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 (1965), American courts today do not automatically abstain from scrutinizing a foreign State's involvement in purely commercial activities. *See* Alfred Dunhill of London, Inc. v.

characterized the pre-award attachment analysis[157] which highlights important procedural remedies available for more effective arbitration in the United States.[158] Some commentators have argued that pre-award attachment is a unique feature of the Anglo-American legal system and unfairly exposes international arbitration to the "eccentricities of particular nations' legal systems."[159] By permitting parties to resort to "judicially-imposed interim relief," the courts will both undermine the uniformity purpose of international arbitral conventions, and deter contracting parties from resorting to arbitration as a means of solving their disputes.[160] Other commentators opine that the purpose of international arbitral conventions is better served if the courts are permitted to add substance to both the arbitration agreement and the arbitrator's final judgment.[161] In this respect, pre-award attachment is not incompatible with dispute settlement via arbitration.[162]

The dearth of legislative history underlying American acces-

Republic of Cuba, 425 U.S. 682 (1976). Courts are now required to "consider the merits of cases involving foreign confiscations violative of international law." Note, *An Exercise in Judicial Restraint: Limiting the Extraterritorial Application of the Sherman Act Under the Act of State Doctrine and Sovereign Immunity*, 9 SYR. J. INT'L L. & COM. 379, 386 (1982). Thus, the "restrictive" theory of sovereign immunity, which has basically emanated from international conventions, encompasses judicial scrutiny of acts *jure gestionis*, State private acts, but not of acts *jure imperii*, State public acts.

157. Pre-award attachment involves the seizure of the defendant's assets prior to rendering of a decision by an arbitral body. The purpose of pre-award attachment is to ensure the availability of assets for the satisfaction of an award rendered against the defendant in the arbitral proceedings.

158. *Compare* McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032 (3d Cir. 1974), Coastal States Trading, Inc. v. Zenith Navigation S.A., 446 F. Supp. 330 (S.D.N.Y. 1977) *and* Metropolitan World Tanker Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional, 427 F. Supp. 2 (S.D.N.Y. 1975) (pre-award attachment held inconsistent with the N.Y. Convention) *with* Drys Shipping Corp. v. Freights. Sub-Freights, Charter Hire, 558 F.2d 1050 (2d Cir. 1977), Andros Compania Maritima, S.A. v. Andre & Cie, S.A., 430 F. Supp. 88 (S.D.N.Y. 1977) *and* Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977) (attachment permissible under the U.N. Convention). In recognition of this problem, UNCITRAL concluded in 1979 that "[w]here such a procedure is not part of the normal enforcement of an award but requested during or even before arbitration proceedings, the answer depends on the understanding of the aim of the [Convention], in particular, article II." Report of the Secretary-General, U.N. Doc. A/CN.9168 (1979).

159. Note, *Attachment Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 36 WASH. & LEE L. REV. 1135, 1141 (1979).

160. Note, *Pre-Award Attachment Under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 VA. J. INT'L L. 785, 803-04 (1981).

161. 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION, pt. I.B.1 (G. Gaja ed. 1980).

162. G. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES 79-87 (1975).

sion to international arbitral conventions,[163] together with a strict reading of the relevant statutory language yield the observation that pre-award attachment is not expressly part of either the U.N.[164] or the Inter-American Conventions. The basic goals and policies of both Conventions, however, will be better realized if pre-award attachment is permitted in limited circumstances[165] as a means of legitimizing the viability of arbitration proceedings.[166]

The goal of the Inter-American Convention is to unify the standards by which agreements to arbitrate are observed and enforced in signatory countries.[167] Past experience suggests that the implementing legislation will promote a more stringent legal regime to enforce arbitration agreements than is actually mandated by the Convention.[168] The judiciary will similarly resist any efforts to expand the narrow construction previously applied to express and implied justifications for non-recognition of the arbitral agreement.[169] The courts have long realized that arbitration mechanisms offer an equitable means of solving disputes, and are effective alternatives to already crowded court dockets.

B. ENFORCING THE AWARD[170]

1. Recognition of the Award

The Inter-American Convention and its implementing legislation incorporate almost verbatim the U.N. Convention's mechanisms for enforcing the arbitral award.[171] The implementing legisla-

163. *See* Carolina Power & Light Co. v Uranex, 451 F. Supp. 1044, 1050-52 (N.D. Cal. 1977).

164. *See* I.T.A.D. Assoc., Inc. v. Podar Bros., 636 F.2d 75 (4th Cir. 1981).

165. *See* Carolina Power & Light, 451 F. Supp. at 1050.

166. *Cf.* Cooper v. Ateliers de la Motobeacane, S.A., 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728 (1982). Courts must consider whether such attachment was either intended by the parties or would significantly promote the efficient settlement of their disputes by the means specified. *See supra* note 158. Undoubtedly, an arbitration *award* renders attachment orders "moot and unnecessary." Sperry Int'l Trade, Inc. v. Gov't of Israel, 689 F.2d 301, 303n.1 (2d Cir. 1982).

167. *See supra* note 5 and accompanying text.

168. American courts have not hesitated to compel arbitration even in cases where such proceedings involve a foreign forum. *See* Star-Kist Foods, Inc. v. Diakan Hope, S.A., 423 F. Supp. 1220 (C.D. Cal. 1976).

169. *See supra* note 11 and accompanying text.

170. Because the Inter-American and the U.N. Conventions have practically identical provisions enumerating the permissible defenses to enforcement of arbitration awards, the cases cited interpret the provisions of the U.N. Convention while the analysis presented refers to the Inter-American Convention.

171. The U.N. Convention's implementing legislation ostensibly presents some diffi-

tion governs the rules of procedure for the domestic enforcement of an arbitral award falling under the Inter-American Convention.[172] American courts, when faced with a motion to enforce an arbitral decision, generally will not review the merits of the award but may, under the proper circumstances, entertain the defenses permitted by the Convention's article five.

2. *The Defenses to the Award*

The language of article V(1)(e) and the general provisions of the Inter-American Convention indicate that the party seeking enforcement of the award need not prove the award's binding effect in the *lex fori*.[173] Rather, the party against whom enforcement is sought must prove that the award is not conclusive.[174] Because the purpose of the Convention is to liberalize[175] and unify the standards for international arbitration,[176] American courts have narrowly construed the article V defenses available to parties against

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culty in the domestic enforcement of many foreign arbitration awards. Pursuant to Chapter-1 of the Federal Arbitration Act, 9 U.S.C. § 9 (1982), the parties must insert into their arbitral agreement a provision calling for "judgment upon the award" to be instituted in "any Court having jurisdiction." *Id. See* Sperry Int'l Trade, Inc. v. Gov't of Israel, 689 F.2d 301 (2d Cir. 1982). Chapter-2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208 (1982) is silent on this matter. Because 9 U.S.C. § 208 (1982) mandates the applicability of Chapter-1 to enforcement of arbitral awards, to the extent that it does not conflict with Chapter-2, it is unclear whether the domestically required provision is similarly necessary in enforcing foreign awards.

The courts have adopted a rather flexible approach. The wording of the arbitration agreement and the conduct of the parties may imply consent to entry of judgment upon the award. *See* I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424 (2d Cir. 1974); Audi NSU Auto Union A.G. v. Overseas Motors, Inc., 418 F. Supp. 982 (E.D. Mich. 1976). A more stringent requirement will undoubtedly produce an anomolous and detrimental result contrary to the purpose of the Inter-American Convention. The Convention itself, in article 4, suggests that foreign awards will be enforced by similar mechanisms as domestic awards. In this respect, courts need not reach the issue of judgment upon the award. The parties need not invoke the judicial power of Article III courts: They are bound to the arbitrator's decision as a result of their contractual agreement to abide by it. The duties and rights which emanate from this contractual agreement should supplant any need for judicial intervention.

172. The parties may, however, expressly remove the arbitral procedure from national law. *See supra* note 80, art. V(1)(d),(e).

173. Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co., 415 F. Supp. 133 *passim* (D.N.J. 1976).

174. There is a strong rebuttable presumption that a foreign award is valid. *See* Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974).

175. *Id.* at 973.

176. Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

whom enforcement is sought. These defenses will be analyzed seriatim in the ensuing discussions.

Narrow judicial construction of article V defenses is generally attributed to considerations of reciprocity.[177] Broad domestic interpretation of article V defenses is likely to yield reciprocal biases abroad. Widespread nonenforcement, based upon expansive interpretations of the available defenses to enforcement of awards, seriously endangers the efficacy of the Convention and upsets the legal regime's predictability, as well as the stability deemed so essential to international commerce.[178] Resultant disparate judicial policies could frustrate the essential purpose for resorting to arbitration, namely the avoidance of litigation.[179] Absent strong and cogent reasons, therefore, U.S. courts should endeavor to implement the Convention's goal of rendering arbitral awards enforceable in courts of law.[180]

a. Violations of Due Process[181]

Article V(1)(b) affords a party, against whom enforcement is sought, a legal remedy to assert insufficient notice or inability to present its case. Despite this article's popularity and rather broad language, American courts have limited this defense to cases demonstrating blatant violations of the contracting party's legal rights.[182] The narrow construction of article V(1)(b) is particularly evident in situations where the courts have observed that violations of domestic notions of due process are not necessarily determinative in cases involving foreign awards.[183] The due process de-

177. *See supra* note 11 and accompanying text.

178. Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974).

179. *See, e.g.*, Saxis S.S. Co. v. Multifacs Int'l Traders Inc., 375 F.2d 577, 582 (2d Cir. 1967); Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960).

180. *See* 8 VAND. J. TRANSNAT'L L. 935, 942-43 (1975).

181. It must be noted that American courts have not specifically considered the article V(1)(a) defense of incapacity of party. The related defense of immunity from suit, however, has been asserted in several cases. *See, e.g.*, Ipitrade Int'l S.A. v. Fed. Republic of Nig., 465 F. Supp. 824 (D.D.C. 1978) (foreign State agreement to adjudicate all disputes constituted a waiver of sovereign immunity under the Foreign Sovereign Immunities Act). For the article V(1)(a) defense of invalidity of arbitration agreement, see *supra* note 155 and accompanying text.

182. Policy considerations favoring international arbitration supercede any allegations of violation of a contracting parties' minor due process rights. *See infra* notes 188 & 201 and accompanying text.

183. *See* Quigley, *supra* note 16, at 1067 n.81. *Cf.* Parsons & Whittemore Overseas Co.,

fense is therefore limited to apparent breaches of *audi et alteram partem*, the most fundamental principle of procedure.

The first case in which an American court enforced a foreign arbitral award based on Chapter-2 of the Federal Arbitration Act,[184] the legislation which implemented the United States' accession to the U.N. Convention, was *Parsons & Whittemore Oerseas Co., v. Sociéte Générale de l'Industrie du Papier* (RAKTA).[185] At issue were several article V defenses raised by Overseas, a U.S. corporation, against confirmation of an Egyptian arbitral award in favor of RAKTA, an Egyptian corporation.[186] Overseas maintained that the award was unenforceable because the arbitration tribunal refused to delay its proceedings during the Six Day War to permit the personal appearance of Overseas' key witness, David Ness, the United States Charge d'Affairs in Egypt.[187] Construing this defense narrowly, the Second Circuit rejected Overseas' contentions.

The court noted that arbitration proceedings are not required to replicate legal remedies available in the courtroom.[188] The inability to produce witnesses in the absence of subpoena power is a risk inherent in arbitration proceedings.[189] In addition, the procedural schedule should not be altered for the mere convenience of one of the parties.[190] In this respect, the affidavit presented by Mr. Ness was sufficient testimony for tribunal consideration.[191] The

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Inc. v. Sociéte Générale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 975 (2d Cir. 1974) (stating that "this provision essentially sanctions the application of the forum state's standards of due process").

184. 9 U.S.C. §§ 201-208 (1982).

185. 508 F.2d 969 (2d Cir. 1974).

186. The contract in *Parsons & Whittemore* called for the building of a paper mill in Egypt. The project was funded by the United States Department of State, through the A.I.D. program. Before completion of the construction, the Egyptian government broke off diplomatic relations with the United States and ordered all Americans out of Egypt. The State Department instructed the American Company to cease performance of the contract pursuant to 22 U.S.C. §§ 2370(p), (q), (t) (1979). The Egyptian company demanded arbitration before the International Chamber of Commerce (I.C.C.), as provided in the agreement. The I.C.C. held the American Company in breach of contract. 508 F.2d at 971-73.

187. *Id.* at 975.

188. *Id.* (citing Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Co., 442 F.2d 1234, 1238 (D.D.C. 1971)). A later court observed that an arbitration agreement, incorporated in the commercial contract, defines the parties' substantive rights. Such rights may not be altered even by an express provision of an international convention. Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 948 (S.D. Ohio 1981). *See also* J. LEW, *supra* note 130, *passim* (advocating the supremacy of the parties' intentions as delineated in their binding agreement).

189. 508 F.2d at 975.

190. *Id.*

191. *Id. See generally* M. HILL & A. SINICROPI, EVIDENCE IN ARBITRATION *passim* (1980)

court consequently concluded that Overseas' due process rights were not infringed upon by the tribunal's refusal to delay the hearings.[192]

The due process defense was further illuminated in *Biotronik Mess-und Therapiegerate GmbH & Co. v. Medford Medical Instrument Co.*[193] Although Medford, the American respondent, received an invitation to arbitrate under the Arbitration Rules of the International Chamber of Commerce in Switzerland, it failed to participate in the proceedings.[194] The American company contended that Biotronik had knowingly withheld evidence and had engaged in a "calculated attempt to mislead the arbitrators."[195] Biotronik responded that one party's failure to prove another's case neither constitutes fraud nor violates its due process rights.[196]

The court reasoned that the mere fact that arbitration awards may be vacated under certain conditions " 'does not obliterate the hesitation with which courts should view efforts to re-examine awards.' "[197] In an adversary system, a party must present its own case, particularly in situations where it believes relevant evidence exists to rebut the other party's arguments.[198] In this case, no evidence was offered to prove that Biotronik actually prevented Medford from presenting its argument. The public policy defense of article V was, therefore, *a fortiori* inapplicable.[199]

The court was additionally unpersuaded that domestic application of article V(1)(b) was violated in this case.[200] The court observed that the primary elements of American due process are notice of the proceedings and the opportunity to be heard

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(discussing the burden of proof requirement and the evidentary weight given to affidavit testimony).

192. 508 F.2d at 975.

193. 415 F. Supp. 133 (D.N.J. 1976).

194. *Id.* at 135.

195. *Id.* at 137. Medford argued that Biotronik's non-disclosure rendered the award " 'procured by . . . fraud within the meaning of the United States Arbitration Act, 9 U.S.C. § 10(a) [(1979)].' " Although fraud is not one of the U.N. Convention's enumerated defenses, it is incorporated through either 9 U.S.C. § 208 (1982) or the "public policy" defense of article V(2)(b) of the Convention.

196. 415 F. Supp. at 137.

197. *Id.* at 139 (quoting Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 598 (3rd Cir. 1968), *cert. denied*, 393 U.S. 954 (1968)).

198. 415 F. Supp. *passim*.

199. *Id.* at 139-40. The court did not reach Medford's fraud incorporation argument.

200. Medford argued that it was unable to present its case because its rights and liabilities did not mature and could not be calculated until well after the arbitration date. *Id.* at 140.

therein.[201] Medford received proper notice of the arbitral proceeding but voluntarily chose not to attend.[202] The behavior of the arbitral tribunal and Biotronik, therefore, did not abridge Medford's due process rights under American law.[203]

The due process defense has been construed narrowly by American courts. Once a party has been offered the opportunity to present its case, a refusal to participate, or inactivity in the arbitration process, is not deemed a violation of its due process rights.[204] Due process merely implies that the arbitrator must inform a party of the arguments and evidence presented by its adversary and allow the party to express an opinion in the arbitration proceedings.[205] Short time limits for the preparation of a defense similarly do not constitute a violation of due process rights. Arbitral procedural requirements, in cases falling under the Inter-American Convention, must not necessarily duplicate domestic due process guarantees.[206] Such cases are governed by the parties' choice of law, IACAC rules, or the *lex fori*,[207] and receive extensive judicial scrutiny only in instances of serious irregularities. American courts, therefore, should adhere to the weighty presumption supporting the validity of the arbitral process[208] by applying a narrow construction to article V(1)(b) defenses.

b. Jurisdictional Limitations

The Inter-American Convention's article V(1)(c) governs cases where the arbitration agreement is valid *per se*, but the arbitrator

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201. *Id.* (citing Fuentes v. Shevin, 407 U.S. 67, 80 (1972)).

202. 415 F. Supp. at 140-41.

203. The court assumed that American law governs this action. *See supra* note 136; *infra* notes 207-08 & 224.

204. *See supra* note 198 and accompanying text.

205. *See supra* note 201 and accompanying text.

206. *See supra* note 188 and accompanying text. For brief discussions concerning the impartiality of an arbitrator as a due process violation, see Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334 (5th Cir. 1976); Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 948, 953-55 (S.D. Ohio 1981), *reh'g den.* 530 F. Supp. 542 (S.D. Ohio 1982).

207. *But cf.* Trooboff & Goldstein, *Foreign Arbitral Awards and the 1958 New York Convention: Experience to Date in the U.S. Courts*, 17 VA. J. INT'L L. 469, 476-77 (1977) (arguing that the courts of a Contracting State should interpret article V(1)(b) to require confirmation of an award if the due process standards of the law applied by the arbitrators are satisfied). *See supra* note 202.

208. At least one court has found a serious breach of due process rights even when applying the laws of the State which hosted the arbitration. Corporacion Salvadorena de Calzado, S.A. v. Injection Footwear Corp., 533 F. Supp. 290 (S.D. Fla. 1982).

has rendered a decision which was not contemplated by the contracting parties, or which was not within the scope of the arbitration agreement and the subsequent questions submitted by the parties.[209] This article was used by Overseas, the American company, in *Parsons & Whittemore*,[210] as its fourth defense to enforcement of the arbitration award. Overseas argued that the arbitrator exceeded his jurisdiction by granting an excessively large award.[211] The arbitrator granted $60,000 for start-up expenses, $30,000 for costs, and $185,000 for consequential damages, although the contract itself absolved either party from liability for loss of production.

The Second Circuit reiterated its previous determination that article V defenses be construed narrowly.[212] The court declared that, making its defense, Overseas must "overcome a powerful presumption that the arbitral body acted within its powers."[213] Such a presumption may be defeated only if the arbitrator premised the award upon a construction which is in "apparent" excess of the scope of his jurisdiction.[214] The arbitrator, however, need not base his decision on express authority.[215] Consequently, the court concluded that "[a]lthough the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement."[216]

In *Fertilizer Corporation of India v. IDI Management, Inc., (FCI v. IDI)*,[217] the U.S. District Court for the Southern District of

209. *Cf.* 9 U.S.C. § 10(d) (1982) (authorizing courts to vacate awards "where the arbitrators exceeded their powers"). The Inter-American Convention does not imply that the arbitrator may give a final decision on his jurisdictional parameters. Because the courts generally have the final say in this matter, most national laws provide the arbitrator with power to give *provisional* rulings on his competence. Such laws have aimed to prevent delay in the arbitration process and to alleviate dilatory tactics by obstructive respondents.

210. 508 F.2d at 976-77.

211. *Id.* at 976.

212. *Id.* The court stated that 9 U.S.C. § 10(d) (1979) has similarly received a strict reading. *See, e.g.*, United Steel Workers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Coenen v. R.W. Pressprich & Co., 453 F.2d 1209 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972).

213. 508 F.2d at 976.

214. *Id.*

215. *Id.* at 977.

216. *Id.* The court also observed that such a limitation upon judicial review is aimed to prevent usurption of the arbitrator's role.

217. 517 F. Supp. 948 (S.D. Ohio 1981), *reh'g den.* 530 F. Supp. 542 (S.D. Ohio 1982).

Ohio faced a similar article V(1)(c) defense. Petitioner FCI, a wholly-owned entity of the Government of India, requested arbitration through the International Chamber of Commerce pursuant to an arbitral clause in its contract with IDI.[218] The duly appointed arbitration tribunal unanimously awarded FCI 9,679,000 rupees ($1.3 million) plus $10,118.31. Subsequently, IDI refused to pay the award. In its fifth affirmative defense, IDI alleged that the arbitrators had exceeded their authority in awarding consequential damages. [219] The parties' contract expressly excluded any damages for lost profit. FCI responded that article V(1)(c) only prohibits consideration of issues not submitted to the arbitrators.[220]

The court observed that the contract in question clearly excluded consequential damages, and yet the award was based almost exclusively on such damages. The court, nevertheless, emphasized that its review of the arbitration award under the U.N. Convention must be narrow.[221] The fact that Indian law limits judicial review of arbitral awards to cases where a "fundamental breach" upon which the award is predicated is readily apparent on the face of the record,[222] may not bind a U.S. court to make a similar determination. Nevertheless, absent this apparent fundamental breach, the court decided to adjourn a final enforcement on the validity of the award pending resolution of the issue in the Indian court.[223]

These decisions have added significant impetus to the prevailing view that article V defenses are construed narrowly and should not entail a court's re-examination of the merits of the award.[224] Courts, however, may evaluate the enforcement of

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218. *Id.* at 950.

219. *Id.* at 958.

220. *Id.*

221. *Id.* at 958-59 (citing General Tele. Co. of Ohio v. Communications Workers of Am., 648 F.2d 452, 456 (6th Cir. 1981)).

222. 517 F. Supp. at 960-61. The court concluded that Indian law controls because: (1) The arbitration was held in India; (2) the contract was executed and was to be performed in India; (3) the venue of arbitration was expressly stated to be New Delhi, India; and (4) neither party claimed that American law governs the contractual rights of the parties. *Id.*

223. 517 F. Supp. at 961. IDI petitioned an Indian court to vacate the award, and FCI had petitioned another Indian court for confirmation of the award. Both petitions were still pending at the time FCI petitioned this court to enforce the award. Article VI of the U.N. and Inter-American Conventions expressly permits courts to stay enforcement of the arbitration award under these circumstances.

224. The Second Circuit merely applied United States laws to enforcement of foreign awards. Other authorities have disagreed as to which laws apply in such situations. *Compare* Quigley, *supra* note 16, at 1068 n.82 (advocating application of the law chosen by the

awards which are in part *ultra* or *extra petita*.[225] The courts are advised to balance the jurisdictionally excessive portion of the award with the unjustified hardship facing a party seeking enforcement, if the award in its entirety is vacated. An incomplete award, however, does not justify refusal of enforcement under article V(1)(c), or under any other ground of article V. The courts should endeavor to promote the Inter-American Convention's primary goal of uniformity and consistency through an evaluation of the parties' intentions, derived from an expansive reading of their contractual stipulations, and from a narrow application of any alleged defenses to enforcement of arbitral awards.

c. Non-binding Awards

Article V(1)(e) permits refusal of a foreign arbitration award if the respondent can prove either that the award has not yet become binding upon the parties, or that the award has been set aside or suspended by the country of origin.[226] This provision has not been subjected to extensive review by American courts. Nevertheless, in *FCI v. IDI*,[227] IDI argued that the award granted by the arbitration tribunal was not binding until reviewed by an Indian court.[228] FCI responded that consideration of the award by an Indian court does not obviate the binding effect of the award.[229] The court observed, following its review of Indian law, that the award is *res judicata* as to the parties when made.[230] The court

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parties or the law of the State where the award was made) *with* Trooboff & Goldstein, *supra* note 207, at 478 (advocating arbitrator discretion in choosing the law preferred by the parties, arbitrators, or the law of the State where the arbitration was conducted). *See supra* note 203.

225. Such awards contain decisions which are partially or entirely outside the scope of the questions submitted to the arbitration tribunal.

226. The term "binding" borrowed from "final" as expressed in the Geneva Convention of 1927, *done* Sept. 26, 1927, 92 L.N.T.S. 301 (effective July 26, 1929), was the most discussed proviso at the U.N. Convention Conference of 1958. For an excellent examination of the problems associated with the different interpretations of this term, see Domke, *The United States Implementation of the United Nations Arbitral Convention*, 19 AM. J. COMP. L. 575, 578-84 (1971).

227. 517 F. Supp. at 948.

228. *Id.* at 956. IDI alleged that Indian courts conduct a more expansive review of the defenses to enforcement of arbitral awards. Under Indian law, "speaking awards" may be vacated for any error of law, whereas under American law review is permitted only if the award is in "manifest disregard" of the law. *Id.*

229. *Id.*

230. *Id.* Article IV of the Inter-American Convention suggests that the court's decision may have been different had this case arisen under this Convention. *Cf. infra* note 231.

concluded that an appeal to a judicial body of an arbitration award does not toll the binding effect of the award.[231]

The district court reiterated the uniform American judicial policy to narrowly construe the defenses to enforcement of foreign arbitral awards. The petitioner need not receive judicial enforcement of the award under the *lex arbitri* for the award to be binding under the *lex loci arbitri* and under the *lex fori*.[232] The award is normally binding at the moment at which it is no longer open to genuine appeal on the *merits* to a second arbitral body, or to a judicial court in those instances where such means of recourse are available.[233]

d. Public Policy Ex Officio

Public policy is a traditional ground available to the contracting parties, and the courts *sua sponte*, when reluctant to abide by or to enforce foreign arbitral awards and to apply foreign law. The public policy defense is intended to safeguard the "fundamental moral convictions or policies of the forum."[234] Article V(2) of the Inter-American Convention empowers courts to scrutinize awards which are perceived to threaten public policy. The first part of this article concerns the non-arbitrability of the subject matter of the arbitration,[235] while the second governs pure policy justifications for non-enforcement of the arbitral award.[236]

Domestic judicial examination of the non-arbitrable subject matter defense of article V(2)(a) has been relatively limited. In *Scherk v. Alberto-Culver Co.*,[237] the United States Supreme Court

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231. *Id.* at 957. One commentator succinctly stated that the "award will be considered 'binding' for the purposes of the Convention if no further recourse may be had to another arbitral tribunal. . . . The fact that recourse may be had to a court of law does not prevent the award from being 'binding.' " Asken, *supra* note 29, at 11.

232. Mann, *State Contracts and International Arbitration*, 1967 BRIT. Y.B. INT'L L. 1, 6.

233. *See supra* note 226 and accompanying text.

234. J. LEW, *supra* note 130, at ¶ 403.

235. Non-arbitrable matters include, *inter alia*, disputes which involve antitrust, intellectual property rights, family law, equity considerations, and those which arise from contracts not commercial in nature. *See, e.g.*, B.V. Bureau Wijsmuller v. United States, 1976 A.M.C. 2514 (S.D.N.Y. 1976) (where the court stated that relations arising out of activities of warships have never been regarded as commercial in nature). The non-arbitrability of subject matter defense to enforcement is not accepted if the subject matter is only of an incidental nature in the resolution of the dispute. *See* Audi-NSU Auto-Union A.G. v. Overseas Motors Inc., 418 F. Supp. 982 (E.D. Mich. 1976).

236. Article V(2)(b) seems to be a provision of residual application for those cases not expressly covered by other provisions of the Inter-American Convention.

237. 417 U.S. 506 (1974).

was faced with a conflict between an international commercial arbitration agreement and the unwaivable protections for investors under the 1934 Securities and Exchange Act (SEA).[238] Although the litigants had initially agreed to arbitrate all disputes, the 1934 SEA became applicable when Alberto-Culver alleged that Scherk had made fraudulant representations of trademark rights.[239] The Court was asked to resolve whether the arbitration agreement or the unwaivable statute[240] would control the settlement of this dispute.

The Court concluded that because the arbitration agreement was "truly international",[241] the U.N. Convention's uniformity and consistency policies outweighed the benefits intended by domestic statutory protections.[242] A contrary result would produce uncertainty in a conflict of laws situation, and would operate to frustrate the advantages of arbitration agreements.[243] Thus, the Court was able to transform a non-arbitrable subject matter into a case falling within the parameters of the U.N. Convention by promoting policy reasons which are also at the root of the Inter-American Convention.[244]

In *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya (LIAMCO)*,[245] a federal district court invoked the act of

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238. 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.

239. The 1934 SEA is normally automatically applicable to cases involving allegations of fraud. *See id.*

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

241. 417 U.S. at 515. *Cf.* Wilko v. Swan, 346 U.S. 427 (1953); Boyd v. Grand Trunk W.R.R. Co., 338 U.S. 263 (1949) (in which arbitrations without international ramifications were superceded by federal acts).

242. 417 U.S. at 515-17.

243. *Id.*

244. Although *Scherk* was decided in the specific circumstances of an alleged violation of the securities laws, the Court's reasoning would appear to compel the same result in an international dispute in which one of the parties alleges violation of a statute designed primarily to protect public rights as opposed to commercial relations between contracting parties. The Court, therefore, seems to have enforced the proposition that international arbitration proceedings may be unsympathetic to defenses based solely on purely domestic statutes, even where the contract by its terms is governed by the laws of that country. *See* Antco Shipping Co. v. Sidermar, Sp.A., 417 F. Supp. 207 (S.D.N.Y. 1976).

245. 482 F. Supp. 1175 (D.D.C. 1980). Following settlement by the parties, several groups appeared before the Circuit Court as *amici curiae* while the case was on appeal and asked that the district court's decision be vacated as moot. Motions of Amici Curiae Requesting an Order Vacating the Jan. 18 1980 Order of the District Court as Moot, Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980). The D.C. Circuit granted the motion by an order dated May 6, 1981.

state doctrine, incorporated into the U.N. Convention by article V(2)(a), to bar enforcement of a foreign arbitral award. In 1973 and 1974, Libya nationalized LIAMCO's rights under certain petroleum concessions. Following the breakdown of negotiations for reparations, LIAMCO commenced an arbitration proceeding against Libya under the arbitration clause contained in the concessions.[246] Libya refused to participate in the arbitration, which culminated in LIAMCO's favor.[247] LIAMCO asked the United States district court to enforce the award in light of the American accession to the U.N. Convention. As one of its defenses, Libya claimed that the court should refrain from enforcing the award under the Convention's article V(2)(a) incorporation of the act of state doctrine.[248]

The court observed that Libya's nationalization of LIAMCO's assets and the concomitant schedule of compensation was the "subject matter of the difference" encompassed by article V(2)(a).[249] Moreover, had the parties initiated the settlement of their dispute before this court, the court would have declined jurisdiction because it could not rule on the validity of the Libyan nationalization law.[250] In this respect, judicial abstention, in light of the act of state doctrine, is within the scope and design of the article V(2)(a) defenses.[251] The court, therefore, refused to recognize or enforce the arbitral award.[252]

Generally, article V(2)(a) non-arbitrability of subject matter defenses have received unfavorable cursory treatment in American courts. The LIAMCO decision, however, seems to assert that certain fundamental policy justifications are more

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246. The concessions signed in 1955 contained an arbitration clause providing for Libya's capital, Tripoli, as the locale. The clause was amended in 1966 at LIAMCO's request to provide for arbitration either by mutual agreement of the parties or by decision of the arbitrators. 482 F. Supp. at 1177.

247. Libyan Am. Oil Co. v. Socialist People's Libyan Jamahirya (1977) (Mahmassani, arb.) (LIAMCO Award), *reprinted in* 20 I.L.M. 1 (1981).

248. The act of state doctrine:

> [R]equires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned, but must be accepted by our courts as a rule for their decision.

Ricaud v. American Metal Co., 246 U.S. 304, 309 (1917). *See supra* note 156.

249. 482 F. Supp. at 1178.

250. *Id.*

251. *Id.* at 1178-79.

252. *Id.* at 1179.

important than international commercial arbitration.[253] This decision cannot be easily reconciled with existing domestic application of the U.N. Convention. Nevertheless, the tone of the opinion suggests that international commercial transactions, between private corporations and foreign states, would ultimately benefit from such a judicial determination. Significant freedom allocated to foreign state *qua* state behavior is likely to yield commensurate benefits. Foreign governments would be more inclined to entertain commercial contracts which permit less restrictive foreign investment. In this respect, the U.N. and Inter-American Conventions' ultimate goal of alleviating the problems associated with international commercial intercourse, may actually be better served by this uniquely expansive reading of article V(2)(a).

The dearth of legislative history leading to the codification of article V(2)(b) illustrates the imprecise nature of the guidelines within which courts have had to operate when considering domestic application of this defense to enforcement of foreign arbitral awards.[254] The public policy defense could conceivably encompass all allegations which invoke existing policy concerns, as well as any new defenses courts may choose to entertain.[255] As noted above,[256] public policy invokes the fundamental moral convictions and policies of the forum State. What constitutes a violation of public policy is largely a question of fact and will be decided on

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253. Commentators have harshly criticized the *LIAMCO* decision for failing to recognize the full potential of benefits inherent in the arbitration process. One scholar concluded that:

> The act of state doctrine did not represent a sufficiently overriding national interest to justify the nonenforcement of the LIAMCO award under article V(2)(a). The doctrine has been sharply curtailed by the commercial and territorial exceptions as well as by the Hickenlooper Amendment [22 U.S.C. § 2370(e)(2) (1976)]. It is designed to permit judicial abstention only when there is a lack of consensus regarding the applicable international legal principles or a potential risk of judicial interference with the Executive's conduct of U.S. foreign policy. . . . Thus, to include the act of state doctrine within the article V(2)(a) defense would impair the ability of U.S. businesses to have similar awards enforced abroad. This result would undercut the utility of arbitral clauses in long-term investment agreements and would undermine the goals of the Convention.

Note, *International Arbitration*, *supra* note 156, at 150, 152 (footnotes omitted).

254. *Parsons & Whittemore* significantly narrowed the Second Circuit's entertainment of the article V(2)(b) defense. The court expressly concluded that "public policy" does not infer "national policy." The public policy defense "was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' " 508 F.2d at 974.

255. Comment, *International Commercial Arbitration Under the United Nations Convention and the Amended Federal Arbitration Statute*, 47 WASH. L. REV. 441, 446 (1972).

256. *Supra* note 234 and accompanying text.

an *ad hoc* basis.[257] In the United States, issues of public policy have emerged in nearly every case under the U.N. Convention.[258] Nevertheless, the most prominent recurring article V(2)(b) argument is the question of arbitrator impartiality.

In *Imperial Ethiopian Government v. Baruch-Foster Corp.*,[259] the Fifth Circuit entered judgment confirming a foreign arbitral award, without compelling the appellee to honor the appellant's "far reaching" request for discovery, when there was no evidence of disqualification other than the loser's bare assertions.[260] Appellant Baruch-Foster Corporation neither paid nor challenged a 1974 arbitral decision granting Ethiopia a $703,188 award. The government of Ethiopia sought American judicial confirmation of the award based upon the U.N. Convention and its implementing legislation. The appellant contended that the president of the arbitration panel had a material connection with the Ethiopian government which biased his decision.[261]

The Fifth Circuit affirmed the district court's decision to deny the appellant's arguments challenging the validity of the award.[262] The court observed that where there is sufficient evidence in the record itself, vouching for the character and integrity of the questioned individual, the court will presume the validity of the award.[263] The court concluded that the "loser in arbitration cannot freeze the confirmation proceedings in their tracks and indefinitely postpone judgment" by questioning the impartiality of the arbitrator.[264]

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257. *See supra* note 142 and accompanying text.

258. *See, e.g.*, Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co., 484 F. Supp. 1063 (N.D. Ga 1980) (concluding that the arbitrators' application of French law, which established a penalty interest rate upon the award, was impermissible under U.S. law); Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A.G., 480 F. Supp. 352 (S.D.N.Y. 1979) (concluding that a party alleging duress has the heavy burden of establishing that it was so overborne that it lost any other options it may have had).

259. 535 F.2d 334 (5th Cir. 1974).

260. *Id.* at 336.

261. *Id.* at 335.

262. *Id.*

263. *Id.* at 337. It seems likely that this pronouncement resulted from the court's impression of the parties involved, particulary Baruch-Foster as a bad-faith operator. Baruch-Foster Corporation had apparently been engaging in dilatory tactics throughout the process, and the court viewed this defense as one more delay. Therefore, the key to this decision is the court's desire to implement the policy of expediting the confirmation of arbitral awards.

264. 535 F.2d at 337.

In *FCI v. IDI*,[265] IDI asserted that Mr. B. Sen, the arbitrator nominated by FCI, had served as council for FCI in at least two other proceedings and that such facts were not disclosed to IDI.[266] FCI responded that Mr. Sen was chosen properly under the I.C.C. rules, which governed the proceedings, as well as under the U.N. Convention's stipulations.[267] The court agreed with IDI that American public policy requires that settlement of controversies by arbitration "not only must be unbiased but also must avoid even the appearance of bias."[268] The court, however, distinguished this case on the facts from previous decisions holding to the contrary.[269] In particular, Mr. Sen was not the third neutral member on the arbitration panel, but rather was appointed by FCI.[270] In this respect, the court concluded that overwhelming American public policy favors enforcement of an award that although "appears" biased[271] is actually not biased in fact.[272]

Domestic application of article V(2)(b), by which a court may refuse enforcement of a foreign arbitral award *sua sponte*, has not been one of a residual nature, but has coexisted with other provisions of the U.N. Convention. In this respect, when deciding cases falling under the Inter-American Convention,[273] courts will nar-

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265. 517 F. Supp. at 948. On motion to rehear, the court reiterated its view that American public policy had not been offended. 530 F. Supp. 542, 545-46 (S.D. Ohio 1982).

266. 517 F. Supp. at 953.

267. *Id.*

268. *Id.* at 954 (quoting Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150 (1969)).

269. 517 F. Supp. at 954-55.

270. *Id.*

271. *See aslo* Int'l Produce, Inc. v. A/S Rosshavet, 638 F.2d 548 (2d Cir. 1981), *cert. denied* 451 U.S. 1017 (1981) (deciding that an award should not be vacated because of an appearance of bias).

272. 517 F. Supp. at 955.

273. Under the Inter-American Convention, in cases where the parties fail to stipulate their choice of law, the IACAC rules are automatically invoked. The IACAC rules of procedure expressly provide that a party may challenge an arbitrator within fifteen days either "after the appointment of the challenged arbitrator or after the circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence . . . become known to the party." INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION, RULES OF PROCEDURE 8-9, arts. 9-11 (1982). If the challenged arbitrator is replaced, the rules provide that: "[if] the sole or presiding arbitrator is replaced, any hearing held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal." *Id.* at 10, art. 14. Alternatively, in cases where the parties do in fact stipulate their choice of procedure, that procedure governs the challenge to arbitrator(s). If the stipulated procedure is silent as to this matter, the guidelines provided

rowly construe allegations of national public policy violations.[274] The test to be applied, in cases alleging biased awards, will not be based upon the circumstances which have created the lack of impartiality, but rather on whether the arbitrator has effectively acted in an unbiased manner.

V. CONCLUSION

American ratification of the Inter-American Convention will definitively promote a more efficient legal regime ensuring the equitable settlement of international commercial disputes. The Convention's field of applicability, however, is limited to the enforcement of foreign arbitration agreements and awards within its purview.[275] It does not presume to give an all-embracing regulation of international arbitration.[276] Uniform legal mechanisms, established by means of international conventions, have never spontaneously altered the behavior and policy of national courts.[277] This is particularly evident here, in light of cognizable Latin American aversion to binding international commitments.[278] In this respect, issues of sovereign immunity and the act of state doctrine are additional testimony to the ambiguities associated with domestic enforcement of foreign arbitral agreements and awards.[279] The Inter-American Convention itself, therefore, will not resolve the myriad impediments to uniform enforcement inherent in diverse national systems. The Convention, however, will

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by courts interpreting the U.N. Convention shall prevail. *See supra* notes 259-72 and accompanying text.

274. For the differences between national and international public policy, see Sanders, *Consolidated Commentary*, IV Y.B. COM. ARB. 231, 251 (1979), and *supra* note 141.

275. *See supra* note 80 and accompanying text. For a discussion of the enforcement of arbitration agreements and awards not covered by the Inter-American and U.N. Conventions, see Note, *supra* note 42, at 89-100.

276. *See supra* notes 91-94 and accompanying text.

277. *See supra* notes 95-99 and accompanying text. On the treatment of foreign arbitration in countries other than the United States, see Beaumont, *Dispute Resolution and Arbitration in Britain: Current Trends and Prospects*, 14 CASE W. RES. J. INT'L L. 323 (1982); Bertram-Nothnagel, *Enforcement of Foreign Judgments and Arbitral Awards in West Germany*, 17 VA. J. INT'L L. 385 (1977); Carbonneau, *The Elaboration of a French Court Doctrine on Inter-National Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 TUL. L. REV. 1 (1980); Hahn, *Negotiating Contracts With the Japanese*, 14 CASE W. RES. J. INT'L L. 377 (1982); Pedersen, *International Arbitration in Denmark*, 14 CASE W. RES. J. INT'L L. 259 (1982); Rosenn, *Enforcement of Foreign Arbitral Awards in Brazil*, 28 AM. J. COMP. L. 498 (1980).

278. *See supra* notes 49-76 and accompanying text.

279. *See supra* notes 234-53 and accompanying text.

apply significant pressure on domestic courts to develop consistent and binding legal principles which best effectuate the contracting parties' original intentions.

Domestic application of the U.N. Convention has indicated an American receptiveness to enforcement of international arbitration agreements based upon both the Convention and an independent base of foreign policy. Judicial inclination to promote the efficacy of international commercial arbitration will similarly characterize the domestic application of the Inter-American Convention.[280] Nevertheless, American businessmen are advised to carefully delineate their choice of mechanisms governing dispute settlement.[281] A modicum of effort can provide a superior method for handling foreign commercial disputes.[282] A properly constructed arbitration clause will effectively bypass the problems and ambiguities inherent in disparate foreign legal systems.[283] Only in this manner can the contracting parties successfully evade

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280. Chief Justice Warren E. Burger has advocated the use of arbitration as a means of alleviating the growing pressures upon the traditional legal process. Annual Report on the State of the Judiciary by Chief Justice Warren E. Burger, American Bar Association, Chicago, Ill. (Jan. 24, 1982).

281. The Inter-American Commercial Arbitration Commission recommends the following arbitration clause for effective settlement of commercial disputes:

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidation thereof, shall be settled by arbitration in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission in effect at the date of this agreement. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono.*

INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION, RULES OF PROCEDURE 2 (1982).

282. *See generally* AMERICAN ARBITRATION ASSOCIATION, NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 198 (1971) (discussing important regulations governing arbitration in the major global trading nations); De Vries, *supra* note 3, at 61-79 (discussing the desirability, rather than the legal effectiveness, of the arbitration clause in international contracts); M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION 30 (1968) (outlining the essential provisions of an arbitration clause).

283. Recent studies have indicated that effective and successful arbitration proceedings emanate both from a well-drawn arbitration provision and from educated procedural choices made by the contracting parties. In this respect, "[b]asic questions arise concerning where to arbitrate, which procedures to utilize and how to enforce a resultant arbitration award." Coulson, *A New Look at International Commercial Arbitration*, 14 CASE W. RES. J. INT'L L. 359, 359 (1982). The American Arbitration Association's 1981 survey of major U.S. law firms and multinational corporations has revealed that satisfactory awards normally result in situations where the parties carefully select the arbitrator(s). Additionally, the "arbitration procedure, while important, is of secondary significance." *Id.* Thus, this study seems to suggest that even though the Inter-American Convention employs back-up procedural rules, as delineated by the Inter-American Commercial Arbitration Commission, executives and their attorneys should not underestimate the importance of the arbitrator(s) selection process.

substantial litigation and the seemingly unpredictable nature of foreign judicial review,[284] thereby assuring quicker and more efficient settlement of their commercial disputes.

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284. Irrespective of the ostensibly uniform domestic application of international commercial arbitration awards, contracting parties almost certainly may evade the quagmire-like status of conflict of laws problems associated with foreign arbitration by a well-drawn arbitration agreement. *See generally* Croff, *The Applicable Law in an International Commercial Arbitration: Is it Still a Conflict of Laws Problem?*, 16 INT'L LAW. 613 (1982) (discussing the relationship between *lex mercatoria* and *lex fori*).