bar to this lawsuit. Summary judgment on the issue of *res judicata* is denied.

D. CONCLUSION

For the reasons stated herein, the first count of the second amended complaint is dismissed. The City of Willoughby Hills is dismissed as a party defendant. The motions by the individual defendants to dismiss the second count and for summary judgment thereon are denied.

IT IS SO ORDERED.

RHONE MEDITERRANEE COMPAGNIA FRANCESE DI ASSICURAZIONI E RIASSICURAZIONI, Plaintiff,

v.

Achille LAURO, et al., Defendants.

Civ. No. 81-116.

District Court, Virgin Islands, D. St. Thomas and St. John.

Oct. 4, 1982.

Time charterer's insurer brought suit as subrogee to recover payments it made to time charterer from vessel owners and master and/or captain after vessel caught fire and burned. On defendants' motion to dismiss, the District Court, Christian, Chief Judge, held that: (1) federal law determined enforceability of arbitration provision in time charter agreement; (2) under federal law, arbitration clause was enforceable; (3) United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards' mandate to refer parties to arbitration is not necessarily negated because arbitral award would be unenforceable under foreign forum's law; but (4) although parties would be referred to arbitration in Italy, action would not be dismissed but would be stayed pending arbitration.

Motion denied, arbitration ordered and proceeding stayed.

1. Federal Courts ⇐403

Federal law was controlling in determining validity of arbitration clause contained in time charter agreement where parties to agreement were subject to United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, which stated that court had to refer parties to arbitration pursuant to terms of time charter agreement unless agreement to arbitrate was "null and void, inoperative or incapable of being performed" but which did not specify which nation's law should be utilized in determining whether agreement to arbitrate was valid. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. II, 9 U.S.C.A. § 201 note; 9 U.S.C.A. §§ 201–208.

2. Shipping ⇐39(7)

Under federal law, arbitration clause in time charter agreement which called for reference of any dispute arising under charter to arbitration in Italy was enforceable where no defects in arbitration agreement had been alleged under principles of federal contract law.

3. Arbitration ⇐82.5

Mandate of United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards to refer parties to arbitration unless agreement to arbitrate is "null and void, inoperative or incapable of being performed" is not necessarily negated because arbitral award would be unenforceable under foreign forum's law. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. II, 9 U.S.C.A. § 201 note.

4. Shipping ⇐39(7)

Although time charterer's insurer and vessel owner would be referred to arbitration in Italy pursuant to time charter arbitration clause, and although arbitration did not merely stay trial but stayed all proceedings and required rescission of any pretrial

judicial action taken prior to arbitration, it was not proper to dismiss lawsuit but, rather, action was stayed pending arbitration. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. II, 9 U.S.C.A. § 201 note.

5. Shipping ⇐39(7)

Where time charterer's claim against master and/or captain of vessel was based on same operative facts and was inherently inseparable from claim against vessel owner, and where time charterer's suit had to be stayed as against vessel owner while parties were referred to Italy for arbitration under time charter agreement, action would be stayed as to claims against master and/or captain also without reaching question whether Virgin Islands was convenient forum for litigation.

John Short, Dudley, Dudley & Topper, Charlotte Amalie, St. Thomas, V.I., for plaintiff.

Thomas D. Ireland, Charlotte Amalie, St. Thomas, V.I., for defendants.

MEMORANDUM AND ORDER

CHRISTIAN, Chief Judge.

Before the Court is the motion of the defendants to dismiss the amended complaint and for an order directing the plaintiff to arbitrate the instant controversy in Napoli, Italy. The motion will be granted in part and denied in part.

I. *Facts*

The relevant facts of this cause are as follows. On March 30, 1979, the vessel "Angelina Lauro" caught fire and burned while tied up at the dock of the West Indian Co., Ltd. in Charlotte Amalie, St. Thomas, U.S. Virgin Islands. The fire resulted in a total loss of the vessel. The "Angelina Lauro" was allegedly owned by an Italian citizen, defendant Achille Lauro, who is doing business under the name of Achille Lauro-Armatore, a/k/a Flotta Lauro, a/k/a Lauro Lines (hereinafter "Achille Lauro"), and by defendant X Company, an unknown corporation, partnership, joint venture, trust and/or other business entity which may have owned all or part of the vessel. All business addresses of defendant Achille Lauro are in Italy.

On the date of the fire, the ship was under time-charter to Costa Armatori S.P.A. (hereinafter "Costa") an Italian corporation, whose principal place of business is in Genoa, Italy. Costa lost property and fuel in the fire which was worth at least 910 million liras (over $1 million). Costa was reimbursed for its losses by its insurer, plaintiff Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni (hereinafter "Rhone"), an Italian insurance company.

Rhone filed this law suit, as subrogee of Costa, to recover the payments it made to its insured. Rhone alleges that the fire was caused by the unseaworthy condition of the vessel "Angelino Lauro," and/or by the negligence of the employees and/or agents of defendant Achille Lauro and X Company, and/or by the negligence of defendant Antonio Scotto di Carlo, an Italian citizen, who was the master and/or captain of the "Angelino Lauro" on March 30, 1979, and who was the agent of Achille Lauro and/or X Company. Plaintiff also contends that defendants breached the time-charter agreement with Costa.

Defendants Achille Lauro and Antonio Scotto di Carlo have filed a motion to dismiss the amended complaint because they contend that the plaintiff is required to arbitrate this dispute in Napoli, Italy. They note that plaintiff's claim is derived from the rights of its insured, Costa, and that Costa agreed to arbitrate all disputes arising out of the charter of the "Angelino Lauro," pursuant to a time charter agreement, dated January 22, 1977, that it entered into with Achille Lauro-Armatore. The relevant portions of the agreement are as follows:

"23. *Arbitration*

Any dispute arising under the charter to be referred to arbitration in London (or such other place as may be agreed according to box 24) one Arbitrator to be nomi-

nated by the Owners and the other by the Charterers, and in case the Arbitrators shall not agree then to the decision of an Umpire to be appointed by them, the award of the Arbitrators or the Umpire to be final and binding upon both parties."

"*Box 24*

Place of arbitration (only to be filled in if place other than London agreed) (Cl.23)

NAPOLI"

The plaintiff does not contest the fact that Costa entered into an agreement with the foregoing clause, or that the plaintiff is bound to arbitrate the action if Costa would have been so bound. Plaintiff has opposed defendant's motion on the grounds that the agreement to arbitrate is null and void under Italian law and therefore need not be complied with. Plaintiff further argues that even if it is compelled to arbitrate, this action should not be dismissed, but merely stayed during the pendency of the arbitration. Finally, plaintiff notes that even if it is required to arbitrate its claim against Achille Lauro, its claim against defendant Antonio Scotto di Carlo should be allowed to proceed to trial because Mr. di Carlo was not a party to the time-charter agreement. Further, plaintiff argues that this Court is not required to dismiss its claim against Mr. di Carlo under the doctrine of *forum non conveniens*. We will treat each of the foregoing points in turn.

1. Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201–208, implements the United States accession to the Convention, 3 U.S.T. 2517, T.I.A.S. No. 6997 (1970). 9 U.S.C. § 202 provides the following in pertinent part:

> "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless . . ."

9 U.S.C. § 2 states:

> "Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration of an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract."

It should also be noted that the Convention was ratified by Italy on January 31, 1969. *See* notes to 9 U.S.C.A. § 201, 1982 Pocket Part at 153–54, for a list of signatory nations to the convention.

II. *Federal Law Determines the Enforceability of the Arbitration Provision*

[1] The arbitration provision at issue is contained in a maritime contract between two foreign citizens (from Italy), and therefore the mandates of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (hereinafter "Convention") must be followed by this Court.[1] Article II of the convention which contains the provisions relevant to this dispute, states the following:

> "1. Each Contracting State shall recognize an agreement the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

In sum, the Convention states that this Court must refer Achille Lauro and Rhone (as subrogee of Costa) to arbitration, pursuant to the terms of the time-charter agreement, unless the agreement to arbitrate is "null and void, inoperative or incapable of being performed." However, the Convention does not specify which nations' law should be utilized when determining whether the agreement to arbitrate is valid. *See* discussion in Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1064 (1961); *Matter of Ferrara S.p.A.*, 441 F.Supp. 778, 780–81 at n. 2 (S.D. N.Y.1977).

Although the Convention is silent on this issue, the United States Court of Appeals for the Third Circuit has issued a pertinent ruling which we are bound to follow. In *Becker Autoradio v. Becker Autoradiowerk GmbH*, 585 F.2d 39 (3rd Cir.1978), the appellate court was asked to rule whether a West German corporation and a Pennsylvania corporation should be required to arbitrate their contract dispute. The arbitration clause at issue read as follows:

> "The Arbitration Court domiciled in Karlsruhe [Federal Republic of Germany] shall have sole jurisdiction with regard to all disputes arising out of and about this agreement. The Arbitration Court shall determine its procedures according to the Rules of Procedure of the International Chamber of Commerce, Paris. The arbitral award shall have the effect, with respect to the parties, of a legally valid court judgment."

Becker, supra, at 42. In deciding the question before it, the Third Circuit stated,

> "There has been much discussion by the parties concerning the applicability of German law or Pennsylvania law in the resolution of this dispute. It may well be that the question of which law is to be applied will have to be answered in deciding the merits of the underlying controversy. However, the case before us presents only the issue of the *arbitrability* of that controversy when a contract involves 'commerce,' as this one does, whether as 'suit proceeding is referable to arbitration ... under an agreement [to arbitrate]' *pursuant to ... or to the Convention on Recognition and Enforcement of Foreign Arbitral Awards ... is clearly a matter of federal substantive law.* Thus, the question of whether, in contracts involving commerce, there is an agreement to arbitrate an issue or dispute upon which suit has been brought is governed by federal law. Concomitantly, questions of interpretation and construction of such arbitration agreements are similarly to be determined by reference to federal law .... [numerous citations omitted] As the court in *Coenen v. R.W., Pressprich & Co.*, 453 F.2d 1209, 1211 (2nd Cir.1972), stated, '[o]nce a dispute is covered by the [federal Arbitration] Act, *federal law applies to all questions of [the arbitration agreement's interpretation, construction validity, revocability, and enforceability.*' "

Becker, supra at 43 (emphasis added). Thus, the Third Circuit's position is that ~~normal conflicts of law rules should not be used to determine which law should govern the validity of an arbitration clause, when the parties are subject to the dictates of the Convention.—Neither the law of a foreign country, or the law of a particular state (or territory) can ever be chosen—only federal law is controlling.~~

This approach was explained further in *Matter of Ferrara, supra*. First, the district court noted that "[s]ince this court's jurisdiction over these actions is conferred by Chapter 2 of the Federal Arbitration Act [2] ... it would seem that the enforceability of the arbitration clause at issue must be determined in accordance with federal

2. See 9 U.S.C. § 203 which states:
> "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy."

law, i.e., generally accepted principles of contract law," at 780. It then explained that this rule appears to be in accord with the scheme set up by the Convention. "Article II [of the Convention] does not indicate which law is to govern enforceability of an arbitral *agreement*, but it appears that [the] drafters intended to impose on the ratifying states a 'broad undertaking' to give effect to such an agreement unless it '*offends the law or public policy of the forum*' " at 780–81 n. 2 (*quoting* Haight, Convention of the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958, at 28 (1958)). Finally, the court stated that applying federal law "is consistent ... with the view that enforceability of an agreement to arbitrate relates to the law of remedies and is therefore governed by the law of the forum," at 781 n. 2.

[2] Under federal law, the arbitration clause at issue is clearly enforceable, as there is "a strong policy in the federal courts favoring arbitration, especially in the context of international agreements.... Moreover, any 'doubts as to whether an arbitration clause may be interpreted to cover the asserted dispute should be resolved in favor of arbitration...' " *Becker*, *supra*, at 44. No defects in the arbitration agreement have been alleged under the principles of federal contract law.

[3] However, plaintiff has strenuously argued that in this case an exception should be made to the rule requiring the application of federal law because it contends, under Italian law any award that might be made by the arbitrators would be unenforceable in the courts of Italy, where the defendants reside and do business. Plaintiff states that this Court should not order a "useless act" i.e. an arbitration which would not be recognized in Italy, but rather should modify the usual choice-of-law principles. We disagree.

Firstly, if there were no law on this issue in our circuit, we might have adopted plaintiff's view that Italian law should govern. However, there is no void in the law. In *Becker*, *supra*, the Third Circuit directed the lower courts to apply federal law. The language in *Becker* is clear and unambiguous—it leaves no room for the carving out of exceptions.

Secondly, we find that the result in this case is not contrary to the intent of the drafters of the Convention. It appears that the delegates chose not to limit the mandate to arbitrate to those cases in which it was certain that an arbitral award would subsequently be enforced by the courts. "[A]rticle [II(3)] does not explicitly relate arbitral agreements which will be the basis for a stay order to arbitral awards capable of enforcement under the Convention." Quigley, *supra*, at 1064. At the Convention, the German delegate observed this omission and proposed that the article be amended so that arbitral agreements were related to arbitral awards that were enforceable. "When the German proposal was put to a vote, it failed to obtain a two-thirds majority (13 to 9) and the Article was thus adopted without any words linking agreements to the awards enforceable under the Convention. Nor was this omission corrected in the Report of the Drafting Committee ..." *Scherk v. Alberto-Culver Co.* 417 U.S. 506, 530–31 n. 10, 94 S.Ct. 2449, 2462–2463 n. 10, 41 L.Ed.2d 270 (*quoting* Haight, *supra*, at 28). In sum, the Convention's mandate to refer parties to arbitration is not necessarily negated because an arbitral award would be unenforceable under a foreign forum's law.[3]

Finally, even if an arbitral award would not be recognized in court, we conclude that referring the parties to arbitration would not necessarily be "useless". If all parties

3. We must note that the above statement is not a ruling that an arbitral award would in fact be unenforceable under Italian law in the circumstances of this case. All parties have submitted extensive briefs on that issue, but we will not rule, as the question is not material at this juncture of the litigation. If a party subsequently seeks to obtain recognition and enforcement of an arbitral award, the issue will then be ripe for decision. See Article IV(1)(a) of the Convention.

are satisfied with the arbitrators' decision, and voluntarily abide by its terms, there will be no need for further litigation or enforcement of an arbitral award. Arbitration will afford the parties a final opportunity to amicably settle their differences.

III. *Stay Should be Granted Pending Arbitration*

[4] Although we agree with the defendants that we should refer Rhone and Achille Lauro to arbitration in Napoli, Italy, we do not believe that it would be proper to dismiss this lawsuit. Rather, we will stay this action pending arbitration.

Defendants have cited *McCreary Tire & Rubber Co. v. Ceat S.p.A.*, 501 F.2d 1032 (3rd Cir.1974), as precedent for the proposition that we should dismiss this action. In *McCreary*, at 1038, the Court of Appeals for the Third Circuit said:

> "Unlike § 3 of the federal Act, article II(3) of the Convention provides that the court of a contracting state shall 'refer the parties to arbitration' rather than 'stay the trial of the action.' The Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate. Thus the contention that arbitration is merely another method of trial, to which state provisional remedies should equally apply, is unavailable."

The appellate court concluded that because a pre-trial foreign attachment violated the terms of the pertinent arbitration agreement, the lower court would be required to discharge the foreign attachment. The Third Circuit also ordered the district court to refer the parties to arbitration. It did not order the district court to dismiss the action.

Defendants argue that *McCreary* holds that if a controversy must be referred to arbitration under the Convention, then a court is divested of its subject matter jurisdiction over the action. We disagree. Our interpretation of *McCreary* is that if a controversy must be referred to arbitration under the Convention no other judicial action should be taken in the interim. Arbitration does not merely stay the trial, it stays all proceedings—e.g. pre-trial conferences, discovery, etc. Further, any pre-trial judicial action that was taken prior to arbitration, which is in conflict with the terms of the arbitration, must be rescinded. *McCreary* does not state, however, that a controversy referred to arbitration must be removed from a court's docket. A Third Circuit case which was decided after *McCreary* supports our conclusion. In *Becker, supra*, at 47, the Third Circuit held that arbitration was mandated by the Convention and then went on to say that "the case will be remanded with the direction that the district court *stay* the proceedings before it pending arbitration." (emphasis added).

IV. *Plaintiff's Action against Defendant Antonio Scotto di Carlo will also be Stayed*

[5] Although defendant Antonio Scotto di Carlo was not a party to the arbitration agreement at issue, we will stay the action as to the claims pending against di Carlo also. The "power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket." *Lawson Fabrics, Inc. v. Akzona, Inc.* 355 F.Supp. 1146, 1151 (S.D.N.Y.1973). The plaintiff's claim against di Carlo is based on the same operative facts, and is inherently inseparable, from its claim against Achille Lauro. If the fire at issue was caused in whole, or in part, because di Carlo improperly performed his tasks as master and/or captain of the vessel, Achille Lauro and di Carlo may both be liable to the plaintiff, as di Carlo was allegedly acting as Achille Lauro's agent. In this type of situation, courts have chosen to stay all proceedings, because if one party "was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681, (5th Cir.1976).

As we are staying the claims against di Carlo, we will not reach the question of

whether this is a convenient forum for the litigation. That issue will need to be decided only if the plaintiff chooses to continue litigation in this Court after the arbitration proceedings in Napoli, Italy have terminated.

ORDER

The premises considered and the Court being fully advised,

IT IS ORDERED the motion of the defendants to dismiss this action be, and the same is hereby, DENIED;

IT IS FURTHER ORDERED that Rhone Mediterranee Compagnia Francese di Assicurazioni E. Riassicurazioni and Achille Lauro submit the instant dispute to arbitration in Napoli, Italy pursuant to the terms of the arbitration agreement;

IT IS FURTHER ORDERED that all proceedings in the instant action be, and they are hereby, STAYED PENDING ARBITRATION.

KEY NUMBER SYSTEM

Sally WILLIAMSON, individually and as Personal Representative of the Estate of Walter E. Williamson, Tim Williamson, Mike Williamson, David Williamson and Tracy Yurek, Plaintiffs,

v.

Lyle SARTAIN and the Montana Civil Air Patrol, a United States corporation, Defendants.

No. CV-81-130-GF.

United States District Court,
D. Montana,
Great Falls Division.

Oct. 6, 1982.

Action was brought against the United States in a Montana state court seeking to recover for the wrongful death of a volunteer member of the Civil Air Patrol which occurred as result of an airplane crash while decedent was engaged in the performance of United States Air Force authorized mission. After removal, the government moved to dismiss the case and the plaintiffs moved to amend their complaint to include the United States as a party defendant, thereby seeking recovery under the Federal Tort Claims Act. In ruling on the motions, the District Court, Hatfield, J., held that fatal injuries sustained by volunteer member of Civil Air Patrol while engaged in a United States Air Force authorized mission were compensable under Federal Employees Compensation Act and therefore suit could not be maintained against government under Federal Tort Claims Act.

Motion to amend denied; motion to dismiss granted.

1. United States ⇐78(4)

United States is liable under Federal Tort Claims Act for the negligent acts or omissions of Civil Air Patrol or its members, committed while CAP or its members are engaged in a United States Air Force authorized mission. 10 U.S.C.A. § 9441(c); 28 U.S.C.A. § 2671 et seq.

2. United States ⇐78(4)

Once it is determined that a particular agency is not a "federal agency" within meaning of Federal Tort Claims Act, it necessarily follows that employees of that agency are not employees of United States for purposes of the Act. 28 U.S.C.A. § 2671 et seq.

3. Workers' Compensation ⇐255, 2085

Fatal injuries sustained by volunteer member of Civil Air Patrol while engaged in a United States Air Force authorized mission were compensable under Federal Employees Compensation Act and therefore suit could not be maintained against government under Federal Tort Claims Act. 5 U.S.C.A. § 8101 et seq.; 10 U.S.C.A. § 9441(c); 28 U.S.C.A. § 2671 et seq.

copy sent to A.F.

BURLINGHAM UNDERWOOD & LORD
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TO: Mrs. E. M. J. Herlinga-Reder

Your ref.

Our ref. 91091

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- ☐ With compliments
- ☐ In compliance with your request
- ☐ Returned with thanks
- ☐ Kindly telephone me about this matter
- ☐ For your guidance
- ☒ May be of interest — Decision of the U.S. Court of Appeals for the Third Circuit in Rhone v. LAURO, 712 F.2d 50 (3 Cir. 1983).
- ☐ Copies for your files
- ☐ For your approval
- ☐ Kindly let me have your comments
- ☐ For your signature
- ☐ Need not be returned
- ☐ Kindly return

Date October 3 198 3

MICHAEL MARKS COHEN

RHONE MEDITERRANEE COMPAGNIA FRANCESE DI ASSICURAZIONI E RIASSICURAZONI, Appellant,

v.

Achille LAURO, d/b/a Achille Lauro Armatore, a/k/a Achille Lauro, d/b/a Flotta Lauro, a/k/a Achille Lauro, d/b/a Lauro Lines, X Company and Antonio Scotto di Carlo.

No. 82-3523.

United States Court of Appeals, Third Circuit.

Argued April 27, 1983.

Decided July 6, 1983.

A time charterer's insurer brought suit as subrogee to recover payments it made to the time charterer from vessel owners and master and/or captain after a vessel caught fire and burned. On defendants' motion to dismiss, the United States District Court for the Virgin Islands, Almeric L. Christian, Chief Judge, 555 F.Supp. 481, ordered arbitration. Appeal was taken. The Court of Appeals, Gibbons, Circuit Judge, held that: (1) the rule that an order staying an admiralty suit pending arbitration is an interlocutory order and not an appealable injunction does not apply to an action for breach of a time charter agreement, given that the action could also be brought as an ordinary civil action in law, and (2) the fact that the arbitration provision of the time charter agreement may have contravened Italian law requiring an odd number of arbitrators did not render the agreement null and void under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, therefore, arbitration was appropriate.

Order affirmed.

1. Federal Courts ⇐573

Rule that district court order staying admiralty suit pending arbitration is interlocutory order and not appealable injunction was inapplicable to suit for breach of time charter which could be entertained by district court as ordinary civil action in law. 28 U.S.C.A. §§ 1291, 1292(a), 1333(a).

2. Shipping ⇐39(7)

Where all parties to time charter agreement and lawsuit arising out of breach of that agreement were Italian and Italy and United States were both parties to Convention on Recognition and Enforcement of Foreign Arbitral Awards, arbitration clause of time charter agreement fell within Convention's coverage. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Arts. I et seq., II, subd. 3, 9 U.S.C.A. § 201 note.

3. Arbitration ⇐6

Under Convention on Recognition and Enforcement of Foreign Arbitral Awards, agreement to arbitrate is "null and void" only when it is subject to internationally recognized defense such as duress, mistake, fraud or waiver, or when it contravenes fundamental policies of forum state; "null and void" language must be read narrowly, for signatory nations have jointly declared general policy of enforceability of agreements to arbitrate. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Arts. II, II, subd. 3, V, 9 U.S.C.A. § 201 note.

4. Shipping ⇐39(7)

Arbitration provision of time charter agreement was not void within meaning of Convention on Recognition and Enforcement of Foreign Arbitral Awards by virtue of fact that it required even number of arbitrators in violation of Italian law in that rule as to required number of arbitrators did not implicate fundamental concerns of either international system or of forum. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Arts. II, II, subd. 3, V, 9 U.S.C.A. § 201 note.

5. Shipping ⇐39(7)

Even if arbitration award pursuant to time charter agreement may have been unenforceable in Italy by virtue of fact that arbitration clause of time charter agree-

ment required even number of arbitrators in violation of Italian law, arbitration award could be enforced outside of Italy under Convention on Recognition and Enforcement of Foreign Arbitral Awards given that forum court could disregard procedural defect. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Arts. II, II, subd. 3, V, subds. 1, 1(d), 9 U.S.C.A. § 201 note.

John G. Short, Charlotte Amalie, V.I., David C. Indiano, San Juan, P.R. (argued), Dudley, Dudley & Topper, Charlotte Amalie, St. Thomas, V.I., for appellant.

Thomas D. Ireland, Charlotte Amalie, St. Thomas, V.I., Richard G. Ashworth (argued), Charles B. Anderson, Haight, Gardner, Poor & Havens, New York City, for appellee.

Before GIBBONS, SLOVITER and BECKER, Circuit Judges.

OPINION OF THE COURT

GIBBONS, Circuit Judge.

Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazioni (Rhone), a casualty insurer, appeals from an order of the District Court of the Virgin Islands staying Rhone's action pending arbitration. The action results from a fire loss which occurred when the vessel Angelina Lauro burned at the dock of the East Indian Co, Ltd. in Charlotte Amalie, St. Thomas. At the time of the fire the vessel was under time charter to Costa Armatori S.P.A. (Costa), an Italian Corporation. Rhone insured Costa and reimbursed it for property and fuel losses totaling over one million dollars. Rhone, as subrogee of Costa, sued the owner of the vessel, Achille Lauro, (Lauro) and its master, Antonio Scotto di Carlo, alleging breach of the Lauro-Costa time charter, unseaworthiness, and negligence of the crew. The district court granted defendants' motion for a stay of the action pending arbitration, and Rhone appeals.[1] The defendants have moved to dismiss the appeal for lack of an appealable order. We hold that we have appellate jurisdiction, and we affirm.

I. Appellate Jurisdiction

[1] The defendants' motion to dismiss Rhone's appeal is predicated on *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454, 55 S.Ct. 475, 79 L.Ed. 989 (1935) which holds that a district court order staying an admiralty suit pending arbitration is an interlocutory order for purposes of the predecessor to 28 U.S.C. § 1291 (1976), and is not an injunction within the meaning of the predecessor to 28 U.S.C. § 1292(a) (1976). The Court reasoned:

> While courts of admiralty have capacity to apply equitable principles in order to better attain justice, they do not have general equitable jurisdiction and, ... they do not issue injunctions.

Id. 457–58, 55 S.Ct. at 476–77 (footnotes omitted). For this reason stays of admiralty actions have been held not to fall within the well-settled *Enelow-Ettelson* rule[2] that a stay of an action at law is the equivalent of an injunction against proceeding with that action, appealable under 28 U.S.C. § 1292(a). *Diacon-Zadeh v. Denizyollari*, 196 F.2d 491, 492 (3d Cir.1952) (per curiam); 9 J Moore's Federal Practice ¶ 110.19[3] (2d ed. 1983).

The *Schoenamsgruber* rule does not apply in this case, however, because Rhone sues for breach of a time charter agreement. The District Court of the Virgin Islands, a court of general jurisdiction, can entertain actions at law which, despite their connection with maritime commerce, fall within the saving to suitors clause in 28 U.S.C. § 1333(a) (1976). An action for breach of a time charter agreement may be brought in personam in a law court. *E.g., Carich v. Rederi A/B Nordi*, 389 F.2d 692, 695 (2d Cir.1968) (underlying action for violation of

1. The district court opinion is reported, 555 F.Supp. 481, 482 (D.V.I.1982).

2. *Ettelson v. Metropolitan Life Insurance Co.*, 317 U.S. 188, 63 S.Ct. 163, 87 L.Ed. 176 (1942); *Enelow v. New York Life Insurance Co.*, 293 U.S. 379, 55 S.Ct. 310, 79 L.Ed. 440 (1933).

a charter party is at law and stay order is appealable); *Mailloux v. Elxnit*, 7 Alaska 192 (1924) (action for money due for a charter is a common law action in contract). Such an action may be brought in admiralty, but may also be brought as an ordinary civil action in law in a court of general jurisdiction. G. Gilmore & C. Black, *The Law of Admiralty*, § 1–13 at 40 (2d Ed. 1975). This being so, appealability is controlled by cases such as *J. & R. Sportswear & Co. v. Bobbie Brooks, Inc.*, 611 F.2d 29 (3d Cir.1979) (denial of stay of breach of contract action for money damages is appealable), *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 42 n. 7 (3d Cir.1978) (denial of stay of action alleging breach of agreement to renew franchise appealable), *Gavlik Construction Co. v. H.F. Campbell Co.*, 526 F.2d 777, 781–82 (3d Cir.1975) (stay of action for services under contract is appealable), and *McCreary Tire & Rubber Company v. CEAT*, 501 F.2d 1032, 1034–35 (3d Cir.1974) (denial of stay of action seeking money damages appealable).

II. The Merits

[2] As subrogee, Rhone stands in place of its insured, the time charterer Costa. In the time charter contract there is a clause:

> 23. *Arbitration* –
>
> Any dispute arising under the Charter to be referred to arbitration in London (or such other place as may be agreed according to box 24) one arbitrator to be nominated by the Owners and the other by the Charterers, and in case the Arbitrators shall not agree then to the decision of an Umpire to be appointed by them, the award of the Arbitrators or the Umpire to be final and binding upon both parties.
>
> *Box 24*
>
> Place of arbitration (only to be filled in if place other than London agreed (cl. 23)
> NAPOLI

All the parties to the time charter agreement and the lawsuit are Italian. Italy and the United States are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997; reprinted following 9 U.S.C.A. §§ 201–208 (1983 Supp.). The Federal Arbitration Act, Pub.L. No. 91–368, 84 Stat. 692, codified at 9 U.S.C. §§ 201–208 (1976), implements the United States' accession on September 1, 1970 to the Convention by providing that it "shall be enforced in United States courts in accordance with this chapter." 9 U.S.C. § 201. That act further provides:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial . . . falls under the Convention.

9 U.S.C. § 202. The same section exempts from the Convention agreements or relationships entirely between citizens of the United States. That exemption does not apply. Thus by virtue of the Federal Arbitration Act the arbitration clause in the time charter falls within the Convention's coverage. Rhone does not contend otherwise.

What Rhone does contend is that under the terms of the Convention the arbitration clause in issue is unenforceable. Rhone's argument proceeds from a somewhat ambiguous provision in Article II section 3 of the Convention:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Ambiguity occurs from the fact that no reference appears in section 3 to what law determines whether "said agreement . . . is null and void, inoperative or incapable of being performed."

Rhone contends that when the arbitration clause refers to a place of arbitration, here Naples, Italy, the law of that place is determinative. It then relies on the affidavit of an expert on Italian law which states that in Italy an arbitration clause calling for an even number of arbitrators is null and void,

even if, as in this case there is a provision for their designation of a tie breaker.

The ambiguity in Article II section 3 of the Convention with respect to governing law contrasts with Article V, dealing with enforcement of awards. Section 1(a) of Article V permits refusal of recognition and enforcement of an award if the "agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." Section 1(e) of Article V permits refusal of recognition and enforcement if "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Section 1(d) of Article V permits refusal of enforcement if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." Thus Article V unambiguously refers the forum in which enforcement of an award is sought to the law chosen by the parties, or the law of the place of the award.

Rhone and the defendants suggest different conclusions that should be drawn from the differences between Article II and Article V. Rhone suggests that the choice of law rule of Article V should be read into Article II. The defendants urge that in the absence of a specific reference Article II should be read so as to permit the forum, when asked to refer a dispute to arbitration, to apply its own law respecting validity of the arbitration clause.

There is some treaty history suggesting that a proposal to incorporate in Article II choice of law language similar to that in Article V was rejected because delegates to the United Nations organization which drafted it were concerned that a forum might then have an obligation to enforce arbitration clauses regardless of its "local" law. G.W. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of U.N. Conference*, May/June 1958 at 27–28. It thus appears that the ambiguity in Article II section 3 is deliberate. How it should be resolved has been a matter of concern to commentators, who suggest, variously, that the forum state should look to its own law and policy, to the rules of conflicts of laws, or to the law of the place of execution of the agreement. *See, e.g.*, P. Sanders, *A Twenty Years' Review of the Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 13 Int'l Law. 269, 278 (1979) (criticizing ambiguity); S. Pisar, *The United Nations Convention on Foreign Arbitral Awards*, 33 So.Cal.L.Rev. 14, 15 (1959) (Section 3 refers to conflict of laws); Quigley, *Accession By The United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1064 (Section 3 permits examination of forum law and policy); P. Contini, *International Commercial Arbitration*, 8 Am.J. Comp.L. 283, 296 (1959) (since Section 3 is silent courts may make determination or basis on forum law including forum choice of law).

[3, 4] None of the limited secondary literature sheds so clear a light as to suggest a certain answer. However, we conclude that the meaning of Article II section 3 which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is "null and void" only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, *see Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1st Cir.1982); *I.T.A.D. Associates, Inc. v. Podar Brothers*, 636 F.2d 75 (4th Cir.1981), or (2) when it contravenes fundamental policies of the forum state. The "null and void" language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate. As the Supreme Court observed in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 507 n. 10, 94 S.Ct. 2449, 2451 n. 10, 41 L.Ed.2d 270 (1974):

> The goals of the Convention, and the principal purpose underlying American

adoption and implementation of it, was to encourage the recognition and enforcement of commercial contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

In other words, signatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate. Neither the parochial interests of the forum state, nor those of states having more significant relationships with the dispute, should be permitted to supersede that presumption. The policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate. The rule of one state as to the required number of arbitrators does not implicate the fundamental concerns of either the international system or forum, and hence the agreement is not void.

[5] Rhone urges that this rule may result in a Neopolitan arbitration award which, because of Italy's odd number of arbitrators rule, the Italian courts would not enforce. The defendants insist that even in Italy this procedural rule on arbitration is waivable and a resulting award will be enforced. Even if that is not the law of Italy, however, Rhone's objection does not compel the conclusion that we should read Article II section 3 as it suggests. The parties did agree to a non-judicial dispute resolution mechanism, and the basic purpose of the Convention is to discourage signatory states from disregarding such agreements. Rhone is not faced with an Italian public policy disfavoring arbitration, but only with an Italian procedural rule of arbitration which may have been overlooked by the drafters of the time charter agreement. Certainly the parties are free to structure the arbitration so as to comply with the Italian procedural rule by having the designated arbitrators select a third member before rather than after impasse. Even if that is not accomplished an award may still result, which can be enforced outside Italy.

Rhone urges that Article V section 1(d) prohibits such enforcement outside Italy, because it refers a non-Italian forum to the law of Italy. We disagree. Section 1 says only that "enforcement of an award *may* be refused" on the basis of the law of the country where it was made. Where, as here, the law of such a country generally favors enforcement of arbitration awards, and the defect is at best one of a procedural nature, Article V, section 1 certainly permits another forum to disregard the defect and enforce. That is especially the case when defendants come before the court and, relying on Article II, seek a stay of the action in favor of arbitration. They will hardly be in a position to rely on Italy's odd number of arbitrators rule if Rhone seeks to enforce an award in the District Court of the Virgin Islands.[3]

The forum law implicitly referenced by Article II section 3 is the law of the United States, not the local law of the Virgin Islands or of a state. That law favors enforcement of arbitration clauses. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *Becker Autoradio U.S.A. Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39 (3d Cir.1978). Indeed, "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203. Such an action would be removable from a state court. 9 U.S.C. § 205. The removal section has no application, of course, to the District Court of the Virgin Islands, which exercises the jurisdiction of the United States District Courts in all cases arising under the treaties and laws of the United States. 48 U.S.C. § 1612 (1976 & Supp. V 1981). Since no federal law imposes an odd number of arbitrators rule—the only defect relied upon by Rhone—the district court did not err in staying the suit for breach of the time

3. Had Rhone so requested it would have been proper for the district court to condition its stay order on the defendants' agreement to reform the arbitration clause so as to satisfy Italy's procedural requirement. Since no such request was made we do not consider whether, had it been made, we would remand for such a modification.

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charter agreement pending arbitration. Moreover since the duty to provide a seaworthy vessel and to operate it non-negligently arises out of the charter relationship, it was proper to stay the entire case.

III. Conclusion

The order staying the action in the District Court of the Virgin Islands was in compliance with the Convention and with the law of the United States. It will be in all respects affirmed.

Fred ZIMMERMAN, Trustee of Ludwig Honold Mfg. Co.

v.

CONTINENTAL AIRLINES, INC., Appellant.

No. 82-1639.

United States Court of Appeals, Third Circuit.

Argued April 12, 1983.

Decided July 11, 1983.

Debtor sought to recover balance of contract price on goods manufactured for defendant and defendant requested a stay pending arbitration. The Bankruptcy Court for the Eastern District of Pennsylvania, Emil F. Goldhaber, J., 22 B.R. 436, denied the application. Appeal was taken. The Court of Appeals, A. Leon Higginbotham, Jr., Circuit Judge, held that: (1) when the debtor in a bankruptcy action sues on a contract and the defendant demands a stay of the bankruptcy proceeding pending contractually agreed to arbitration, the decision of whether to grant a stay pending arbitration is left to the sound discretion of the bankruptcy judge, and (2) the Bankruptcy Court did not abuse its discretion in denying the requested stay.

Order affirmed.

1. Arbitration ⇐1.2

There is strong federal policy favoring arbitration as alternative dispute resolution process. 9 U.S.C.A. §§ 1–208.

2. Arbitration ⇐23.9

Dictates of Arbitration Act, requiring stays of proceedings pending arbitration, could result in delays, expenses and duplications similar to those previously experienced in bankruptcy proceedings because of dichotomy between plenary and summary jurisdiction and, therefore, policies underlying expansion of bankruptcy court jurisdiction could be relied on to resolve whether issues in suit by debtor on contract containing arbitration clause were subject to mandatory arbitration. 9 U.S.C.A. §§ 1–208; Bankr.Code, 11 U.S.C.A. § 101 et seq.

3. Arbitration ⇐23.9

Because underlying purposes of Bankruptcy Reform Act impliedly modified Arbitration Act, granting of stay pending arbitration of dispute between debtor and creditor, even when arbitration clause is contractual, is matter left to sound discretion of bankruptcy court. 9 U.S.C.A. §§ 1–208; Bankr.Code, 11 U.S.C.A. § 101 et seq.

4. Arbitration ⇐23.9

In bankruptcy court action by debtor on contract containing arbitration clause, bankruptcy court did not abuse its discretion in denying defendant's request to stay action pending arbitration. 9 U.S.C.A. §§ 1–208; Bankr.Code, 11 U.S.C.A. § 101 et seq.

Gregory M. Harvey (argued), Morgan, Lewis & Bockius, Philadelphia, Pa., for appellant.

Gary M. Schildhorn (argued), Gary D. Bressler, Adelman, Lavine, Krasny, Gold & Levin, Philadelphia, Pa., for appellee.

JUDICIAL DECISIONS

MONROE LEIGH

Arbitration—Convention on the Recognition and Enforcement of Foreign Arbitral Awards—choice of law—procedural defect in arbitration clause insufficient to bar enforcement of clause

RHONE MEDITERRANEE COMPAGNIA FRANCESE DI ASSICURAZIONI E RIASSICURAZONI [*sic*] v. LAURO. 712 F.2d 50.
U.S. Court of Appeals, 3d Cir., July 6, 1983.

Plaintiff challenged the enforceability of an arbitration clause in a time charter contract between plaintiff's subrogee and defendants. The contract provided for the settlement of disputes through arbitration to be held in Italy by two arbitrators, with a deadlock to be resolved by a mutually selected Umpire. When a contract dispute arose, plaintiff sued defendants in U.S. federal court, and defendants were granted a stay of the action pending arbitration.[1] Plaintiff appealed, contending that the arbitration clause was unenforceable under the terms of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention),[2] to which both the United States and Italy were parties. Plaintiff argued that the arbitration agreement was "null and void," since, under Italian law, arbitration was valid only if conducted by an odd number of arbitrators, while defendants contended that the forum should apply its own law respecting the validity of the arbitration clause. The U.S. Court of Appeals for the Third Circuit (per Gibbons, J.) *held:* that the validity of the arbitration clause should be measured against the fundamental policy of the Convention, which is to encourage the enforceability of arbitration agreements. Accordingly, since the Italian rule as to the number of arbitrators did not implicate the fundamental concerns of the Convention, the arbitration agreement was valid.

In support of its contention that under the terms of the Convention the arbitration clause was unenforceable, plaintiff relied on Article II, section 3 of the Convention, which provides in relevant part as follows: "The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement [to arbitrate] . . . shall . . . refer the parties to arbitration, unless it finds that the said agreement is null and void. . . ." Plaintiff contended that when an arbitration clause refers to a place of arbitration (in this case Italy), the law of that place is determinative of the "null and void" provision of Article II, section 3. Thus, plaintiff argued, since, under Italian law, an arbitration calling for an even number of arbitrators is null and void, the agreement at issue was invalid under the terms of Article II, section 3. The court, however, found this section to be ambiguous with respect to the governing

[1] 555 F.Supp. 481 (D.V.I. 1982).
[2] June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 38.

law and compared it in this connection with Article V of the Convention, which concerns the enforceability of awards. Reviewing the language of section 1(a), (d) and (e) of Article V, the court concluded that "Article V unambiguously refers the forum in which enforcement of an award is sought to the law chosen by the parties, or the law of the place of the award."[3]

Plaintiff contended that the choice-of-law rule of Article V should be read into Article II and that therefore Italian law should be applied to determine the validity of the arbitration clause. Defendants responded that Article II should be read so as to allow the forum to apply its own law to determine what is "null and void." After briefly reviewing the *travaux préparatoires* of the Convention, the court concluded that the drafters' failure to include choice-of-law language in Article II had been intentional.[4] The court recognized that the ambiguity of Article II, section 3 admitted of no certain answer; it concluded, however, that

> the meaning of Article II section 3 which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is "null and void" only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, or (2) when it contravenes fundamental policies of the forum state. The "null and void" language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate.[5]

Thus, since Italy's rule as to the number of arbitrators did not implicate fundamental concerns of either the international system or the forum, the court saw no need to allow this rule to interfere with the Convention's general policy favoring a presumption of the enforceability of arbitration agreements.

Having determined that the arbitration agreement was not void under Article II, the court turned to plaintiff's argument that in light of Italy's odd number of arbitrators rule, Italian courts would not enforce any award made under the agreement. In rejecting this argument, the court again adverted to the basic policy of the Convention and observed that plaintiff "is not faced with an Italian public policy disfavoring arbitration, but only with an Italian procedural rule of arbitration which may have been overlooked by the drafters of the time charter agreement."[6] Moreover, the parties remained free to structure the arbitration so as to comply with the Italian procedural rule by having the designated arbitrators select a third member before rather than after impasse.

Finally, the court disposed of plaintiff's contention that any award rendered under the agreement could not be enforced outside Italy, since Article V, section 1(d) of the Convention refers a non-Italian forum to the law of Italy.[7]

[3] 712 F.2d 50, 53.

[4] The court observed that a proposal entertained during the treaty negotiation to incorporate in Article II choice-of-law language similar to that in Article V was rejected by the drafters, who "were concerned that a forum might then have an obligation to enforce arbitration clauses regardless of its 'local' law." *Id.*

[5] *Id.* (citations omitted). *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 530 n.10 (1974).

[6] 712 F.2d at 54.

[7] Article V ¶1(d) permits refusal of enforcement if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing

The court rejected this argument on the ground that the power to refuse enforcement conferred on courts by section 1(d) is merely discretionary. "Where, as here, the law of such a country generally favors enforcement of arbitration awards, and the defect is at best one of a procedural nature, Article V, section 1 certainly permits another forum to disregard the defect and enforce."[8]

The decision in this case is consistent with the overwhelming endorsement by national courts of the arbitration process and the essential purpose of the Convention.[9] Here, the court sensibly refused to frustrate that purpose on the basis of a parochial rule merely technical in nature. As one commentator has justly observed: "The court should not refuse to refer the parties to arbitration because of noncompliance with some formal requirements of national law once the formal requirements of Article II, paragraph 2 have been met."[10]

Arbitration—Convention on the Recognition and Enforcement of Foreign Arbitral Awards—interpretation of "domestic awards"

BERGESEN v. JOSEPH MULLER CORPORATION. 710 F.2d 928.
U.S. Court of Appeals, 2d Cir. June 17, 1983.

Appellant, a Swiss corporation, appealed from a district court decision confirming an arbitral award rendered in favor of appellee, a Norwegian shipowner. The parties had entered into charter parties containing arbitration clauses, pursuant to which a dispute between the parties was resolved by an arbitration held in New York. Appellee sought enforcement of the award in the U.S. District Court for the Southern District of New York under the terms of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention),[1] to which the United States is a party. The district court confirmed the award and entered judgment in favor of appellee.[2] The U.S. Court of Appeals for the Second Circuit (per Cardamone, J.) affirmed and *held:* that in light of the foreign interests involved, the underlying award was not "domestic" to the United States within the meaning of the Convention, even though it was rendered in this country, and that, accordingly, the award could be enforced by a U.S. court under the terms of the Convention.

The issue on appeal was whether the Convention could be applied by a U.S. court to enforce an award arising from an arbitration held in the United States

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such agreement, was not in accordance with the law of the country where the arbitration took place."

[8] 712 F.2d at 54.

[9] *See, e.g.*, Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 15 INT'L LAW. 269, 271 (1979): "[I]n 100 cases applying the New York Convention, enforcement has been refused for reasons of public policy only three times." The three cases denying enforcement dealt with violations of the forum state's public policy that were far more substantive than procedural.

[10] *Id.* at 286.

[1] June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 38.

[2] 548 F.Supp. 650, 651 (S.D.N.Y. 1982), *summarized in* 77 AJIL 308 (1983).