147 a (1)

USA no 1.

FEDERAL SUPPLEMENT

VOLUME 356

Judgm AND AWARD

The ISLAND TERRITORY OF CURACAO, Petitioner,

v.

SOLITRON DEVICES, INC., Respondent.

No. 72 Civ. 625.

United States District Court, S. D. New York.

Feb. 14, 1973.

Motion was made for order confirming an arbitration award and enforcing a judgment entered in a foreign country. The District Court, Wyatt, J., held, inter alia, that there was jurisdiction in Curacao to regulate arbitration under agreement between the government of Curacao and a United States manufacturer and to enter judgment on the award, enforceable in proceedings under federal and New York law, where manufacturer had specifically agreed to submit to arbitration in Curacao, agreed that the laws of the Netherlands Antilles should be applicable, and agreed that for "everything" connected with the agreement it had a Curacao "domicile" and a resident agent for service of notice and process, despite, inter alia, manufacturer's attempted, but ineffective, revocation of its "invariable" appointment of its agent, after Curacao had already invoked arbitration, that contention that agreement whereby manufacturer was to lease certain buildings to be constructed by Curacao and hire specified numbers of local residents was made on representations of Curacao that the wage structure would remain stable and that the agreement was terminated by reason of impossibility when minimum wage was quickly increased "by more than 100%" was for the arbitrators, and motion granted, judgment for petitioner.

1. Contracts ⇨202½

There was jurisdiction in Curacao to regulate arbitration under agreement between the government of Curacao and a United States manufacturer and to enter judgment on the award, enforceable in proceedings under federal and New York law, where manufacturer had specifically agreed to submit to arbitration in Curacao, agreed that the laws of the Netherlands Antilles should be applicable, and agreed that for "everything" connected with the agreement it had a Curacao "domicile" and a resident agent for service of notice and process, despite, inter alia, manufacturer's attempted, but ineffective, revocation of its "invariable" appointment of its agent, after Curacao had already invoked arbitration. 9 U.S.C.A. §§ 201–208, 203; CPLR N.Y. 5301–5309, 5305(a), par. 3.

2. Contracts ⇨285(2)

Claims of fraud in the inducement of contract containing arbitration provision generally are exclusively for the arbitrators, as are claims of frustration and termination arising after an admitted execution of an agreement.

Should that be determined by American law?

3. **Arbitration and Award** ⊂=72, 81

Claim of United States manufacturer, which had refused to enter into lease of facilities constructed by the government of Curacao pursuant to earlier agreement of the parties, that the agreement was made on representations of said government that the wage structure would remain stable and that the agreement was terminated by reason of impossibility when the minimum wage was increased "by more than 100%" would not be considered in district court's proceeding to confirm arbitration award and enforce judgment entered thereon in Curacao; such contention was for the arbitrators. 9 U.S.C.A. §§ 201–208.

4. **Arbitration and Award** ⊂=72

Arbitration award entered in Curacao under agreement entered into between a United States manufacturer and the government of Curacao was "final and definite" within the federal Arbitration Act and comparable New York statutes, so as to be enforceable in proceedings in federal district court, though award left open possibility of another arbitration and another award with respect to damage accruing after a specified future date, because of the impossibility of readily predicting such damage at the time of the award, where award specified precisely what manufacturer was to pay for damage accruing up to the specified date. CPLR N.Y. 5301–5309, 7501 et seq., 7511(b), par. 1(iii); 9 U.S.C.A. §§ 10, 10(d), 201–208.

See publication Words and Phrases for other judicial constructions and definitions.

5. **Arbitration and Award** ⊂=16

Where United States manufacturer, in arbitration under agreement between manufacturer and the government of Curacao, was fully advised as to the employment of one of the arbitrators as a judge of a court in Curacao, but made no objection to his acting, any objection on theory that he was not impartial as a matter of law was waived, and could not be maintained in action in federal court to confirm the award and enforce judgment entered thereon. 9 U.S.C.A. §§ 201–208.

6. **Arbitration and Award** ⊂=85(1)

Contract between United States manufacturer and a foreign government whereby, inter alia, the foreign government was to construct certain buildings and the manufacturer was to lease said buildings for its manufacturing operations and employ specified numbers of local residents was "commercial" within United States reservation to the Convention on the Recognition Enforcement of Foreign Arbitral Awards and statutes providing for enforcement of such Convention as to commercial contracts. 9 U.S.C.A. § 202.

See publication Words and Phrases for other judicial constructions and definitions.

7. **Judgment** ⊂=830

Even if legal relationship between United States manufacturer and foreign government whereby, inter alia, the foreign government was to construct certain buildings and the manufacturer was to lease them and hire specified numbers of local residents, was not commercial within United States reservation to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, so that arbitration award entered in the foreign country pursuant to the agreement would not be enforceable under federal statutes, judgment on such award would be enforceable under New York law which enforces any foreign judgment which is "final, conclusive and enforceable where rendered." 9 U.S.C.A. § 202; CPLR N.Y. 5302.

8. **Arbitration and Award** ⊂=72, 81

Even if arbitrators under agreement between United States manufacturer and a foreign government were in error in awarding such government damages in amount of unemployment insurance and medical assistance it would have to disburse to persons who were to have been employed by the manufacturer under agreement but were not, such error in fact or law was not subject to correction in proceedings in federal

court to confirm the award and to enforce judgment entered thereon in the foreign country. 9 U.S.C.A. §§ 201-208.

9. Arbitration and Award ⟨⟩85(1)

Purpose of statutes providing for enforcement of foreign arbitrable awards was to encourage arbitration of disputes arising out of transactions by American business in foreign countries. 9 U.S.C.A. §§ 201-208.

10. Arbitration and Award ⟨⟩82(5)

Where arbitrators gave defendant credit for item which was the subject of its counterclaim, said counterclaim, in proceedings to confirm award and enforce judgment entered thereon in foreign country, was concluded by the award and judgment. 9 U.S.C.A. §§ 201-208.

11. Judgment ⟨⟩946

Where judgment was entered in federal district court confirming arbitration award and enforcing judgment entered thereon in foreign country, the amount of the foreign judgment, in foreign currency, would be converted into United States dollars at the rate prevailing on the date of the United States judgment.

Weil, Gotshal & Manges, New York City, for petitioner, Edward F. Wallace, Marshall F. Berger, New York City, of counsel.

Windels, Marx, Davies & Ingraham, New York City, for respondent, Paul Windels, Jr., Francis E. Koch, New York City, of counsel.

WYATT, District Judge.

This is a motion by petitioner The Island Territory of Curacao (Curacao) for an order confirming an arbitration award and enforcing a judgment.

Curacao is a political entity which is part of the Netherlands Antilles, which in turn is a separate political entity and a part of the Kingdom of the Netherlands.

Respondent Solitron Devices, Inc. (Solitron) is a New York corporation with its principal place of business in Rockland County in this District. Solitron makes and sells semiconductor devices for the electronics industry.

The award was made by three arbitrators at Willemstad in Curacao on August 13, 1970. Solitron did not participate in the arbitration. The award was in favor of Curacao and, among other things, directed Solitron to pay to Curacao some 445,000 guilders (the local currency; something over $250,000), with interest and costs. The award was "deposited" at the Registry of the Court of First Instance in Curacao and on August 14, 1970 a Judge of that Court issued a "writ of execution" which declared that the award was "enforceable".

On February 10, 1972, Curacao filed in this Court a petition "to confirm arbitration award and to enforce the judgment entered thereon". Curacao then filed service to be made on Solitron of the summons and petition and also of notice of the present motion (the exhibits described in the petition are in fact annexed to the motion papers).

The petition invokes the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", the enforcement of which is provided for in Chapter 2 (§§ 201-208) of Title 9 of the Code. Jurisdiction seems clearly conferred by 9 U.S.C. § 203; diversity jurisdiction is also asserted. There is a "related claim" based on New York law, specifically CPLR Article 53 (§§ 5301-5309), "Recognition of Foreign Country Money Judgments".

Solitron filed an answer asserting many defenses and with a counterclaim for money damages.

The matter was pending before Judge McLean at the time of his death, was thereafter reassigned to me, and duly came on to be heard.

I.

A written agreement was executed in triplicate in Curacao on January 12,

1968. Solitron and Curacao were parties; the Netherlands Antilles, the government entity for all the Dutch islands in that area and referred to in the agreement as the "Central Government", was also a party. (The geographical area and the government entity of Netherlands Antilles will sometimes be referred to simply as the "Antilles".) The agreement was apparently in Dutch. A translation is part of the moving papers; Solitron has submitted nothing to cast doubt on the accuracy of this translation; a certain awkwardness is noticed as to a few of the words in translation.

The aims of the parties are evident. The principal competitors of Solitron had been manufacturing their devices "offshore", outside the United States "in places where labor is available . . . at far less than prevailing wage rates in the United States." (Friedman opposing affidavit, p. 1) There was "heavy price competition" in the industry, "pressures" on Solitron mounted" (Friedman, pp. 1, 2), and Solitron believed a plant in Curacao would give it the needed advantages. On their part, Curacao and Antilles wanted to attract industry to the islands and thus to create jobs. There were no representations in the agreement, however, as to wage rates—past, present, or future—or as to anything else.

Curacao had initiated the contact with Solitron, whose President "expressed interest in locating a manufacturing facility in Curacao" (Friedman, p. 2). The negotiations for the agreement then took place in Curacao. Solitron's president was in Curacao in August 1967 where he met "all of the top governmental and judicial officials of the island" and "many of its business leaders and bankers" (Friedman, p. 2). He was there again before and at the signing of the agreement and undoubtedly Solitron had counsel in Curacao for all needed advice.

The agreement goes into some detail but for present purposes only the principal provisions which affected the award need be outlined.

Curacao set aside ("destines" is the word used in the translation) for an industrial park about 60 acres near the airport (Art. 1).

Curacao agreed to construct two factory buildings in the park, one ("the larger") of about 30,000 square feet and the other ("the smaller") of about 20,000 square feet. These are to be built according to plans submitted by Solitron and approved by Curacao. Presumably the buildings were to be erected at the expense of Curacao, but there is a statement that when the plans are approved, "a written agreement shall be concluded" between the parties specifying what costs were to be for Curacao and what for Solitron. (Art. 9) Presumably such an agreement was made because, as will later appear, Curacao did in fact bear many expenses and Solitron did in fact send in a substantial amount of material for the buildings.

Curacao agreed to build an access road to the park and other roads within the park up to the building sites (Art. 8). Curacao agreed at its expense to lay pipes to supply the park with distilled sea water (Art. 5).

The two buildings were required to be "delivered" within 12 months of approval of the plans and to be leased "forthwith" to Solitron for 20 years at a rent the amount of which was specified (Art. 9). It was agreed that Solitron would operate in the larger building and could use the smaller building also or could sublease it.

Solitron agreed "to put its electronic manufacturing industry into operation" within 12 months of delivery of the larger building and "shall create" at least 100 jobs (presumably within the 12 month period). (Art. 3)

Solitron agreed that before January 1, 1974 it would establish (presumably in the park) "manufacturing industries" which, with Solitron's own employment, would "provide employment for at least three thousand (3000) persons born in the Netherlands Antilles . . ." (Art. 3)

It was provided that "the laws of the Netherlands Antilles shall be applicable" (Art. 12).

There were detailed provisions in Article 12 for arbitration of any dispute between the parties. Since these provisions are of significance to the present motion, it may be well to quote them in full:

"2a. All disputes arising between the CENTRAL GOVERNMENT [redacted] or the ISLAND GOVERNMENT, and SOLITRON as a consequence of or in connection with the present agreement or further agreements for the implementation of the present agreement, legal as well as factual, shall be submitted to a board of arbitration. The decision of this board shall be binding on all parties involved in the dispute.

"b. A dispute shall be considered to exist if one of the parties notifies the other party by registered letter that he is of opinion that such is the case. In the case of such a dispute each of the parties shall appoint an arbitrator and both arbitrators so designated shall jointly appoint a third one. Should one of the parties or both parties not designate an arbitrator within one month or should both arbitrators not reach an agreement on the choice of the third arbitrator, then the third arbitrator shall at the request of the willing party be appointed by the President of the Court of Justice of the Netherlands Antilles.

"c. The arbitrators shall have to render an award within four months after the day on which the third arbitrator has accepted his appointment.

"d. The arbitrators shall judge and give an award like good men and true, taking into account that which has been stipulated by contract between parties without being bound by rigid rules of the laws of the Netherlands Antilles. The procedure with respect to the settlement of the dispute shall be determined by the arbitrators.

"e. The fee due to the arbitrators shall be borne by the CENTRAL GOVERNMENT and/or the ISLAND GOVERNMENT, and SOLITRON, on a fifty/fifty basis. All other costs arising from the arbitration shall be chargeable to the party found to be in error. The arbitrators are entitled to set off these costs against each other wholly or partially, should both parties be found to be partially in error."

Finally, there was a provision which reads as follows:

"*Article 13*

SOLITRON shall invariably choose domicile for everything pertaining to the execution of the present agreement and further agreements made for the implementation or supplementation of the present agreement, as well as for all acts of judicial execution at the office of notary-public Mr. E. L. Joubert, Kerkstraat 11A, Wilemstad, Curacao."

The word "invariably" seems to be a poor translation. According to counsel for Curacao, the Dutch word "onveranderlijk", this same word is also used in the award (Exhibit I, p. 1) and is there translated "irrevocably" (Exhibit J, p. 1). The meaning conveyed, even by "invariably", is that Solitron submits itself to the jurisdiction of Curacao and designates, without power of change, a resident of Curacao as its agent on whom notice or process can be served.

It seems that the local resident agent of Solitron, Notary Public Joubert, was in fact the attorney in Curacao for Solitron.

2.

From the papers submitted (other than the arbitration awards), it is not clear what happened between the execution of the agreement on January 12, 1968, and the initiation of arbitration by Curacao on April 13, 1970. For purposes of the present motion, this is of no moment. Some things do appear from the papers without any serious dispute

and, at least for background, it may be well to mention them.

Solitron did submit plans for the two buildings and the plans were approved.

Solitron shipped to Curacao structural steel, air conditioning and other equipment, and work tables; this was for the two buildings and Solitron says it was "worth" $221,855 (this is the subject of Solitron's counterclaim).

The two buildings were completed and, except for the material shipped in by Solitron, was at the expense of Curacao. When the buildings were completed, does not appear; on April 13, 1970 the Lieutenant Governor stated that: " . . . we completed the two factory buildings at an expense to us of NAf. [local currency] 1,500,000".

In May 1969 and for a time thereafter, widespread disorders occurred in Curacao, probably caused by unemployment, low wages and social unrest. Government did not break down, but there was some change in government personnel and policies. As one of the new policies, there was a new minimum wage law which, according to Solitron, "immediately raised minimum wages by two and one-half times" (Friedman, p. 4).

The new minimum wage law caused Solitron to lose interest in Curacao and in the agreement; it determined that it would not carry out the agreement. As counsel for Solitron later and frankly put it: "The new wage rate destroys the economic advantage of manufacturing in Curacao".

The president of Solitron was in Curacao in November 1969, apparently attempting to get out of the agreement.

A lease on the two completed buildings was offered to Solitron in accordance with the January 12, 1968 agreement. Solitron refused the lease. This seems to be established by the papers and in any event to be evident. The position of Solitron in its pleading is in this respect puzzling.

The petition of Curacao alleges:

"8. Thereafter, the two factory buildings required to be constructed by the Agreement were in fact built by Curacao. Despite this, Solitron refused to enter into a lease agreement and perform other obligations imposed upon it by the Agreement."

The answer of Solitron does not mention this paragraph 8 and does not specifically admit or deny its averments. Apparently Solitron intends to cover paragraph 8 of the petition by a general denial in paragraph 1 of its answer. It is difficult to see how Solitron can deny that it refused to enter into a lease, whatever its excuses may be. Refusal to enter into a lease was and is the critical issue in the dispute. It is also difficult to see how Solitron can deny that the buildings were completed; Solitron does not say that it is without knowledge or information sufficient to form a belief as to the truth of the averment that the buildings were completed; it denies outright that the buildings were completed. Yet later in the answer Solitron avers (para. 31) that Curacao "has leased to third persons the premises which it agreed to lease to Solitron".

3.

On April 13, 1970, Curacao sent to Solitron in care of its agent in Curacao a written notice of dispute and of the invocation of arbitration. Curacao appointed as its arbitrator Dr. de Haseth. It does not appear what is the business or profession of Dr. de Haseth.

Evidently Solitron received the notice. On May 12 and May 13, 1970, Solitron sent cables to its resident agent in Curacao, named in the agreement, which agent was also its attorney there. The cables purported to revoke the authority of the agent "to represent us" (annex to Friedman affidavit). The agreement, however, does not permit any such revocation. Under date of May 15, 1970, New York counsel to Solitron wrote to

Curacao declining to proceed to arbitration.

When Solitron failed to designate an arbitrator within the time provided in the agreement, Curacao asked the President of the Court of Justice of Antilles to make the appointment. The President on June 9, 1970 appointed Dr. Schoordijk, who is a professor (of what does not appear) at the University of Tilburg, a city in the southern part of the Netherlands. Notice of this was given to New York counsel for Solitron.

The two arbitrators then appointed a third arbitrator, Dr. Ariens. At the time, Dr. Ariens was a "substitute member" (probably similar to a "senior judge" in the federal courts) of the Court of Justice of the Antilles and had formerly been President of that Court.

By cable on July 1, 1970, Dr. de Haseth advised Solitron at its principal place of business in Rockland County of a schedule for submission of statements by the parties (in English, if desired) and of a hearing to be held on Monday, August 11, 1970 (evidently this was a typographical error; August 11, 1970 was a Tuesday). Under date of July 9, 1970, Dr. de Haseth confirmed this by letter to Solitron in Rockland County and also advised of the appointment of the second and third arbitrators and of their professional backgrounds.

By letter dated July 23, 1970, Dr. de Haseth advised Solitron of the appointment of Dr. Ariens as Chairman and of the appointment of a Secretary.

By letter under date of August 3, 1970 to Solitron in care of its agent in Curacao, the Secretary advised that the hearing would be on August 10, 1970 at 0900 in the Chamber of Commerce Building in Curacao and summoned Solitron to appear then and there. A similar advice was sent by letter dated August 4, 1970 to Solitron in Rockland County.

4a.

The arbitrators met on August 10, 1970 and conducted a hearing, Curacao being there represented. Documentary evidence was received. On the same day, the arbitrators visited the industrial park wherein the factory buildings were located "to take stock of the configuration of the terrain" (Award, p. 5; references to the award are to the English translation, physically a part of the motion papers but described in the petition and recited to have been annexed thereto). The arbitrators heard witnesses on August 11 and 12, 1970 and drew up a report of their testimony.

Solitron ignored the arbitration completely; it did not attend any hearing and submitted nothing to the arbitrators, in writing or otherwise.

ex parte

The award was made and signed by the arbitrators in Curacao on August 13, 1970. The award is said to be made "ex aequo et bono". This expression probably has no bearing on the present motion but its meaning can be determined.

A translation of relevant parts of the arbitration law of the Antilles is part of the moving papers. That law is sometimes referred to herein as simply "the law", where the context points of the law of the Antilles.

The law provides that a "reward" (evidently a typographical error for "award") is to be made "according to the law, unless the compromise has granted them the power to judge as good men in accordance with the principles of equity". It is assumed that "compromise" is a poor translation for "agreement".

It would appear that the provision in the January 12, 1968 agreement that the arbitrators shall "give an award as good men and true" was intended to authorize them "to judge as good men in accordance with the principles of equity".

The use by the arbitrators of the expression "ex aequo et bono" is believed to indicate that the arbitrators acted under the authority just described. "Ex aequo et bono" comes from the civil law and means, among other things, "according to equity and conscience" (Black's Law Dictionary (4th ed.) 659). Indeed,

the word "equity" comes from the Latin "aequus" ("equal").

4b.

The award was in favor of Curacao, but the arbitrators did not accept all the points of Curacao, rejecting important items of damages.

The arbitrators found that the date of completion of the buildings was December 1, 1969 (p. 15); references are to pages of the English translation in the moving papers); that in negotiations thereafter between the parties about the lease Solitron never objected to December 1, 1969 as the date when the lease should begin (p. 12); that an offer of lease of the two buildings had been made to and refused by Solitron (pp. 3, 7); and that this was a breach of contract for which Solitron was obligated "to pay compensation" (p. 7).

While Solitron boycotted the arbitration proceeding, the arbitrators nevertheless considered the two defenses asserted by Solitron in a letter of March 18, 1970 to Curacao by Solitron's attorney therein and in the letter (already mentioned) of May 15, 1970 of Solitron's New York counsel to Curacao.

The two defenses were:

(i) that the "basic factors and information" on which Solitron decided to operate in Curacao having "disappeared" because of the May disorders and the new "general minimum wage law", Solitron by "force majeure" was "discharged" from the January 12, 1968, contract (p. 6); and

(ii) that Solitron made the contract by mistake induced by assurances of Curacao that the wages then obtaining would continue whereas there was quickly a new and increased minimum wage law (p. 8).

The arbitrators noted that the new minimum wage law did not apply to a private enterprise such as Solitron but only to employees of the government in Curacao; and that as to the May 1969 disorders these were "an isolated incident" (pp. 10, 11) and not a standard by which to judge the 20 year contract period (p. 11).

As to (i), the arbitrators found that in agreeing to a 20 year lease Solitron could not have expected wages in Curacao to remain the same over the 20 year period as they were on January 12, 1968; that under the contract law of the Antilles force majeure refers to an external cause not foreseeable at the time of the contract; and that wage changes over the 20 year period, foreseeable by Solitron, could never be force majeure [illegible].

As to (ii), the arbitrators found that whether there had been any assurances by Solitron involved a dispute suitable for arbitration; and that on the evidence there had been no such assurances. Further, the arbitrators found that, for a successful defense of mistake under the contract law of the Antilles, the party pleading mistake (Solitron) must have reasonably believed in the existence of the matter as to which it was mistaken and moreover that such mistaken belief was known to the other party (Curacao). The arbitrators found that neither condition was satisfied in the dispute before them.

The arbitrators accordingly found that the position of Solitron, expressed before but not in the arbitration, was without merit.

The arbitrators then turned to the question of damages.

With one exception, the arbitrators rejected all claims of Curacao for damages for "investment costs" (p. 4), such as erection of the buildings, laying out of roads, etc. These items were rejected because it was said that even if Solitron had performed its obligations, these "investment costs" would have been incurred (p. 11). The one exception was the cost of an acid neutralization plant which was found to have been intended uniquely for Solitron and in which no other lessee would be likely to have an interest. The amount allowed for this (p. 12) was 53,602.53 "NAfls." (the le-

ral currency, Netherlands Antilles guilders; the currency figures hereafter shown without a dollar sign are in local currency). The total amount of "investment costs" claimed by Curacao was 1,521,000.25 (p. 4); the amount not allowed by the arbitrators was thus 1,467,397.72.

The arbitrators allowed 192,482.62 for loss of rent on the two buildings for the period December 1, 1969 to July 1, 1971 (pp. 12, 13). It was found "virtually certain" that Curacao could not find another lessee before July 1, 1971 at the earliest.

For the same period, the arbitrators allowed 1,021.25 as damages on account of fire insurance premiums which Curacao had paid and would pay. Under the January 12, 1968 contract, Solitron agreed at its own expense to insure the buildings against fire (Article 9(6)).

The arbitrators allowed 375,000 for the period December 1, 1970 to December 31, 1973 as damages for Solitron's failure to create 100 jobs as agreed (pp. 14, 15). The basis for this allowance was that, by reason of Solitron's breach, Curacao would have 100 more unemployed in the period than otherwise. Under its laws, Curacao would have to pay "unemployment benefits" to these 100 and also "medical assistance" (p. 14). The amounts of such payments were calculated by using 1969 statistics, with percentage increases for later years as "can be expected". The total amount of such payments for the period was calculated to be 427,971.35 which the arbitrators "[i]n aequo et bono" reduced to 375,000 to reflect the present value discount (p. 15). The beginning of the period (December 1, 1970) was determined as the date when Solitron's breach occurred. The end of the period (December 31, 1973) was determined as the date beyond which the arbitrators would not be justified in awarding this type of damages because the existence of unemployment that far in the future was dependent on unknown factors and "not readily predictable" (p. 16).

The arbitrators did not allow the claim of Curacao for damages for Solitron's failure to create 3,000 jobs by January 1, 1974. This was for the same reason given for ending at December 31, 1973 the award of damages for failure to create the 100 jobs. Damages, if any, for breach of the 3,000 job obligation would be for a period beginning on January 1, 1974 and the existence of unemployment that far in the future was dependent on unknown factors and "not readily predictable" (p. 16).

The arbitrators, as noted, did not—for the reason indicated—award damages for any period after December 31, 1973. It is said in the award, however, that "around January 1, 1974 the more diligent party will be able to submit" certain questions to arbitration in accordance with the procedure laid down in the Agreement" (p. 16). These questions are: (1) loss of rent after December 31, 1973; (2) fire insurance premiums after that date; (3) damages after that date for failure to create 100 jobs; and (4) damages after that date for failure to create 3000 jobs.

The arbitrators allowed the cost to Curacao of foreign travel to secure the establishment of industries there. This was found necessary because of the failure of Solitron to perform its obligation to establish such industries. The cost was found to be 25,000 per year and this was allowed for three years: 1971, 1972, and 1973. After applying a present value discount, the allowance for this item was 67,000 (pp. 16, 17).

The arbitrators allowed the cost to Curacao of customs to guard the two factory buildings. According to "vouchers produced" (p. 17), this cost was 2,100 per month. The period for which this allowance was made began at August 1, 1970 (presumably because this was the first month for which "vouchers" were "produced") and ended at July 1, 1971 (for the same reason as the allowance for lost rent). For the 11 month period, the total was thus 23,100. After applying a present value discount,

"Further" award

the allowance for this item was 21,000. (p. 17)

— The arbitrators rejected a claim for the costs of prosecuting the arbitration (pp. 16, 17).

To recapitulate the award to this point, the following items were allowed:

for the acid neutralizing plant	$ 14,02 53
for loss of rent to July 1, 1971	192,402 62
for fire insurance premiums to July 1, 1971	1,021 75
for failure to create 130 jobs	175,023 00
for failure to establish industries (foreign travel to December 31, 1970)	69,028 00
for quarries for building (to July 1, 1971)	21,000 00
	472,526 45

— The arbitrators then allowed Solitron a set off for the value of the structural steel and air conditioning plant (but not "chairs and tables"). This value was found to be 266,424.05. (pp. 18, 19)

The net allowance to Curacao was thus 445,682.35.

— The arbitrators awarded interest at the rate of 6% (p. 20); it was stated that interest would run from July 10, 1970, the date when the proceedings commenced.

— In addition, under Article 12(e) the arbitrators awarded to Curacao against Solitron $7,500 as one-half the fees of the arbitrators and $1,665 as the total of the expenses incurred by the arbitrators, already paid by Curacao.

The award to Curacao was therefore 445,682.35 Netherlands Antilles guilders and $9,165.

The award gives every indication of able, careful, and impartial work by the arbitrators.

4c.

After the award had been made, the procedure followed was that prescribed by the law of the Antilles.

The law requires that the original award must be filed in the Court of First Instance. This was done on August 13, 1970.

The law provides that an award "may be executed by the usual procedure of execution in virtue of an order of the Court of First Instance." Under this provision, Curacao asked for issuance of a writ of execution and on August 14, 1970 the Court of First Instance declared the award to be enforceable and issued a writ of execution.

An award may not be "opposed" nor may it be appealed (unless the agreement so provides and that in suit did not so provide).

There is provision in the law for an action to annul the award on grounds which include in general those specified in 9 U.S.C. § 10. Such an action must be brought within three months from the filing of the award in Court. Solitron brought no such action. The award and the judgment entered thereon are final.

In April 1971, a "marshal" of the "Court of Justice of the Netherlands Antilles" served by mail to Solitron in Rockland County a writ based on the award and judgment in Curacao. This writ recited that Solitron "is no longer domiciled in the Netherlands Antilles". (Whether the "Court of Justice of the Netherlands Antilles" is the same as the "Court of First Instance", does not appear.)

5.

(1) Solitron objects that there was "no jurisdiction" over it in Curacao. The objection is so without merit as to be frivolous.

Under the January 12, 1968 agreement, Solitron specifically agreed to submit to arbitration in Curacao, agreed that the laws of the Antilles should be applicable, and agreed that for "everything" connected with that agreement it had a Curacao "domicile" and a resident agent for service of notice and process.

Under such an agreement, there was jurisdiction in Curacao to regulate the arbitration and to enter judgment on the award. There are controlling federal and New York decisions supporting this conclusion. National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–316.

84 S.Ct. 411, 11 L.Ed.2d 354 (1964); Reed & Martin, Inc. v. Westinghouse Electric Corp., 439 F.2d 1268, 1276 1277 (2d Cir. 1971); Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931); New Central Jute Mills v. City Trade & Industries, Ltd., 65 Misc.2d 653, 318 N.Y.S.2d 980, 984 (Sup.Ct., N.Y.Cty. 1971); CPLR § 5305(a)(3).

There is an argument for Solitron based on the statement in the 1971 writ that Solitron was then "no longer domiciled" in Curacao. Why such a statement was made is indeed mystifying. Doubtless it is based on the revocation messages of May 12 and 13, 1970 from Solitron to its resident agent in Curacao. It may be that for purposes of proceedings to enforce a judgment, for example, by writ of execution, the revocation of authority was effective, on the theory (dubious in my view) that such proceedings were outside the consent in the January 12, 1968 agreement. There is some support for such a theory in Sargant v. Monroe, 268 App.Div. 749, 49 N.Y.S.2d 546 (1st Dept., 1944). But the arbitration, however, and "everything" else pertaining to the agreement, the revocation was ineffective because under the agreement the consent to jurisdiction was irrevocable. Moreover, by the time of the attempted revocation on May 12, 1970, Curacao had already invoked arbitration under the agreement.

6.

(2,3) Solitron objects because it says it made the agreement on representations of Curacao that "the wage structure would remain stable" (Memo, p. 5) whereas the minimum wage was quickly increased "by more than 100%," and the agreement was thus "terminated by reason of impossibility" (Memo, p. 5). This objection also has no merit whatever.

It has been determined by highest authority that "claims of fraud in the inducement of the contract generally" are exclusively for the arbitrators. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967).

If fraud in the inducement is for the arbitrators, then even more so is any issue, such as frustration and termination, arising *after* an admitted execution of an agreement. This follows from the reasoning of *Prima Paint*. It has been held that "whether circumstances have arisen which have discharged one or both parties from further performance" is a question for the arbitrators. Heyman v. Darwins, (1942) A.C. 356, 366, quoted with approval in In re Pahlberg Petition, 131 F.2d 968, 970 (2d Cir. 1942). It has been specifically held that "frustration of performance of the contract" is an issue solely for the arbitrators. Cobbold etc. v. Caribbean Shipping Co., 56 F.Supp. 31 (S.D.N.Y.1944).

7.

(4) Solitron objects that the award and judgement are "not final, definite, and conclusive". This objection is based on 9 U.S.C. § 10(d) which provides that an award may be vacated if the arbitrators "so imperfectly executed" their powers "that a mutual, final, and definite award . . . was not made".

The strange point made by Solitron is that the arbitrators did not award damages in a larger amount for a longer period, but instead stopped at the period ending December 31, 1973; "they make no attempt to ascertain the total damages occasioned" (Memo, p. 7). Solitron objects that the arbitrators left open the possibility of a further arbitration in the future to fix the amount of damages after January 1, 1974. The argument is that because the damages awarded Curacao are not sufficient to cover the entire contract period, Curacao should receive nothing, not even what Solitron argues are the incomplete and inadequate damages in the present award. Such an argument is not persuasive.

The federal Arbitration Act is the same or almost the same as the arbitration law in New York, now CPLR § 7501 and following. Thus, "the state practice

may be regarded as highly persuasive, even if not controlling". The Hartbridge, 57 F.2d 672, 673 (2d Cir. 1932). Section 10(d) of Title 9 is substantially the same as CPLR 7511(b)(1)(iii).

No federal cases have been found which are helpful in connection with the "final" character of an award.

The attitude of New York courts toward arbitration is that such proceedings "are equitable in character". In re Feuer Transp., Inc., 293 N.Y. 87, 92, 55 N.E.2d 178 (1946).

The kind of award which has been held not "final" is illustrated by Matter of Overseas Distributors Exchange, Inc., 5 A.D.2d 498, 173 N.Y.S.2d 119 (1st Dept. 1958). The award left open "the amount which appellants are obligated to pay". The Court said: "These directions are not only indefinite, but the determination of the amounts depends upon more than just arithmetical calculations. Businessmen and accountants can well disagree as to what a set of books shows as being 'due' to a party. An award must be clear enough to indicate unequivocally what each party is required to do."

Another example is Pyramid, Inc. v. Nat. Telefilm Assoc. Inc., 40 Misc.2d 955, 243 N.Y.S.2d 170 (N.Y.Cty.Sup.Ct. 1963). The award directed an accounting, subject to audit by independent accountants who, if they found the accounting unfair, were directed themselves to prepare an accounting which would be binding. The Court found that the arbitrator had delegated to accountants his power to decide the amount due, and that the award was thus not "final".

In the examples cited, the result was not that the debtor party escaped liability, as Solitron apparently hopes to do, but simply that the matter was resubmitted to the arbitrators to find the amount due.

In the case at bar, the award specifies precisely what Solitron is to pay. Nothing more remains to be calculated at this time. That at some time in the future another arbitration and another award are *possibilities* does not mean that the present award at the present time is not "final" and "definite".

8.

[5] Solitron objects that one of the arbitrators was a judge of a court in Curacao, was then in the employ of Curacao, and was not impartial as a matter of law (Memo. p. 8). There is nothing to support the objection. For all that appears, the judge was already retired; for all we know, he was said to be leaving the Antilles in August or September 1970. For all that appears, his tenure was for life or for a term unaffected by any decision in this matter.

In any event, Solitron was fully advised as to the employment of the arbitrator but remained silent and made no objection to his acting. The point, whatever its worth, was thereby waived. Cook Industries, Inc., v. C. Itoh & Co. Inc., 449 F.2d 106, 107–108 (2d Cir. 1971).

9.

[6] Solitron objects (Memo. pp. 10, 11) that the award did not arise out of a "legal relationship . . . which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title . . . " (9 U.S.C. § 202) and thus did not fall under the Convention (9 U.S.C. § 202). The reference to Section 2 is to "any maritime transaction or a contract evidencing a transaction involving commerce".

The Convention, which is enforced by Chapter 2 of Title 9 of the Code, was adopted in 1958 by the United Nations Conference on International Commercial Arbitration. It was provided that each "Contracting State" (and both the United States and the Netherlands became such) could declare that it would apply the Convention only to awards arising from "legal relationships . . . which are considered as commercial

". . . The United States so declared and 9 U.S.C. § 202 so provides.

Research has developed nothing to show what the purpose of the "commercial" limitation was. We may logically speculate that it was to exclude matrimonial and other domestic relations awards, political awards, and the like.

Judged by any test, however, the contract of January 12, 1968 seems clearly to be "commercial". It has been said in this connection (Quigley, Convention on Foreign Arbitral Awards, 58 A.B.A.J. 821, 823 (1972)): "In the case of the United States reservation it seems clear that the full scope of 'commerce' and 'foreign commerce', as those terms have been broadly interpreted, is available for arbitral agreements and awards."

[7] It should also be noted that even if the "legal relationship" were not "commercial" the Curacao judgment would be enforceable under the New York law on recognition of foreign judgments which enforces any foreign judgment which is "final, conclusive and enforceable where rendered" (CPLR § 5302). There is no "commercial" limitation in the New York law.

[8] In this connection, Solitron suggests that damages should not have been awarded for what Curacao will have to disburse for unemployment insurance and medical assistance since these involve a "governmental function". The items are most unusual, it is true, and would not be awarded to the usual landlord on breach of contract. The award could only have been made and justified because Curacao was a government.

The difficulty for Solitron is that, assuming (but without deciding) that it was error for the arbitrators to award such damages, it is not the function of a court to correct such an error. The statute specifies the grounds for vacating an award (9 U.S.C. § 10); but error in fact or law is not among them. Amerocia Societa Nav. v. Chilean Nitrate, etc. Corp., 274 F.2d 805, 808 (2d Cir. 1960). As has recently been said: "arbitrators are not bound by principles of substantive law or rules of evidence". Lentine v. Fundaro, 29 N.Y.2d 382, 385, 328 N.Y.S.2d 418, 421, 278 N.E.2d 633, 635 (Breitel, J., 1972).

Solitron had an opportunity to urge this point before the arbitrators or in the courts of Curacao but elected to forego the opportunity. This Court may not now correct the alleged error.

Many years ago, the principle was stated by the Court of Appeals of New York that a foreign judgment was conclusive on the merits. The Court said (Dunstan v. Higgins, 138 N.Y. 70, 74, 33 N.E. 729, 730 (1893); emphasis supplied): "It is the settled law of this state that a foreign judgment is conclusive upon the merits. It can be impeached only upon proof that the court in which it was rendered had not jurisdiction of the subject-matter of the action or of the person of the defendant, or that it was procured by means of fraud. . . . But even if it appeared in this case, as it does not, that some legal right of the defendant was denied in refusing the application, that would not affect the validity or conclusive nature of the judgment, so long as it stood unreversed and not set aside. Legal errors committed upon the trial or during the progress of the cause may be corrected by appeal or motion to the proper court, but they furnish no defense to an action upon the judgment itself. Where a party is sued in a foreign country upon a contract made there, he is subject to the procedure of the court in which the action is pending, and must resort to it for the purpose of his defense, if he has any, and any error committed must be reviewed or corrected in the usual way. *So long as he has the benefit of such rules and regulations as have been adopted or are in use for the ordinary administration of justice among the citizens or subjects of the country, he cannot complain, and justice is not denied to him. The presumption is that the rights and liability of the defendant have been determined according*

to the law and procedure of the country where the judgment was rendered.

* * *

10.

The other objections made by Solitron have been considered and found to have no merit.

Both under the federal law and the law of New York, the award and judgment must be enforced.

[9] With reference to Chapter 2 of Title 9 of the Code, the House Committee Report stated that this legislation would "serve the best interests of American firms doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts." U.S.Cong. & Admin.News, p. 3602 (1970). It is apparent that the whole purpose of the legislation was to encourage the arbitration of disputes arising out of transactions by American business in foreign countries. There is every reason to enforce the award and judgment in the case at bar.

[10] The so-called counterclaim in the answer of Solitron is concluded by the award and the judgment. The arbitrators have given Solitron credit for the equipment which is the subject of the counterclaim.

[11] The motion is granted. There will be judgment in favor of Curacao against Solitron for 445,682.35 Netherlands Antilles guilders, to be converted into United States dollars at the rate prevailing on the date of judgement (Deutsche Bank v. Humphrey, 272 U.S. 517, 47 S.Ct. 166, 71 L.Ed. 383 (1926); Conte v. Flota Mercante, 277 F.2d 664, 670-71 (2d Cir. 1960)) with interest thereon at 6% from July 10, 1970 to the date of judgment; and for $9,165 in addition, with interest thereon at 6% from August 13, 1970 to the date of judgement. There will be judgment dismissing the counterclaim on the merits.

Settle judgment on notice.

CITIZENS FOR CLEAN AIR, INC., et al., Plaintiffs,

v.

CORPS OF ENGINEERS, UNITED STATES ARMY et al., Defendants.

No. 72 Civ. 2239.

United States District Court, S. D. New York.

Feb. 15, 1973.

Action to determine validity of construction permit issued by the Corps of Engineers. The District Court held, inter alia, that permit issued was invalid, 349 F.Supp. 696. Thereafter plaintiffs moved for an order seeking, inter alia, to enjoin utility from proceeding with construction and to enjoin the Corps of Engineers from issuing any permit in connection therewith on grounds that the Corps' refusal to hold a public hearing on the environmental impact statement being prepared as a precondition to issuance of any such permit was in violation of, inter alia, the National Environmental Policy Act and hence violated court's prior order. The District Court, Gurfein, J., held, inter alia, that where Corps of Engineers was preparing its final environmental impact statement in relation to construction of water intake and discharge facility for cooling system of proposed power plant, and where, after such final statement had been completed, the Secretary of the Army would decide whether or not further public hearings would be required, it would be premature for court to order the Secretary to hold a public hearing.

Motion denied.

1. Federal Civil Procedure ⇐2662

Where order of the court in prior action to determine validity of construction permit issued by Corps of Engineers specifically "reserved jurisdiction * * * to grant such further relief as may be appropriate.", new evidence could be considered on a later motion for

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The ISLAND TERRITORY OF CURACAO, Appellee,
v.
SOLITRON DEVICES, INC., Appellant.
No. 99, Docket 73-1664.

United States Court of Appeals, Second Circuit.

Argued Nov. 15, 1973.

Decided Dec. 26, 1973.

Proceeding on petition for confirmation of arbitration award and enforcement of Curacaoan judgment against American manufacturer for breach of contract under which it agreed to put its electronic manufacturing industry into operation in Curacao. The United States District Court for the Southern District of New York, Inzer B. Wyatt, J., 356 F.Supp. 1, enforced judgment and alternatively enforced award, and manufacturer appealed. The Court of Appeal, Oakes, Circuit Judge, held that federal law implementing Convention on Recognition and Enforcement of Arbitral Awards does not preempt New York state law to extent that it permits, regulates and establishes a procedure for enforcement of foreign money judgment, that jurisdiction obtained over manufacturer by virtue of contract did not terminate by reason of impossibility of performance, that judgment was not unenforceable under New York law to extent that award consisted of damages in lieu of welfare payments Curacao would have had to make as result of manufacturer's breach of obligation to create 100 jobs, that enforcement of judgment was not contrary to public policy of New York against permitting party to derive advantage from its wrong and that judgment was a "final" Curacaoan judgment for purposes of statute providing that only a final and conclusive judgment may be enforced in New York.

Judgment affirmed.

489 F.2d—83

1. International Law ⊂=13

Convention on the Settlement of Investment Disputes between states and nationals of other states does not preclude other forms of arbitration or settlement of international disputes, investment or otherwise.

2. States ⊂=4.14

Federal law implementing Convention and Recognition and Enforcement of Arbitral Awards does not preempt New York state law to extent that it permits, regulates and establishes a procedure for enforcement of foreign money judgment; thus, policy of New York to recognize foreign judgments prevails in absence of interference with federal regulatory scheme. 9 U.S.C.A. §§ 201-308; CPLR N.Y. §§ 5301-5309.

3. Judgment ⊂=830

Jurisdiction obtained over American manufacturer under contract wherein it agreed to put its industry into operation in Curacao, to create 100 jobs, to submit to arbitration in Curacao and agreed to a Curacao domicile, did not terminate, for purposes of enforcement, under New York and federal law, of Curacaoan judgment on arbitration award, by reason of impossibility of performance due to increase in minimum wage, in that contract did not indicate that manufacturer's obligations were predicated on continued existence of any particular wage rate and that issue as to impossibility was initially a question for arbitrators. CPLR N.Y. §§ 5301 et seq., 5304(a), par. 2.

4. Judgment ⊂=929

That "marshal's writ," which was issued after "Court of First Instance" "declared executed" the "arbitral verdict," contained language to effect that American manufacturer, which contracted to put its electronic manufacturing industry into operation on Curacao and to submit to arbitration on Curacao and which "invariably" or irrevocably chose domicile at office of its attorney-notary public in Curacao, was no longer domiciled in Netherlands Antilles did not

represent a concession by Curacao that manufacturer's Curacaoan domicile terminated before arbitration was invoked, in that marshal's language related to time of issuance and presentation of writ.

5. Judgment ⇐830

Curacaoan judgment entered on award made against American manufacturer pursuant to arbitration provisions of contract wherein manufacturer agreed to put its industry into operation in Curacao and to create 100 jobs, was not unenforceable under New York law, to extent that award consisted of damages in lieu of welfare payments Curacao would have had to make due to manufacturer's breach of obligation to create such jobs, notwithstanding assertions that New York would vacate arbitral award if arbitrators' construction of document was completely irrational and that matter was not subject to arbitration under New York law.

6. Judgment ⇐830

Where contract, which provided that American manufacturer would put its electronic manufacturing industry into operation in Curacao, contained no representation or warranty that wages of Curacao would remain stable, enforcement of Curacaoan judgment entered on arbitration award for breach of contract by manufacturer, which contended that performance of contract was rendered impossible due to increase in minimum wage in Curacao from approximately 45¢ to $1.10, was not contrary to public policy of New York on theory that enforcement would permit a party to derive an advantage from its own wrong. CPLR N.Y. § 5304(b), par. 4.

7. Judgment ⇐929

Though Curacaoan judgment which was entered on arbitration award left it open to either party to demand further arbitration and possibly to obtain further and more extensive damages, judgment was a "final" Curacaoan judgment, for purposes of statute providing that only a final and conclusive judgment may be enforced in New York, where no review was sought within three months of award. CPLR N.Y. § 5302.

See publication Words and Phrases for other judicial constructions and definitions.

8. Judgment ⇐939

American manufacturer, against which Curacaoan judgment was entered on arbitration award, was not entitled to counterclaim for its investment in Curacao where manufacturer was given credit for investment in the award.

Paul Windels, Jr., New York City (Windels, Merritt & Ingraham, Francis E. Koch, New York City, of counsel), for appellant.

Edward C. Wallace, New York City (Weil, Gotshal & Manges, Harold Klapper, New York City, of counsel), for appellee.

Before KAUFMAN, Chief Judge, and SMITH and OAKES, Circuit Judges.

OAKES, Circuit Judge:

This appeal is by an American manufacturer, the respondent below, from a judgment of the district court granting a petition by The Island Territory of Curacao (Curacao) to confirm an arbitration award made in its favor and to enforce a judgment entered thereon in the courts of Curacao. The arbitration itself arose out of a dispute over a contract, the parties to which were the Central Government of the Netherlands Antilles and The Island Territory of Curacao, both of these political entities being a part of the Kingdom of the Netherlands, and Solitron Devices, Inc. (Solitron), a manufacturer of electronic products from Rockland County, New York, relative to the construction of an industrial park in Curacao and the installation of a Solitron manufacturing facility in the park. Solitron did not participate in the arbitration proceeding in Curacao or in the judicial proceedings in confirmation of the award in Curacao, as to which it had a right under the law of Curacao to bring an action to set

nul the award. Assorted defenses were urged below and found wanting by the district court, which held that the arbitration award was enforceable under the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, implemented by Title 9 of the United States Code Chapter 2 (§§ 201–208 inclusive), and that the judgment of Curacao w[as] enforceable under Article 53 of the New York Civil Practice Law and Rules, CPLR §§ 5301–5309 McKinney's Consol.Laws c. 8 inclusive, entitled Recognition of Foreign Country Money Judgments.

Because the facts are set forth in extensive detail in Judge Wyatt's capable opinion below, The Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1 (S.D.N.Y.1973), we will state them only generally for purposes of ease of comprehension here. Suffice it to say that the underlying written agreement between Curacao and Solitron which was executed in Curacao on January 12, 1968, provided basically that, because Solitron wanted an electronics plant there and Curacao and the Netherlands Antilles wanted to attract industry to the islands and create jobs, Curacao agreed to establish an industrial park of [illegible] and to construct two factory buildings pursuant to Solitron-approved plans and to build an access road and water pipes to the building sites. Solitron was to lease the buildings for 20 years at a specified rent and operate in the larger building and to sublease the smaller one, agreeing to use the electronic manufacturing industry in the operation within 12 months after completion of the larger building and to employ at least 100 jobs. Solitron undertook to "establish itself or cause to arise prior to January 1, 1974 manufacturing industries not yet established in the Netherlands Antilles which will in particular employment for at least persons" (including Solitron's own employees). It was agreed that the laws of the Netherlands Antilles would be applicable to the agreement and that all disputes as a consequence of or in connection with it, legal as well as factual, should be submitted to a board of arbitration, the decision of which would be binding. The usual provisions were made for designation of one arbitrator by Solitron and Curacao; they were in turn to designate a third arbitrator or, failing an appointment, to have one designated or appointed by the president of the Court of Justice of the Netherlands Antilles. The arbitrators were enjoined to give an award "like good men and true"—ex aequo et bono." There was a provision that Solitron would "invariably"—retranslate as "irrevocably"—fix as its domicile for everything pertaining to the execution of the agreement as well as "for all acts of judicial execution," the office of a notary public who also was Solitron's attorney in Willemstad, Curacao.

Exchanges of correspondence incorporated as appendices to the affidavit of counsel for Curacao in the district court and statements in the opposing affidavit executed by the president of Solitron indicate that by April 13, 1970, Curacao had completed the two buildings as agreed, but that Solitron had failed to enter into a lease agreement, had failed to pay the costs of maintenance or to insure the buildings as required, and had otherwise treated the agreement as unilaterally terminated by Curacao. Solitron declined to proceed to arbitration on the basis that there had been express representations made regarding the favorable economic climate of Curacao particularly in respect to wage rates and availability of labor at those rates, namely, approximately 45 United States cents per hour. What had happened was a change in government and a revision upward of the minimum hourly rate of wages to $1.10 (U.S.) in January of

[illegible] the arbitration clause was of the [illegible] type, reserving no issues for resolution in the first instance by any tribunal, judicial or otherwise. *See generally* Note, The Consequences of a Broad Arbitration Clause Under the Federal Arbitration Act, 52 B.U.L. Rev. 571 (1972).

1970. Solitron conceded that the electronics industry was exempted from the minimum wage increase but, quoting from counsel's letter to Curacao of May 15, 1970, claimed that as a practical matter "there is no prospect of our being able to hire employees for less than it" and this "new wage rate destroys the economic advantage of manufacturing in Curacao." Other claims are set forth in the opposing affidavit of Solitron's president, but these are what might be called window dressing, since the real claim was, as the letter of May 15 stated, that "By its own act, therefore, your government made it impossible for us to perform the agreement in question, thereby terminating the agreement and any obligation to arbitrate that we may have under it." [2] These "window dressing" claims were based on the eruption of "violent riots in Curacao" with the "business areas of Willemstad . . . in flames" and the riots being directed "immediately against foreign interests," etc.

The arbitration proceeded without Solitron's participation, but Solitron was duly informed at all times of the time and dates of hearings and the other procedures followed. The award was made and signed by the arbitrators in Curacao on August 13, 1970, and in substance, as the district court pointed out, 356 F. Supp. at 8, was in favor of Curacao's position but by no means accepted all of the claims of Curacao as to damages. Thus, while the arbitrators found that Solitron was in breach of contract by omission to lease the completed buildings, they also found that Curacao could not recover as damages its 1,521,000 Netherlands Antilles guilders (NAfls) investment costs in respect to the buildings, although they did allow 53,602 NAfls as the cost of an acid neutralization plant because it was intended uniquely for Solitron. On the theory that it was virtually certain that Curacao could not find another lessee before July 1, 1971, at the earliest, the arbitrators allowed 192,482 NAfls for loss of rent on the two buildings for the period from December 1, 1969, to July 1, 1971, and a small amount as damages on account of fire insurance premiums paid.

The only item that really is complained about by Solitron in its brief, and which strikes us as unusual, is the award of 175,000 NAfls as reflecting the present value discount of an award of 423,671.35 NAfls for the period December 1, 1970, to December 31, 1973, as damages for Solitron's failure to create 100 jobs as agreed. The basis of this award was that Curacao would have had 100 more unemployed in the period than otherwise and, under its laws, Curacao had to pay unemployment benefits and medical assistance to these unemployed persons. This award was computed by using 1969 statistics, with percentage increases for later years as could be expected. In turn, the unemployment benefits payable were computed on the basis that, of the 1,000 registered unemployed seeking a job with Solitron, some 75 per cent were "breadwinners with dependents," 10 per cent were "breadwinners without dependents," and 15 per cent were "non-breadwinners." Under Curacaoan law in 1969 apparently, "breadwinners" were entitled to 800 NAfls "financial assistance" and "non-breadwinners" were entitled to none, but each "breadwinner" and each dependent was entitled to 175 NAfls by way of "medical assistance."

Expenses to the amount of 90,000 NAfls covering foreign travel to establish industries regarding the buildings were allowed, but Solitron was granted

2. This claim can be read as an allegation of fraud in the inducement to the contract or as "impossibility" of performance of the contract due to the acts of one party, Curacao, to the contract. On appeal, Solitron has chosen to characterize the question along "impossibility" lines in order to avoid the inescapable impact of Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 397, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (fraud in the inducement is a matter to be determined by the arbitrators), should the case be disposed of under the Federal Arbitration Act.

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Expenses to the amount of 90,000 NAfls covering foreign travel to establish industries regarding the buildings were allowed, but Solitron was granted

2. This claim can be read as an allegation of fraud in the inducement to the contract or as "impossibility" of performance of the contract due to the acts of one party, Curacao, to the contract. On appeal, Solitron has chosen to characterize the question along "impossibility" lines in order to avoid the inescapable impact of Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 397, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (fraud in the inducement is a matter to be determined by the arbitrators), should the case be disposed of under the Federal Arbitration Act.

an overall set-off for the value of its structural steel and air conditioning plant to the extent of 266,424.05 NAfls. The arbitrators rejected a claim for the costs of prosecuting the arbitration but awarded interest and, as the original contract provided, one-half of the fees and expenses of the arbitrators. The arbitrators disallowed any claim of Curacao for damages for Solitron's failure to establish 3,000 jobs by January 1, 1974, on the ground that it "depends on so many factors at present entirely unknown and not readily predictable," even on the basis of expert advice, but left this question open for future submission. Similarly the arbitrators made no allowance for damages for failure to create the original 100 jobs beyond December 31, 1973, on the basis that it was not known whether there would be "structural unemployment" after January 1, 1974. As the district court found, "The award gives every indication of able, careful, and impartial work by the arbitrators." 356 F.Supp. at 10.

As the district court also found, after the award was made the law of the Netherlands Antilles was fully complied with in terms of filing the award, Curacao seeking the issuance of a "writ of execution" on the basis of the award, which was declared enforceable in the Court of First Instance." While Solitron had the opportunity to take advantage of the provision in the Antilles law permitting an action to annul the arbitral award within three months from the filing of the award in court, it did not exercise it. The award and the judgment entered thereon were, as the district court held, final under the law of Antilles and a marshal "served" by mail to Solitron a writ based upon the award and judgment in Curacao. The district court went on to hold that objections by Solitron on the basis of lack of jurisdiction were frivolous because it had agreed in the original agreement to submit to arbitration in Curacao and that the laws of the Antilles should be applicable and, indeed, had agreed that it had a domicile in Curacao and an irrevocable agent for service of notice and process there. In this respect the district court was clearly correct. National Equipment Rental Ltd. v. Szukhent, 375 U.S. 311, 315–316, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964); Reed & Martin, Inc. v. Westinghouse Electric Corp., 439 F.2d 1268, 1276–1277 (2d Cir. 1971); Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931).

[1] Neither the jurisdictional point, nor that one of the arbitrators was a judge of a court in Curacao and hence was not impartial as a matter of law, is urged here. Rather, Solitron claims that the arbitral award is not enforceable under the Convention on Recognition and Enforcement of Arbitral Awards (Convention on Recognition), as implemented in 9 U.S.C. § 201 et seq., for the following reasons: (1) the construction of an industrial park is a "governmental" and not a "commercial" function, so that the Convention does not apply; (2) the arbitration award is not final and definite and is contrary to the public policy of the United States; and (3) the contract and the arbitration agreement terminated by reason of impossibility and, as a result of this termination, there was lack of jurisdiction in Curacao over Solitron. The claim is also made here, as it was below, that the judgment on the arbitral award is not enforceable under Article 53, the New York statute, because the Convention on Recognition and its implementing legislation have preempted the New York statute and because, under the terms of the New York statute as it has been construed, enforcement is not permitted here. In its reply brief Solitron also argues for the first time that the whole matter is governed by the Convention on the Settlement of Investment Disputes between states and nationals of other states which was ratified and adhered to both by the United States, [1966] 1 U.S.T. 1270, TIAS No. 6090, and the Netherlands, [1966] 1 U.S.T.

1355; 55 U.S. State Dept.Bull. 596 (1966).[3]

[2] We deal first with the question under New York law, whether the foreign judgment is enforceable.[4] The first question is whether Article 53, permitting the enforcement of a foreign money judgment, has been preempted by the overriding federal law implementing the Convention and relating to the enforcement of foreign arbitral awards, 9 U.S.C. § 201 et seq. The Convention on Recognition in no way purports to prevent states from enforcing foreign money judgments, whether those judgments are rendered in the enforcement of an arbitration award or otherwise. This is not to say that Solitron's argument is not, indeed, ingenious, since it apparently was not made in the sole case decided under Article 53 or any prior thereto in which the courts of New York State have granted enforcement to foreign judgments based upon foreign arbitration awards arising after the United States Senate's accession to the Convention, albeit with reservations, on October 4, 1968, and the adoption by the Congress of 9 U.S.C. ch. 2 on July 31, 1970.[5] New Central Jute Mills Co. v. City Trade & Industries, Ltd., 65 Misc.2d 653, 318 N.Y.S.2d 980 (Sup.Ct.1971).[6]

3. This afterthought we find to have no merit whatsoever, since the Convention in its preamble points out that it applies only where there is "mutual consent by the parties to submit . . . disputes to conciliation or to arbitration through . . . facilities" established under the Convention and the jurisdiction of the "International Center for Settlement of Investment Disputes" constituting such facilities under Article 25 of the Convention, [1966] 1 U.S.T. 1280, only extends to "any legal dispute . . . which the parties to the dispute consent in writing to submit to the center . . . ." That is to say, this Convention, which operates under the auspices of the International Bank for Recovery and Development, is purely a voluntary device for arbitration and is by no means intended to preclude other forms of arbitration or settlement of international disputes, investment or otherwise.

4. We need not deal with the question—not argued by the parties and not touched upon in the briefs—whether the action on the arbitration award was merged in the Curacaoan judgment. *See* Restatement of Judgments § 47. *See also* Pepper v. Bankers Life & Casualty Co., 414 F.2d 356 (8th Cir. 1969). This would presumably be a matter of Curacaoan law in the first instance. *See* Restatement (Second) of Conflict of Laws §§ 218, 187(2) & 188. By first addressing ourselves to the question whether or not the Curacaoan judgment confirming or enforcing the award is enforceable qua judgment, we avoid the question—raised impliedly, if not directly by the appellant—whether the cause of action or, more particularly, the nature of damages awarded for breach of the covenant to create jobs by way of equating such damages with welfare payments that are required to be paid in Curacao, is so contrary to the strong public policy of the forum—a question which we need not decide and on which we express no opinion—that the award might not be enforceable qua award (whether under the Federal Arbitration Act or otherwise). Cf. Benton v. Singleton, 114 Ga. 518, 40 S.E. 811 (1902) (gambling contract).

5. For some of the legislative history in connection with the adoption of 9 U.S.C. Ch. 2, see H.R.Rep. 1181, *reprinted in* 1970 U.S. Code Cong. & Ad.News p. 3601 et seq. The Committee points out that "so far as is known, there is no opposition to the bill" and "in the Committee's view, the provisions of S. 3274 will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts." *Id.* at 3602. The Committee, of course, recognized the obvious distinction between an award as such and the enforcement of an award, whether in a United States or foreign court, and to that extent, at least, appears to recognize the distinction between suing on the award and suing on a foreign judgment confirming or enforcing the award. It would appear that the Convention itself, and the United States enabling legislation, is addressed to the situation in which there may not be jurisdiction over the United States person or corporation for purposes of awarding a foreign judgment even though there may be jurisdiction for the making of a foreign arbitral award.

6. Article 53 was principally a codification of pre-existing New York case law permitting the enforcement of foreign country money judgments. *See* Judicial Conference Report, 2 McKinney's Session Laws of New York 2784 (1970). There were a number of decisions of the courts of New York granting enforcement to foreign judgments based

It is not insignificant that the Federal Arbitration Act itself makes a very clear distinction between action on an award and action on a judgment enforcing the award, pointing out that application for an order confirming the award may be made only when "the parties in their agreement have agreed that a judgment of the court shall be entered upon the award . . ." and on certain other conditions, subject to certain other qualifications. 9 U.S.C. § 9. This very important difference was, indeed, the key to our own recent decision in Varley v. Tarrytown Associates, Inc., 477 F.2d 208 (2d Cir. 1973), where we held that, because the parties in their contract to arbitrate had not agreed that a judgment of the court could be entered upon the award, there was no consent to the entry of judgment thereon. We hold, then, that, since the Convention on Recognition itself and its enforcing legislation go only to the enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards, New York state law is not preempted to the extent that it permits, regulates and establishes a procedure for the enforcement of the foreign money judgment. Thus it cannot be doubted that the policy of New York State to recognize foreign judgments "prevails in the absence of interference with the federal regulatory scheme." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, — U.S. —, 94 S.Ct. 383, 396, 38 L.Ed.2d 348 (Dec. 4, 1973).

It remains then to be seen whether under New York law the Curacaoan judgment may be enforced and, in this respect, it is helpful to recall, see note 6 supra, that Article 53 itself represents a codification of pre-existing common law on the subject. Thus, for example, the district court was plainly correct in its holding, not contested on appeal, that a claim of fraud in the inducement of the contract generally—alleged here on the basis of supposed representations that the wage structure in Curacao would remain stable—is a question for the arbitrators. Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); Weiarott v. Carp, 32 N.Y.2d 190, 191, 344 N.Y.S.2d 848, 298 N.E.2d 42 (1973). This carries with it as the district court quite properly held the claims that the contract itself terminated or was frustrated by virtue of the changes in wage rates in Curacao and legislation changing the minimum wages for non-electronic industry employees as well as by the supposed riots and change in personnel of government.[7]

[3] We thus turn to the other points on the basis of which the appellant claims that under New York law and under Article 53 enforcement of the Curacaoan judgment would not be granted. Concededly one of the bases on which New York would not enforce a foreign judgment would be if it were made without jurisdiction. NYCPLR § 5304(a)2. Appellant argues that jurisdiction over it ended in March of 1970, but the basis for this argument is that the contract terminated as a matter of law by reason of impossibility of performance, and this again goes to the change of the minimum wage law imposed by Curacao. The March, 1970, date for "termination" is based upon Solitron's counsel's self-serving letter of May 15 to the effect that performance had by then become economically impos-

from foreign arbitral awards. See, e. g., Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931); Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926); Candelaore-Kalergi v. Hoeterle, 31 N.Y.S.2d 313 (Sup.Ct.1942); von Engelbrechten v. Galveston & New Bros., 59 Misc.2d 721, 300 N.Y.S.2d 229 (Civ.Ct.1969).

7. The same argument might be rejected on the basis that Curacao having acted by granting judgment on the arbitral award was engaged in an act of state which, under Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), and related cases, we should not and indeed may not go behind to determine the validity of the judgment or whether we should give credit to it. See Restatement (Second) of Foreign Relations Law of the United States § 41.

sible. We would point out again that this was, under the broad arbitration clause, initially a question for the arbitrators and was ruled upon and rejected by them. There is nothing in the contract to indicate that Solitron's obligations were predicated on the continued existence of any particular wage rate. Only recently the Fifth Circuit held in Eastern Marine Corp. v. Fukuya Trading Co., 364 F.2d 80, 84–85 (5th Cir.), cert. denied, 385 U.S. 971, 87 S.Ct. 508, 17 L.Ed.2d 435 (1966), that, as a matter of federal substantive law, an arbitration clause survives the frustration of a contract for the purposes of settling, among other things, whether the contract has in fact been frustrated. *See also* Heyman v. Warwins, [1942] A.C. 356, 366, relied upon by Judge Augustus Hand in In re Pahlberg, 131 F.2d 968 (2d Cir. 1942); Prima Paint Corp. v. Flood & Conklin Manufacturing Co., *supra*. In re Kramer & Uchitelle, 288 N.Y. 467, 43 N.E. 2d 493 (1942), heavily relied upon by appellant for the proposition that, at least as a matter of New York law, a proceeding to enforce an arbitration contract presupposes the existence of a valid and enforceable contract at the time the remedy is sought, has been limited, In re Exercycle Corp., 9 N.Y.2d 329, 335–336, 174 N.E.2d 463, 465–466, 214 N.Y.S.2d 353, 356–358 (1961), to the situation in which public policy as embodied in a statute forbids the performance which is the subject of dispute, a policy and statute which are as binding upon the arbitrators as upon the courts. That, of course, is not the situation here, where the defense of frustration is one asserted purely as a common law contractual defense.

[4] On its jurisdictional point, Solitron also argues, however, that its contractual concession of jurisdiction on the basis of the provision that it "invariably" or irrevocably chose domicile at the offices of its attorney-notary public in Willemstad cannot of itself be sufficient. The argument is not that its consent to jurisdiction was revoked, and indeed could not be because Curacao had already invoked arbitration under the agreement by the time of Solitron's attempted revocation of its consent to jurisdiction on May 12, 1970. Rather, the Solitron argument is to the effect that the document in the nature of a "marshal's writ," which was issued after the "Court of First Instance" "declared executed" the "arbitral verdict," contained language to the effect that "respondent [Solitron] is no longer domiciled in the Netherlands Antilles," and that this language represents a concession on the part of Curacao that Solitron's domicile terminated no later than March, 1970. There are at least three answers to this argument:

1. If Solitron's domicile had terminated in March of 1970, why did it wait until May 12, 1970, to cable its agent for service of process to revoke "such authority if any as you may still retain to represent us," confirming this by cable and letter dated May 13, 1970?

2. Solitron's attempt to claim that its domicile was terminated because of impossibility of performance assumes, incorrectly, that it, rather than the arbitrators, had the power to decide that issue, a matter which we have already held adversely to Solitron above.

3. The language of the Curacao marshal's writ in context at most constitutes an acknowledgment of the fact that the attempted revocation in May of 1970 had become effective by the date of the marshal's writ in April of 1971 (a matter which we need not and do not affirmatively decide here). That is to say, the marshal's language to the effect that the respondent is no longer domiciled in the Netherlands Antilles relates to the time of the issuance and presentation of the writ in April, 1971.

[5] Appellant argues strenuously and on two different bases, that—to the extent that the arbitral award consists of damages in lieu of welfare payments that Curacao would have had to make as a result of Solitron's breach of the obligation to create 100 jobs—the award is unenforceable and, therefore, a judg-

...nt based upon it is unenforceable under New York law.[8] These two bases ...ged are, first, that New York will vacate an arbitral award if the arbitrators' construction of a document is "completely irrational." Lentine v. Fundaro, 29 N.Y.2d 382, 385, 278 N.E.2d 633, 635, 328 N.Y.S.2d 418, 422 (1972). The other is that there are some matters, such as the custody of children, Hill v. Hill, 199 Misc. 1035, 104 N.Y.S.2d 755 (Sup. Ct.1951), and the distribution of decedents' estates, Swislocki v. Spiewak, 273 App.Div. 768, 75 N.Y.S.2d 147 (1st Dep't 1947), leave to appeal denied, 273 App. Div. 808, 76 N.Y.S.2d 269 (1948), which are simply not subject to arbitration under New York law. It is Solitron's point that Solitron did not accept a delegation to it by Curacao of the "sovereign duty to provide social welfare payments to any part of the unemployed on the island." But this, of course, entirely misses the point that what the arbitrators were doing—and in a very cautious way they did it with basis in fact—was attempting to fix damages for the purpose of ascertaining the extent of Solitron's liability for breach of its conceded obligation under the agreement to create 100 jobs. While an American court in similar circumstances, or an American board of arbitrators, might not necessarily follow the same route, in ascertaining damages, here it must be remembered that this was obviously an underdeveloped country with a large number of unemployed; indeed the basis of the award was that there were 1,000 unemployed people seeking the 100 new jobs with Solitron and there was expert testimony by the head of the unemployment service of the Island Territory adduced before the arbitrators that for 1969 the Island Territory would have had to pay in respect to those employees sums pursuant to its laws relating to financial and medical assistance, the sums varying as above pointed out. It may be that the arbitrators improperly assumed that the same payments by way of financial aid had to be made for 1970 and 1971, 1972 and 1973, and indeed pursuant to the expert testimony the arbitrators took into account a 10 per cent increase for "financial assistance" and 6½ per cent for "medical assistance." The arbitrators' findings were also based upon "the expected increase in population, the time required for preparing for the establishment of new businesses and the extent of the structural unemployment existing in Curacao." Any objections to this method of computing damages or to the assumptions made by the arbitrators could have been presented to them or, indeed, might well have been presented in judicial proceedings which could have been brought by Solitron to annul the arbitration award in Curacao. They come too late here, however, and they by no means take into account the proposition to the contrary—which we need not pass upon—that, by virtue of the institutional nature and commercial relationship of the parties, remembering that Curacao itself was a government with large numbers of unemployed people, the method of ascertaining damages may well have been a fair and proper one. Solitron points to no New York statutory law that adopts a policy contrary to that agreed to by the parties here in their contract and implemented by the arbitrators. In this posture, Solitron's argument under state law must fail, *see* In re Exercycle Corp., *supra*; New Central Jute Mills Co. v. City Trade & Industries, Ltd., *supra*, in this concluded arbitration proceeding. *Cf.* Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir.), cert. denied, 363 U.S. 843, 80 S.Ct. 1612, 4 L.Ed.2d 1727 (1960).

[6] The next argument by appellant is that it is contrary to the public policy

8. We emphasize that whether the award would be enforced under New York law, a question not before us here, and whether the judgment would be recognized under Article 53 are entirely separate and distinct questions. Indeed, some of the arguments advanced by Solitron with respect to New York "policy" might well be persuasive were this an action to enforce the award under New York law.

of New York to permit a person to derive an advantage from his own wrong, see Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), and violation of New York public policy is a ground for refusing to enforce the Curacaoan judgment under NYCPLR § 5304(b)4. The claim is, once again, that Curacao is attempting to take advantage of its own wrong in that it altered the prevailing wages after having induced Solitron to establish a plant on the basis that the wage rates would be stable so that Solitron would be in a competitive position with other "offshore" manufacturers of semi-conductors. While undeniably Curacao had the power to fix wages, Solitron says, the power to hold Solitron in breach of an agreement after Curacao had made it "impossible" for it to perform the agreement is something else again. Of course, this is just another way of restating the same argument which was rejected factually by the district judge. In the light of the papers submitted we cannot help but agree with Judge Wyatt. There was clearly no representation or warranty in the agreement itself that the wages would remain stable. This may well have been Solitron's hope and, indeed, this conceivably may have been the hope of the Curacaoan government—though it could be doubted—at the time the contract was entered into. But it is absurd to suppose that a sophisticated American manufacturer would expect a 45-cent an hour wage rate to last indefinitely on the Island. In no way, despite more than adequate legal advice, did Solitron attempt to make the wage-rate factor one of the terms or conditions of the agreement. It is interesting to note that the arbitrators considered this argument as having been put forth—despite Solitron's failure to participate in the arbitration—by Solitron's counsel by letter to the Island Territory of May 15, 1970. The arbitrators conceived of it as a defense amounting to a plea of mistake as to the identity of the thing contracted for, and they indicated that under the law of the Netherlands Antilles such a mistake may lead to judicial annulment of the contract in question, but only when there are both reasonable grounds for believing that the party under the mistake would not have entered into the contract had he known the circumstance assumed to be present was in fact absent, and that the other party in this case Curacao, ought to have realized that the presence of the circumstance—here the low wage rate—was the real reason for entering into the contract. As the arbitrators themselves pointed out, "that the wage level prevailing at the time of concluding the Agreement was attractive to Solitron is understandable; but it is quite unacceptable that, *on the basis of that wage level*, Solitron could have felt able to commit itself to operating a business for twenty years, let alone that the Island Territory ought to have realized this." Apparently witnesses testified before them to the effect that indeed no assurance was given that the low wages would be maintained or that Solitron would not have to deal with labor unions. The finding of the arbitrators certainly seems sound on the basis of our independent review of the documents and affidavits submitted to the court below, as it did to the district court itself. It is absurd to think that, if the maintenance of the wage rate were a condition or term of the agreement, it would not have been incorporated into the agreement by way of warranty, covenant or otherwise in light of the fact that Solitron was in a perfectly strong bargaining position, well represented by skilled and learned counsel, with presumably sophisticated and worldly business management at the helm. We see nothing to justify the claim that Curacao was "deriving an advantage from its own wrong." Higher wage rates, whether or not as a result of the change in governmental personnel (and there is no indication that the government as such was overthrown), and whether or not as the result of agitation, were a business risk that Solitron took; it ill behooves the company now to claim otherwise.

[7] The last point made in reference to the Curacaoan judgment is that under NYCPLR § 5302 only a final and conclusive judgment may be enforced in New York. The judgment, it is claimed, is not conclusive or final since the arbitration award left it open to either party, after January 1, 1974, to demand further arbitration and possibly to obtain further and more extensive damages. But this is a point that was not raised before the Curacao courts. By the very terms of the New York statute, the question before us, as it would be before a New York court, is whether the judgment obtained in Curacao is "final . . . where rendered." NYCPLR § 5302. We have already noted that the potential for appellate review of the award in the courts of Curacao ceased when Solitron failed to seek such review within three months of the award. Logic would seem to compel the conclusion, as the district court found, that the judgment rendered on the award in Curacao would be viewed in Curacao as "final" and Solitron presents no evidence to the contrary. Indeed, it is still open to the appellant to raise the question whether further damages may be awarded in the event that further arbitration or confirmation of another arbitral award is sought in the courts of the Netherlands Antilles. For all we know, those courts may very well take the view that any claim for breach of the contract, whether pertaining to present, past or future damages, must be made and proved with sufficient particularity at the time of the arbitration, in the absence of which the party seeking damages for breach of contract will be precluded. The courts of Curacao may, as a matter of Netherlands Antilles law, take the position that the breach of contract was merged in the arbitration award, the arbitration award merged in the judgment, and that any further arbitration is not permissible. See note 4 *supra*. They may take quite the opposite view, of course, and we are not ourselves sufficiently versed in the law of the Netherlands Antilles, nor have the parties attempted to aid us in this respect, that we can with any assurance predict what the Curacao courts will do. We must recognize that the judgment itself is definite in amount, was conclusive and enforceable in Curacao, and, indeed, is final to the extent that it specifies precisely what Solitron is to pay; nothing remains to be calculated.[9]

[8] Thus we conclude that the judgment of Curacao was enforceable under Article 53 of the New York Civil Practice Law and Rules and affirm the district court on this ground. In so holding we need not determine the correctness of the alternative ground advanced by the district court that the arbitration award was independently enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, by virtue of 9 U.S.C. § 201 et seq. The argument that Solitron may counterclaim for its investment in Curacao is absurd, since credit was already given for this in the arbitral award.

Judgment affirmed.

[9] Should the arbitrators in a subsequent proceeding decide that further damages are warranted, and should appellee have to bring another action in a federal court to enforce the judgment on such an award, a federal court would then be in a position to gauge the "finality" accorded to the instant judgment by the courts of Curacao. What Solitron asks us to do here is to look behind the present judgment and either deny its recognition or resolve in its favor the question whether Curacao will be entitled to recognition of a hypothetical judgment for future damages; the time is simply not ripe for such a determination. Even were we to take the view that future proceedings in Curacao might lead to "modification" of the present judgment, our concern would be limited to due process considerations:

> considerations of due process probably require that enforcement be refused to the extent that modifications could be sought in the rendering jurisdiction, unless the requested court allows the defendant to litigate the issues which would entitle him to modification.

von Mehren & Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 Harv.L.Rev. 1601, 1658 (footnote omitted). *Cf.* Griffin v. Griffin, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635 (1946).