vantages gained by recalling tenured teachers instead of hiring new probationary teachers, and the public interest in reinforcing contractual expectations, simply do not compare with the public interest involved in ridding Kalamazoo schools of the terrible effects of segregation. The public interest lies strongly with the court's previous order.

CONCLUSION

The court, finding none of the tests for obtaining a stay to be met, denies the request for a stay pending appeal.

ICCA

In the Matter of the Arbitration between Sigval BERGESEN, as Owners of the M.T. SYDFONN, FROSTFONN, and NORDFONN, Petitioner,

and

JOSEPH MULLER CORPORATION, Respondent.

No. 81 Civ. 7698-CSH.

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

Oct. 7, 1982.

Norwegian owner of three cargo vessels commenced action against charterer of vessels, to confirm and enter judgment upon award of arbitrators rendered in New York in favor of owner and against charterer pursuant to arbitration clauses contained in charter parties. The District Court, Haight, J., held that convention on the recognition and enforcement of foreign arbitral awards, as implemented by United States law, applied to arbitration award involving foreign interests and rendered in United States.

Order accordingly.

International Law ⇐13

Although Congress, in guise of ratifying or implementing "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" could not include provisions contrary to express enactments of convention, where convention itself provided that convention applied to all arbitral awards rendered in country other than state of enforcement and to awards not considered as domestic in state of enforcement, even if such awards were rendered in territory of that state, and Congress excluded from convention only agreement or award arising out of commercial relationship which was entirely between citizens of United States, convention, as implemented by United States law, applied to arbitration award involving foreign interests and rendered in United States. 9 U.S.C.A. §§ 201–208, 202.

Healy & Baillie, New York City, for petitioner; Raymond A. Connell, Elisa M. Pugliese, New York City, of counsel.

Moore, Berson, Lifflander & Mewhinney, New York City, for respondent; Michael T. Sullivan, Michael R. Sonberg, New York City, of counsel.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Petitioner Sigval Bergesen, the Norwegian owner of three cargo vessels ("Bergesen"), commenced this action against respondent Joseph Muller Corporation ("Muller"), a Swiss corporation and charterer of the vessels, to confirm and enter judgment upon an award of arbitrators rendered in New York in favor of Bergesen and against Muller pursuant to arbitration clauses contained in the charter parties. Bergesen invokes the jurisdiction of this Court pursuant to Chapter 2 of 9 U.S.C., entitled "Convention on the Recognition and Enforcement of Foreign Arbitral Awards." 9 U.S.C. §§ 201–208 (the "Convention"). Muller contends that the arbitration award does not fall under the Convention, and that in consequence this Court lacks subject

matter jurisdiction. The case presents, in circumstances rendering its avoidance impossible, the question of whether the Convention, as implemented by United States law, applies to awards involving foreign interests but made in the United States, or only to awards involving such interests and made in foreign countries. The Second Circuit has noted the disagreement of commentators on this question, *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 426 n.2 (1974), and itself characterized the controversy as "intriguing" in *Andros Compania Maritima v. Marc Rich & Co., A.G.*, 579 F.2d 691, 699 n.11 (2d Cir. 1978), although finding it unnecessary to resolve the question in either case, or, so far as appears, in any other case.

This Court construes the Convention, as implemented by United States law, to apply to arbitration awards involving foreign interests and rendered in the United States. Accordingly the award will be confirmed, and judgment entered in Bergesen's favor.

I.

The charter parties provided for the ocean carriage of cargoes consisting of vinyl chloride monomer ("VCM") and propylene between American, Caribbean, and European ports. There is no dispute that the charter parties contained enforceable arbitration clauses,[1] or that arbitrable disputes arose between the parties, or that, under date of December 14, 1978, an arbitration panel appointed in accordance with the terms of the clauses awarded Bergesen $61,406.09, with additional interest running at the rate of 8% per annum until payment. Bergesen has been attempting ever since to collect this amount, together with an additional $8,462.00 and interest representing payment by Bergesen of arbitrators' fees and expenses which should have been paid by Muller.

Bergesen's initial effort at collection took the form of an action commenced in the courts of Switzerland in May, 1979. Certain details of that litigation are furnished in the affidavit of Dr. C. Mark Bruppacher, counsel for Bergesen, submitted on the present motion. I do not pretend to understand all the intricacies of Swiss law to which Dr. Bruppacher refers. It is sufficient to say that Bergesen has not yet obtained a recovery from Muller in the Swiss courts; and that Muller is resisting the Swiss action on the grounds that the arbitration award did not fall within the Convention, and that, in order to be enforceable as a judgment in Switzerland, "the award needed to be confirmed under

1. Clause 18 of the October 27, 1970 charter party provides as follows:

"If at any time there shall arise any controversies, disputes or claims relating to this Agreement, its performance or any alleged breach thereof, or any matter relating to the construction of interpretation of this Agreement, which cannot be amicably settled or disposed of by the parties, the same shall, upon the demand of either party hereto, be resolved by arbitration as herein provided.

"The party demanding arbitration shall notify the other by registered mail, return receipt requested. Within 30 (thirty) days after mailing such letter, each party shall nominate one arbitrator who shall be persons actively and commercially connected with the VCM product, international business and experts in the LPG chemical gas transportation. The two arbitrators so appointed shall, by mutual agreement, appoint a third arbitrator, who shall serve as Chairman or Umpire. If either of the parties fails or refuses to agree on the person to act as Chairman or Umpire within 60 (sixty) days after the demand for arbitration, the Chairman of the American Arbitration Association will, on the application of either party, appoint the theretofore non-appointed arbitrator or Chairman, or both, as the case may be, provided, however, the person or persons so appointed shall be actively and commercially connected with the VCM product, international business and an expert in LPG gas transportation. The arbitration shall take place in New York, New York, and shall be governed by the Laws of the State of New York, and the award when made by a majority of the arbitrators may be enforced in any court which shall have jurisdiction, and shall be final and binding on the parties anywhere in the world.

"Each party shall pay the costs and expenses of the person appointed by him, the costs and expenses of the other arbitrator and/or Chairman shall be paid by the person designated by the majority."

A comparable clause appears in the March 5, 1971 charter party, that being the second of the two charter parties giving rise to disputes between Bergesen and Muller.

the New York Civil Practice Law and Rules § 7150." Bruppacher affidavit of February 16, 1982 at ¶ 5.

If Muller is correct in those contentions—namely, that confirmation of the arbitration award in New York is a condition precedent to an enforceable judgment in Switzerland, and that this case does not fall under the Convention—then Muller may escape liability entirely. That is because it is now too late for Bergesen to move to confirm the award and for entry of judgment under either NYCPLR § 7510 or its counterpart, the Federal Arbitration Act of 1947, 9 U.S.C. §§ 1–14.[2] Under either statute, the motion to confirm the arbitration award must be made within one year of the award. NYCPLR § 7510; 9 U.S.C. § 9. The Convention, however, extends a potential lifeline to Bergesen in the form of 9 U.S.C. § 207, which permits an application to a court having jurisdiction for an order of confirmation "[w]ithin three years after an arbitral award falling under the Convention is made..." It is that lifeline which Muller seeks to snatch from Bergesen's grasping fingers. The case turns upon whether or not the award is one "falling under the Convention."

II

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted at the conclusion of a United Nations conference which was held in New York in 1958. The United States implemented the Convention by enacting Chapter 2 of the Federal Arbitration Act, on July 31, 1970, Pub.L. 91–368, 84 Stat. 692, by which time the Convention was already in effect in 34 other countries.

The scope of the Convention, as enacted into United States law, is delineated in 9 U.S.C. § 202, which provides:

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

The legislative history says of this section:

"Section 202 defines the agreements or awards that fall under the Convention. The second sentence of section 202 is intended to make it clear that an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not enforceable under the Convention in U.S. courts unless it has a reasonable relation with a foreign state." H.R.Rep. No. 91–1181, 91st Cong., 2d Sess. 2, reprinted in [1970] U.S.Code Cong. & Ad.News 3601, 3602.

Confirmation of an award under the Convention is provided for by 9 U.S.C. § 207, which reads in its entirety:

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

It has been held that where entirely foreign interests agree to arbitrate in New York disputes arising out of their commercial relationship, this Court has jurisdiction under the Convention to compel arbitration

2. These arbitration agreements, providing for arbitration in New York, and being contained in maritime transactions, fall within both NYCPLR §§ 7510, 7511 and the Federal Arbitration Act. See, generally, *I/S Stavborg*, *supra*, at 430 n.12.

and, if need be, appoint an arbitrator. *Sumitomo Corp. v. Parakopi Compania Maritima, S.A.*, 477 F.Supp. 737 (S.D.N.Y.1979), *aff'd*, 620 F.2d 286 (2d Cir. 1980).[3] The case at bar presents the question of whether the Convention's provisions with respect to confirming the arbitrators' award also apply where foreign interests agree to arbitration in New York. To sustain its contention that this question must be answered in the negative, Muller must demonstrate a Congressional intent, express in the implementing statute or implicit in its purpose or legislative history, to exclude from the enforcement provisions of the Convention arbitration agreements between foreigners calling for arbitration in New York.

The difficulty Muller faces is that when Congress, in enacting Chapter 2 of the Federal Arbitration Act, intended to exclude certain transactions or proceedings, it knew how to do so. Thus, as we have seen, 9 U.S.C. § 202 provides in part:

> "An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." (emphasis added).

In *Sumitomo Corp.*, *supra*, Judge Werker of this Court rejected a contention that an arbitration agreement solely between foreign parties did not fall under the Convention as implemented in this country by the Congress:

> "In delineating the coverage of the Convention, Congress explicitly excluded purely domestic transactions. 9 U.S.C. § 202. Had Congress also intended to exclude purely foreign transactions, it undoubtedly would have done so explicitly as well." 477 F.Supp. at 741.

Here we deal, not with enforcement of the agreement to arbitrate, but with enforcement of the subsequent award. Had Congress, in delineating the coverage of the enforcement provisions of the Convention, desired to exclude awards rendered in the United States as opposed to a foreign country, it would equally undoubtedly have made that exclusion explicit. But there is no such limitation upon the awards entitled to enforcement under the Convention. Furthermore, the statute by which the Convention became a part of United States law is broad and remedial. 9 U.S.C. § 203 provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States," so that the district courts have original jurisdiction without regard to the amount in controversy. Under § 204, an alternative venue for "an action or proceeding" under the Convention is the district court "which embraces the place designated in the agreement as the place of arbitration if such place is within the United States." Section 206 empowers the district court to compel arbitration in accordance with the agreement, "whether that place is within or without the United States." Thus Congress specifically contemplated an arbitration agreement, falling under the Convention, which provided for arbitration in the United States (such as New York). No logical reason is suggested why a United States District Court, specifically granted jurisdiction and venue over such an agreement, and given the power to compel arbitration, should be denied the power to enforce the subsequent award.

No express language in the implementing statute requires that result. Although the legislative history is relatively sparse, what statements there are militate in favor of a broad construction of the Convention's remedies. Thus the House Report states:

> "In the committee's view, the provisions of S. 3274 will serve the best interests of

3. The case turned on the Convention's provisions for compelling arbitration and appointing arbitrators, which appear in 9 U.S.C. § 206:

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

> 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." [1970] U.S. Code Cong. & Ad.News at 3602.

If Muller's narrow construction of the Convention, as implemented in the United States, is accepted, Americans could not enter into arbitration agreements with foreign interests providing for arbitration in New York, and be assured of enforcement of an award in a United States court.

Similarly, the Department of State in writing to the Speaker of the House of Representatives in support of the implementing statute, spoke of the support which the legislation had received from a number of interested bodies, and went on to say:

> "The consensus of the group, with which the Department of Justice concurs, was that rather than amending a series of sections of the Federal Arbitration Act it would be preferable to enact a new chapter dealing exclusively with recognition and enforcement of awards falling under the Convention. This approach would leave unchanged the largely settled interpretation of the Federal Arbitration Act. Moreover, it would avoid complicated interlineations which, while facilitating implementation of the Convention, might also mislead or confuse persons dealing with cases falling under the Federal Arbitration Act but not under the Convention." *Id.* at 3603.

Again, this language militates in favor of a broad application of the Convention principles unfettered by technical limitations.

In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15, 94 S.Ct. 2449, 2457 n.15, 41 L.Ed.2d 270 (1975), the Supreme Court said of the Convention:

> "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."

While the arbitration involved in *Scherk* took place before the International Chamber of Commerce in Paris, the Court nonetheless speaks broadly in respect of the Convention's goal "to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." That is a uniformity which Muller's narrow view of the Convention's award enforcement remedies would diminish.

For these reasons (though concededly not fully articulated), I have previously held that enforcement of an arbitration award rendered in New York, in disputes arising out of charter parties between foreign corporations, falls within the Convention. *Transmarine Seaways Corp. v. Marc Rich & Co., A.G.*, 480 F.Supp. 352 (S.D.N.Y.1979). I appreciate that in *Diapulse Corporation of America v. Carba, Ltd.*, 78 Civ. 3263 (VLB) (S.D.N.Y., 1979), *remanded on other grounds*, 626 F.2d 1108 (2d Cir. 1980), Judge Broderick reached a different conclusion with respect to the applicability of the Convention to the enforcement of a New York arbitration award in which one of the two parties was foreign, but he gave no analysis for his conclusion, and in any event, and with due respect, I could not follow it.

Thus if we look only to the statute by which Congress made the Convention a part of United States law, this Court's subject matter jurisdiction in the case at bar is manifest.

III.

But Muller argues that the Convention "by its own terms" excludes enforcement of this award in the United States from its scope. Muller relies upon Article I(1) of the Convention itself, which provides as follows:

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences be-

tween persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

In Muller's view, under Article I(1), the award cannot be enforced if New York would regard it as "domestic"; and it must be so characterized, the argument runs, since the award was rendered in New York in an arbitration conducted by the American Arbitration Association, with New York counsel appearing for the parties, and the award, limited to money damages, being payable in dollars.

I accept the proposition that the Congress, in the guise of ratifying or implementing the Convention, could not include provisions contrary to the express and unambiguous enactments of the latter instrument. But this has not occurred. Analysis of Article I(1) of the Convention reveals that it may be read in harmony with the American implementing statute, in such a way as to vest this Court with subject matter jurisdiction in the case at bar.

The first paragraph of Article I has been characterized as "one of the most controversial clauses in the Convention."[4] The conferees' purpose was to draft a Convention on the recognition and enforcement of "foreign arbitral awards"; but the question immediately arose, what was a "foreign award"?

The original draft Convention, prepared by an *ad hoc* committee of governmental experts from eight countries,[5] prepared a draft in which Article I was substantially the same as the first sentence of Article I(1) as the Convention finally emerged.[6] Thus, in the Committee's draft, the concept of "foreign award" was limited to awards rendered in a country other than that where enforcement was sought. The delegates of certain nations took the position that this solely territorial criterion "was not adequate to establish whether an arbitral award should be regarded as foreign or domestic. The nationality of the parties, the object of the dispute, and the rules of arbitral procedure were other factors which should be taken into account in determining the nationality of an award," the place where the award is made often being chosen "merely as a matter of convenience . . ."[7] France, for example, took the position that an award made in France under foreign law should be regarded as a non-domestic, and hence a "foreign" award.[8]

The Conference set up a working committee to deal with this question. As the Conference progressed, the second sentence was added to Article I(1). Thus, Article I(1) as enacted contains two criteria for determining whether or not an award is "foreign," and thus falling within the Convention: the first criterion appears in the first sentence of the Article, and the second criterion appears in the second sentence. The efforts of that working committee, which eventually found their way into the Convention, are summarized thus:

> "In the Working Party of ten states appointed to deal with this problem, it was decided to leave in both criteria: that which determines whether an award is foreign by the place where it is made and that which leaves it to the state where enforcement is sought to determine whether or not the award is domestic."[9]

In order to meet the continuing objections of certain states, a provision was later add-

4. Contini, International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 8 Am.J.Comp.L. 283, 292 (1959).

5. Contini, op. cit. at 290.

6. G. W. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Summary Analysis of Record of United Nations Conference, May/June 1958, at 1.

7. Contini, op. cit. at 292.

8. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1058, 1061 (1961).

9. Haight, op. cit. at 4.

ed "permitting the state to limit recognition and enforcement to awards made only in the territory of another contracting state." [10] That provision appears in Article I(3), which provides:

"When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply to the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

In consequence of all this, and as one commentator has written:

"The language of the first paragraph of Article I seems to permit only one construction, i.e. that, except as provided in paragraph 3, the Convention applies to all arbitral awards rendered in a country other than the state of enforcement, whether or not any of such awards may be regarded as domestic in that state; it also applies to all awards not considered as domestic in the state of enforcement, whether or not any of such awards may have been rendered in the territory of that state." [11]

Addressing the criteria of eligibility under the Convention for the enforcement of an arbitral award as "foreign," another commentator has written:

"In this two-limb formula, the old criterion of eligibility emerges liberalized of the requirements of territoriality and stripped of the conditions of citizenship and reciprocity which were paramount hitherto. Under the first limb, although the territoriality principle remains partially operative in the sense that the award must have been rendered outside the jurisdiction of the enforcing forum, a petitioner whose award happened to be pronounced in the territory of a state not subject to the Convention may well be entitled to relief in the courts of one of the contracting states. Under the second limb, the maxim *locus regit actum* is further modified in that an award relating to an international transaction rendered in the territory where enforcement is requested is not solely governed by its municipal law, but may also qualify under the regime established by the Convention. A patent, if largely deliberate, ambiguity is left by the absence of any definition of 'nondomestic' awards. The intention behind this omission is to extend as far as possible the variety of eligible awards while at the same time allowing the enforcing authority to supply the definition in conformity with its own law." [12]

Since the second criterion for eligibility in Article I(1) of the Convention, embodied in the second sentence thereof, looks to the law of the enforcing state as to whether or not the award falls under the Convention, we return to 9 U.S.C. § 202, quoted *supra*. And, as noted, in that section the Congress saw fit to exclude from the Convention only "[a]n agreement or award" arising out of a commercial relationship "which is entirely between citizens of the United States," unless significant foreign contacts are involved. Congress could have, under the Convention, enacted § 202 to define arbitral awards rendered in the United States between foreign commercial disputants as "domestic" within the context of Article I(1) of the Convention, and hence beyond the subject matter jurisdiction of this Court as conveyed by the implementing statute. Alternatively, Congress could have used the power of reservation contained in Article I(3) of the Convention to limit enforcement in the United States under the Convention to awards rendered in other contracting states. Either provision would have branded the award at bar "domestic" and unenforceable in this forum. But Congress

10. *Id.* at 1.

11. Contini, op. cit. at 293-94.

12. Pisar, The United Nations Convention on Foreign Arbitral Awards, 33 So.Cal.L.Rev. 14, 18 (1959).

adopted neither of these alternatives. And by refraining from such limiting action, Congress manifested its intention "to extend as far as possible the variety of eligible awards" under the Convention, by means of supplying its own broad but legally permissible definitions.[13]

CONCLUSION

The petition to confirm the award of the arbitrators, and to enter judgment thereon, is granted. Counsel for petitioner are directed to settle order and judgment, on five (5) days' notice, within the next ten (10) days, failing which the Court will enter its own order and judgment.

W. A. BUNTIN, Plaintiff,

v.

BOARD OF TRUSTEES OF the VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM, and Glen D. Pond, Director, Defendants.

Civ. A. No. 81-0057-C.

United States District Court, W. D. Virginia, Charlottesville Division.

Oct. 7, 1982.

An action was filed seeking declaratory, injunctive and monetary relief to redress alleged discriminatory practices on the part of the Board of Trustees of Virginia Supplemental Retirement System. A motion to dismiss was filed. The District Court, Michael, J., held that the action was barred by the two-year statute of limitations governing personal actions for injury to person or property.

Action dismissed.

13. *Ibid.*

1. Civil Rights ⇐13.10

Action seeking declaratory, injunctive and monetary relief to redress alleged discriminatory practices by Board of Trustees of Virginia Supplemental Retirement System and its director was governed by Virginia two-year statute of limitations governing personal actions for injury to person or property. 42 U.S.C.A. §§ 1983, 1985; Va.Code 1950, § 8.01-243.

2. Conspiracy ⇐16

Plaintiff failed to establish any conspiracy to deprive him of his civil rights so as to avoid determination that action seeking declaratory, injunctive and monetary relief to redress alleged discriminatory practices on part of Board of Trustees of Virginia Supplemental Retirement System and its director was barred by two-year Virginia statute of limitations governing personal actions for injury to person or property. 42 U.S.C.A. §§ 1983, 1985; Va.Code 1950, § 8.01-243.

3. Civil Rights ⇐13.10

For purposes of action seeking declaratory, injunctive and monetary relief to redress alleged discriminatory practices on part of Board of Trustees of Virginia Supplemental Retirement System and its director, cause of action accrued when plaintiff's benefits were terminated, not when letter was sent to plaintiff's attorney reiterating what plaintiff had repeatedly been told about prior actions. 42 U.S.C.A. §§ 1983, 1985; Va.Code 1950, § 8.01-243.

4. Conspiracy ⇐2

There could have been no conspiracy between Board of Trustees of Virginia Supplemental Retirement System and its director to violate plaintiff's civil rights, as those officials were officials of Commonwealth of Virginia and comprised a single legal entity, not capable of entering into conspiracy. 42 U.S.C.A. § 1985(3).

5. Civil Rights ⇐13.10

Plaintiff's cause of action seeking declaratory, injunctive and monetary relief to

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 951—August Term, 1982

(Argued February 28, 1983 Decided June 17, 1983)

Docket No. 82-7880

SIGVAL BERGESEN, as Owners of the M/T SYDFONN, FROSTFONN and NORDFONN,

Petitioner-Appellee,

—against—

JOSEPH MULLER CORPORATION,

Respondent-Appellant.

Before:

FEINBERG, *Chief Judge,*
CARDAMONE and PIERCE, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York (Haight, J.)

granting enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of an award rendered in New York involving a dispute between two foreign parties.

Affirmed.

MICHAEL R. SONBERG, New York, New York (Michael T. Sullivan, Moore, Berson, Lifflander & Mewhinney, New York, New York, of counsel), *for Respondent-Appellant*.

ELISA M. PUGLIESE, New York, New York (Raymond A. Connell, Healy & Baillie, New York, New York), *for Petitioner-Appellee*.

CARDAMONE, *Circuit Judge:*

The question before us on this appeal is whether the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, is applicable to an award arising from an arbitration held in New York between two foreign entities. Responding to the rapid expansion of international trade following World War II, the Convention reflects the efforts of businessmen involved in such trade to provide a workable mechanism for the swift resolution of their day-to-day disputes. International merchants often prefer arbitration over litigation because it is

faster, less expensive and more flexible. But previous international agreements had not proved effective in securing enforcement of arbitral awards; nor had private arbitration through the American Arbitration Association, the International Chamber of Commerce, the London Court of Arbitration and the like been completely satisfactory because of problems in enforcing awards. *See generally* Pisar, *The United Nations Convention on Foreign Arbitral Awards*, 33 S. Cal. L. Rev. 14 (1959) (Pisar); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1051 (1961) (Quigley).

In 1958, a convention was called to deal with these problems. The United States attended and participated in the conference but did not sign the Convention. Ten years later, in 1968, the Senate gave its consent, but accession was delayed until 1970 in order for Congress to enact the necessary implementing legislation. *See* McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. Mar. L. Com. 735, 737 (1971) (McMahon). There was no opposition to the proposed legislation, H.R. Rep. No. 91-1181, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. Code Cong. & Ad. News 3601, 3602, which became 9 U.S.C. §§ 201-208 (1976).

In resolving the question presented on this appeal, we are faced with the difficult task of construing the Convention. The family of nations has endlessly—some say since the Tower of Babel—sought to breach the barrier of language. As illustrated by the proceedings at this conference, the delegates had to comprehend concepts familiar in one state that had no counterpart in others and to compromise entrenched and differing national commer-

cial interests. Concededly, 45 nations cannot be expected to produce a document with the clear precision of a mathematical formula. Faced with the formidable obstacles to agreement, the wonder is that there is a Convention at all, much less one that is serviceable and enforceable. Yet, the proposals agreed upon in the Convention have not raised the kinds of legal questions that a commentator reported one of the delegates feared would be the joy of jurists, but the bane of plaintiffs, *see* Contini, *International Commercial Arbitration*, 8 Am. J. Comp. L. 283, 293 (1959) (Contini).

I

The facts are undisputed and may be briefly stated. Sigval Bergesen, a Norwegian shipowner, and Joseph Muller Corporation, a Swiss company, entered into three charter parties in 1969, 1970 and 1971. The 1969 and 1970 charters provided for the transportation of chemicals from the United States to Europe. The 1971 charter concerned the transportation of propylene from the Netherlands to Puerto Rico. Each charter party contained an arbitration clause providing for arbitration in New York, and the Chairman of the American Arbitration Association was given authority to resolve disputes in connection with the appointment of arbitrators.

In 1972, after disputes had arisen during the course of performing the 1970 and 1971 charters, Bergesen made a demand for arbitration of its claims for demurrage and shifting and port expenses. Muller denied liability and asserted counterclaims. The initial panel of arbitrators chosen by the parties was dissolved because of Muller's objections and a second panel was selected through the offices of the American Arbitration Association. This

panel held hearings in 1976 and 1977 and rendered a written decision on December 14, 1978. It decided in favor of Bergesen, rejecting all of Muller's counterclaims save one. The net award to Bergesen was $61,406.09 with interest.

Bergesen then sought enforcement of its award in Switzerland where Muller was based. For over two years Muller successfully resisted enforcement. On December 10, 1981, shortly before the expiration of the three-year limitations period provided in 9 U.S.C. § 207, Bergesen filed a petition in the United States District Court for the Southern District of New York to confirm the arbitration award. In a decision dated October 7, 1982 and reported at 548 F. Supp. 650 (S.D.N.Y. 1982), District Judge Charles S. Haight, Jr. confirmed Bergesen's award, holding that the Convention applied to arbitration awards rendered in the United States involving foreign interests. Judgment was entered awarding Bergesen $61,406.09, plus interest of $18,762.01. Additionally, Bergesen received $8,462.00 for Muller's share of arbitrators' fees and expenses which it had previously paid, together with interest of $2,253.63 on that amount.

On appeal from this $90,883.73 judgment, Muller contends that the Convention does not cover enforcement of the arbitration award made in the United States because it was neither territorially a "foreign" award nor an award "not considered as domestic" within the meaning of the Convention. Muller also claims that the reservations adopted by the United States in its accession to the Convention narrowed the scope of its application so as to exclude enforcement of this award in United States courts, that the statute implementing the treaty was not intended to cover awards rendered within the United States, and finally, that Bergesen's petition to obtain

enforcement was technically insufficient under the applicable requirements of the Convention.

II

Whether the Convention applies to a commercial arbitration award rendered in the United States is a question previously posed but left unresolved in this Court. *See Andros Compania Martima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 699 n.11 (2d Cir. 1978); *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 426 n.2 (2d Cir. 1974). The two district courts that have addressed the issue have reached opposite conclusions, with little in the way of analysis. *Compare Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co., A.G.*, 480 F. Supp. 352, 353 (S.D.N.Y.) (Haight, J.) (finding the Convention applicable), *aff'd mem.*, 614 F.2d 1291 (2d Cir. 1979), *cert. denied*, 445 U.S. 930 (1980) *with Diapulse Corporation of America v. Carba, Ltd.*, No. 78 Civ. 3263 (S.D.N.Y. June 28, 1979) (Broderick, J.) (Convention did not apply "by its terms"), *remanded on other grounds*, 626 F.2d 1108 (2d Cir. 1980). The facts of the instant case make it necessary to resolve what this Court earlier termed an "intriguing" issue, *see Andros Compania Maritima, S.A.*, 579 F.2d at 699 n.11.

To resolve that issue we turn first to the Convention's history. Under the auspices of the United Nations, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards was convened in New York City in 1958 to resolve difficulties created by two earlier treaties—the 1923 Geneva Protocol on Arbitration Clauses, 27 L.N.T.S. 157 (1924), and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, 92 L.N.T.S. 301 (1929). Because of the legal and practical

difficulties which arose from application of these earlier treaties,[1] one commentator wrote, "The formidable amount of highly qualified labor which went into their preparation has not been rewarded by any perceptible progress in international commercial arbitration." Nussbaum, *Treaties on Commercial Arbitration—A Test of International Private-Law Legislation*, 56 Harv. L. Rev. 219, 236 (1942).

A proposed draft of the 1958 Convention which was to govern the enforcement of foreign arbitral awards stated that it was to apply to arbitration awards rendered in a country other than the state where enforcement was sought. *See* G. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1 (1958) (Haight). This proposal was controversial because the delegates were divided on whether it defined adequately what constituted a foreign award. On one side were ranged the countries of western Europe accustomed to civil law concepts; on the other side were the eastern European states and the common law nations. Contini at 292. For example, several countries, including France, Italy and West Germany, objected to the proposal on the ground that a territorial criterion was not adequate to establish whether an award was foreign or domestic. These nations believed that the nationality of the parties, the subject of the dispute and the rules of arbitral procedure were factors to be taken into account in determining whether an award was foreign. *Id.*; Haight at 2. In both France and West Germany, for example, the nationality

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of an award was determined by the law governing the procedure. Thus, an award rendered in London under German law was considered domestic when enforcement was attempted in Germany, and an award rendered in Paris under foreign law was considered foreign when enforcement was sought in France. Contini at 292. As an alternative to the territorial concept, eight European nations proposed that the Convention "apply to the recognition and enforcement of arbitral awards other than those considered as domestic in the country in which they are relied upon." Haight at 2. Eight other countries, including the United States, objected to this proposal, arguing that common law nations would not understand the distinction between foreign and domestic awards. These latter countries urged the delegates to adopt only the territorial criterion.

A working party composed of representatives from ten states to which the matter was referred recommended that both criteria be included. Thus, the Convention was to apply to awards made in a country other than the state where enforcement was sought as well as to awards not considered domestic in that state. The members of the Working Party representing the western European group agreed to this recommendation, provided that each nation would be allowed to exclude certain categories of awards rendered abroad. At the conclusion of the conference this exclusion was omitted, so that the text originally proposed by the Working Party was adopted as Article I of the Convention. A commentator noted that the Working Party's intent was to find a compromise formula which would restrict the territorial concept. Contini at 293. The final action taken by the Convention appears to have had the opposite result, i.e., except as provided in paragraph 3, the first paragraph of Article I means that the Conven-

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To assure accession to the Convention by a substantial number of nations, two reservations were included. They are set forth in Article I(3). The first provides that any nation "may on the basis of reciprocity declare that it will apply the Convention" only to those awards made in the territory of another contracting state. The second states that the Convention will apply only to differences arising out of legal relationships "considered as commercial under the national law" of the state declaring such a reservation. These reservations were included as a necessary recognition of the variety and diversity of the interests represented at the conference, as demonstrated, for example, by the statement of the delegate from Belgium that without any right of reservation his country would not accede. Haight at 16; Quigly at 1061.

III

With this background in mind, we turn to Muller's contentions regarding the scope of the Convention. The relevant portion of the Convention, Article 1, is set forth in the margin.[2] The territorial concept expressed in the

[2] This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

first sentence of Article I(1) presents little difficulty. Muller correctly urges that since the arbitral award in this case was made in New York and enforcement was sought in the United States, the award does not meet the territorial criterion. Simply put, it is not a foreign award as defined in Article I(1) because it was not rendered outside the nation where enforcement is sought.

Muller next contends that the award may not be considered a foreign award within the purview of the second sentence of Article I(1) because it fails to qualify as an award "not considered as domestic." Muller claims that the purpose of the "not considered as domestic" test was to provide for the enforcement of what it terms "stateless awards," i.e., those rendered in the territory where enforcement is sought but considered unenforceable because of some foreign component. This argument is unpersuasive since some countries favoring the provision desired it so as to preclude the enforcement of certain awards rendered abroad, not to enhance enforcement of awards rendered domestically.

Additionally, Muller urges a narrow reading of the Convention contrary to its intended purpose. The Convention did not define nondomestic awards. The definition appears to have been left out deliberately in order to cover as wide a variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of "nondomestic" in conformity with its own national law. Omitting the definition made it easier for those states championing the territorial concept to ratify the Convention while at the same time making the Convention more palatable in those states which espoused the view that the nationality of the award was to be determined by the law governing the arbitral procedure. We adopt the view that awards "not considered as domestic"

denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. *See generally* Pisar at 18. We prefer this broader construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards, *see Scherk v. Alberto Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Applying that purpose to this case involving two foreign entities leads to the conclusion that this award is not domestic.

IV

Muller also urges us to interpret the Convention narrowly based on the fact that, as stated in a Presidential Proclamation dated September 1, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, the 1970 accession by the United States to the Convention adopted both reservations of Article I(3). The fact that the United States acceded to the Convention with a declaration of reservations provides little reason for us to construe the accession in narrow terms. Had the United States acceded to the Convention without these two reservations, the scope of the Convention doubtless would have had wider impact. Comment, *International Commercial Arbitration Under the United Nations Convention and the Amended Federal Arbitration Statute*, 47 Wash. L. Rev. 441 (1972). Nonetheless, the treaty language should be interpreted broadly to effectuate its recognition and enforcement purposes. *See Scherk*, 417 U.S. at 520 n.15 (the Convention's goal was "to encourage the recognition and enforcement of com-

mercial arbitration agreements in international contracts"); *Reed v. Wiser*, 555 F.2d 1079, 1088 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *cf. Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (Rakta)*, 508 F.2d 969, 974 (2d Cir. 1974) (defenses to enforcement of foreign awards under the Convention are narrowly construed).

V

We now turn to the argument that the implementing statute was not intended to cover awards rendered within the United States. Section 202 of Title 9 of the United States Code which is entitled "Agreement or award falling under the Convention," provides in relevant part:

> An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

The legislative history of this provision indicates that it was intended to ensure that "an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not enforceable under the Convention in [United States] courts unless it has a reasonable relation with a foreign state." H.R. Rep. No.91-1181, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. Code Cong. & Ad. News 3601, 3602. Inasmuch as it was apparently left to each state to define which awards were to be considered nondomestic, *see Pisar* at 18, Congress spelled out its definition of that concept in

section 202. Had Congress desired to exclude arbitral awards involving two foreign parties rendered within the United States from enforcement by our courts it could readily have done so. It did not. *See Sumitomo Corp. v. Parakopi Compania Maritima*, 477 F. Supp. 737, 741 (S.D.N.Y. 1979), *aff'd mem.*, 620 F.2d 286 (2d Cir. 1980); Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw. U. L. Rev. 1,16 (1971) (Under implementing legislation Convention should apply when foreign contacts are substantial, i.e., "where a foreign person or corporation is a party to an agreement involving foreign performance, or where the business deal has some other 'reasonable relation with one or more foreign states.' "); *see also* McMahon at 740-43 (questioning whether section 202 covers awards similar to that in the present case).

Additional support for the view that awards rendered in the United States may qualify for enforcement under the Convention is found in the remaining sections of the implementing statute. It has been held that section 203 of the statute provides jurisdiction for disputes involving two aliens. *See Sumitomo Corp.*, 477 F. Supp. at 740-41. Section 204 supplies venue for such an action and section 206 states that "[a] court having jurisdiction under this chapter may direct that arbitration be held . . . at any place therein provided for, *whether that place is within or without the United States*" (emphasis supplied). It would be anomalous to hold that a district court could direct two aliens to arbitration within the United States under the statute, but that it could not enforce the resulting award under legislation which, in large part, was enacted for just that purpose.

Muller's further contention that it could not have been the aim of Congress to apply the Convention to this transaction because it would remove too broad a class of awards from enforcement under the Federal Arbitration Act, 9 U.S.C. §§ 1-13, is unpersuasive. That this particular award might also have been enforced under the Federal Arbitration Act is not significant. There is no reason to assume that Congress did not intend to provide overlapping coverage between the Convention and the Federal Arbitration Act. Similarly, Muller's argument that Bergesen only sought enforcement under the terms of the Convention because it has a longer statute of limitations than other laws under which Bergesen could have sued is irrelevant. Since the statutes overlap in this case Bergesen has more than one remedy available and may chose the most advantageous.

VI

Finally, Muller asserts that Bergesen's petition for enforcement was technically insufficient and did not meet the requirements of the Convention. Bergesen submitted the affidavit of Harry Constas, chairman of the arbitration panel, certifying the award and the charter parties on which it was based. Under Article IV(1) of the Convention

> [t]o obtain the recognition and enforcement mentioned in the preceeding article, the party applying for recognition and enforcement shall, at the time of the application supply:
> (a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

Muller would have us read this provision as requiring either a duly authenticated original or a duly certified copy *of a duly authenticated* original. Such an interpretation is unnecessarily restrictive and at odds with a common sense reading of the provision. Copies of the award and the agreement which have been certified by a member of the arbitration panel provide a sufficient basis upon which to enforce the award and such were supplied in this case.

The judgment is affirmed.

BURLINGHAM UNDERWOOD & LORD
1 BATTERY PARK PLAZA
NEW YORK, NEW YORK 10004
Tel. (212) 422-7585

TO: Dr. Rosabel E. Everard

Your ref.

Our ref. 91091

FORWARDED WITHOUT COVERING LETTER

- ☐ With compliments
- ☐ In compliance with your request
- ☐ Returned with thanks
- ☐ Kindly telephone me about this matter
- ☐ For your guidance
- ☒ May be of interest
- ☐ Copies for your files
- ☐ For your approval
- ☐ Kindly let me have your comments
- ☐ For your signature
- ☐ Need not be returned
- ☐ Kindly return
- ☐ As discussed
- ☐ Other – see below

MICHAEL MARKS COHEN

Date June 29 198 3

a more detailed pleading requirement in such cases obliges a plaintiff to give some thought to the theory of his case, thought that may well reveal to him that he does not, after all, have a case worth pursuing in a federal jurisdiction; it also obliges his attorney to reckon with the "good ground" standard of Fed.R.Civ.P. 11 when he endeavors to plead factual allegations.

Though we are not prepared to say that a diminution of a doctor's out-of-state payments cannot satisfy the jurisdictional element of an antitrust claim, we think Dr. Furlong should be more specific as to the jurisdictional facts of her claim before a district court can be asked to rule whether her claim involves a not insubstantial effect on commerce.

For these reasons, the judgment dismissing the complaint without prejudice is affirmed.

Sigval BERGESEN, as Owners of the M/T SYDFONN, FROSTFONN and NORDFONN, Petitioner-Appellee,

v.

JOSEPH MULLER CORPORATION, Respondent-Appellant.

No. 951, Docket 82-7880.

United States Court of Appeals, Second Circuit.

Argued Feb. 28, 1983.

Decided June 17, 1983.

Norwegian owner of three cargo vessels commenced action against charterer of vessels, to confirm and enter judgment upon award of arbitrators rendered in New York in favor of owner and against charterer pursuant to arbitration clauses contained in charter parties. The United States District Court for the Southern District of New York, Charles S. Haight, Jr., J., 548 F.Supp. 650, entered judgment, and appeal was taken. The Court of Appeals, Cardamone, Circuit Judge, held that the Convention on Recognition and Enforcement of Foreign Arbitral Awards was applicable to award arising from arbitration held in New York between two foreign entities.

Affirmed.

1. Arbitration ⇐82.5

Awards "not considered as domestic" under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards denotes awards which are subject to the convention not because made abroad but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. 1 et seq., 9 U.S.C.A. § 201 note.

2. Arbitration ⇐82.5

Convention on the Recognition and Enforcement of Foreign Arbitral Awards was applicable to an award arising from arbitration held in New York between two foreign entities. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. 1 et seq., 9 U.S.C.A. § 201 note.

3. Arbitration ⇐82.5

Treaty and language of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards should be interpreted broadly to effectuate its recognition and enforcement purposes. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. I et seq., 9 U.S.C.A. § 201 note.

Michael R. Sonberg, New York City (Michael T. Sullivan, Moore, Berson, Lifflander & Mewhinney, New York City, of counsel), for respondent-appellant.

Elisa M. Pugliese, Raymond A. Connell, Healy & Baillie, New York City, for petitioner-appellee.

Before FEINBERG, Chief Judge, and CARDAMONE and PIERCE, Circuit Judges.

CARDAMONE, Circuit Judge:

The question before us on this appeal is whether the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, is applicable to an award arising from an arbitration held in New York between two foreign entities. Responding to the rapid expansion of international trade following World War II, the Convention reflects the efforts of businessmen involved in such trade to provide a workable mechanism for the swift resolution of their day-to-day disputes. International merchants often prefer arbitration over litigation because it is faster, less expensive and more flexible. But previous international agreements had not proved effective in securing enforcement of arbitral awards; nor had private arbitration through the American Arbitration Association, the International Chamber of Commerce, the London Court of Arbitration and the like been completely satisfactory because of problems in enforcing awards. *See generally* Pisar, *The United Nations Convention on Foreign Arbitral Awards*, 33 S.Cal.L.Rev. 14 (1959) (Pisar); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1051 (1961) (Quigley).

In 1958, a convention was called to deal with these problems. The United States attended and participated in the conference but did not sign the Convention. Ten years later, in 1968, the Senate gave its consent, but accession was delayed until 1970 in order for Congress to enact the necessary implementing legislation. *See* McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J.Mar.L.Com. 735, 737 (1971) (McMahon). There was no opposition to the proposed legislation, H.R.Rep. No. 91-1181, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.Code Cong. & Ad.News 3601, 3602, which became 9 U.S.C. §§ 201-208 (1976).

In resolving the question presented on this appeal, we are faced with the difficult task of construing the Convention. The family of nations has endlessly—some say since the Tower of Babel—sought to breach the barrier of language. As illustrated by the proceedings at this conference, the delegates had to comprehend concepts familiar in one state that had no counterpart in others and to compromise entrenched and differing national commercial interests. Concededly, 45 nations cannot be expected to produce a document with the clear precision of a mathematical formula. Faced with the formidable obstacles to agreement, the wonder is that there is a Convention at all, much less one that is serviceable and enforceable. Yet, the proposals agreed upon in the Convention have not raised the kinds of legal questions that a commentator reported one of the delegates feared would be the joy of jurists, but the bane of plaintiffs, *see* Contini, *International Commercial Arbitration*, 8 Am.J.Comp.L. 283, 293 (1959) (Contini).

I

The facts are undisputed and may be briefly stated. Sigval Bergesen, a Norwegian shipowner, and Joseph Muller Corporation, a Swiss company, entered into three charter parties in 1969, 1970 and 1971. The 1969 and 1970 charters provided for the transportation of chemicals from the United States to Europe. The 1971 charter concerned the transportation of propylene from the Netherlands to Puerto Rico. Each charter party contained an arbitration clause providing for arbitration in New York, and the Chairman of the American Arbitration Association was given authority to resolve disputes in connection with the appointment of arbitrators.

In 1972, after disputes had arisen during the course of performing the 1970 and 1971 charters, Bergesen made a demand for arbi-

tration of its claims for demurrage and shifting and port expenses. Muller denied liability and asserted counterclaims. The initial panel of arbitrators chosen by the parties was dissolved because of Muller's objections and a second panel was selected through the offices of the American Arbitration Association. This panel held hearings in 1976 and 1977 and rendered a written decision on December 14, 1978. It decided in favor of Bergesen, rejecting all of Muller's counterclaims save one. The net award to Bergesen was $61,406.09 with interest.

Bergesen then sought enforcement of its award in Switzerland where Muller was based. For over two years Muller successfully resisted enforcement. On December 10, 1981, shortly before the expiration of the three-year limitations period provided in 9 U.S.C. § 207, Bergesen filed a petition in the United States District Court for the Southern District of New York to confirm the arbitration award. In a decision dated October 7, 1982 and reported at 548 F.Supp. 650 (S.D.N.Y.1982), District Judge Charles S. Haight, Jr. confirmed Bergesen's award, holding that the Convention applied to arbitration awards rendered in the United States involving foreign interests. Judgment was entered awarding Bergesen $61,406.09, plus interest of $18,762.01. Additionally, Bergesen received $8,462.00 for Muller's share of arbitrators' fees and expenses which it had previously paid, together with interest of $2,253.63 on that amount.

On appeal from this $90,883.73 judgment, Muller contends that the Convention does not cover enforcement of the arbitration award made in the United States because it was neither territorially a "foreign" award nor an award "not considered as domestic" within the meaning of the Convention. Muller also claims that the reservations adopted by the United States in its accession to the Convention narrowed the scope of its application so as to exclude enforcement of this award in United States courts, that the statute implementing the treaty was not intended to cover awards rendered within the United States, and finally, that Bergesen's petition to obtain enforcement was technically insufficient under the applicable requirements of the Convention.

II

Whether the Convention applies to a commercial arbitration award rendered in the United States is a question previously posed but left unresolved in this Court. *See Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 699 n. 11 (2d Cir.1978); *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 426 n. 2 (2d Cir.1974). The two district courts that have addressed the issue have reached opposite conclusions, with little in the way of analysis. *Compare Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co., A.G.*, 480 F.Supp. 352, 353 (S.D.N.Y.) (Haight, J.) (finding the Convention applicable), *aff'd mem.*, 614 F.2d 1291 (2d Cir.1979), *cert. denied*, 445 U.S. 930, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980) *with Diapulse Corporation of America v. Carba, Ltd.*, No. 78 Civ. 3263 (S.D.N.Y. June 28, 1979) (Broderick, J.) (Convention did not apply "by its terms"), *remanded on other grounds*, 626 F.2d 1108 (2d Cir.1980). The facts of the instant case make it necessary to resolve what this Court earlier termed an "intriguing" issue, *see Andros Compania Maritima, S.A.*, 579 F.2d at 699 n. 11.

To resolve that issue we turn first to the Convention's history. Under the auspices of the United Nations, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards was convened in New York City in 1958 to resolve difficulties created by two earlier treaties—the 1923 Geneva Protocol on Arbitration Clauses, 27 L.N.T.S. 157 (1924), and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, 92 L.N.T.S. 301 (1929). Because of the legal and practical difficulties which arose from application of these earlier treaties,[1] one commentator wrote,

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another contracting state. The second states that the Convention will apply only to differences arising out of legal relationships "considered as commercial under the national law" of the state declaring such a reservation. These reservations were included as a necessary recognition of the variety and diversity of the interests represented at the conference, as demonstrated, for example, by the statement of the delegate from Belgium that without any right of reservation his country would not accede. Haight at 16; Quigly at 1061.

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[1, 2] Additionally, Muller urges a narrow reading of the Convention contrary to its intended purpose. The Convention did not define nondomestic awards. The definition appears to have been left out deliberately in order to cover as wide a variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of "nondomestic" in conformity with its own national law. Omitting the definition made it easier for those states championing the territorial concept to ratify the Convention while at the same time making the Convention more palatable in those states which espoused the view that the nationality of the award was to be determined by the law governing the arbitral procedure. We adopt the view that awards "not considered as domestic" denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. *See generally* Pisar at 18. We prefer this broader construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards, *see Scherk v. Alberto Culver Co.*, 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 2457 n. 15, 41 L.Ed.2d 270 (1974). Applying that purpose to this case involving two foreign entities leads to the conclusion that this award is not domestic.

IV

[3] Muller also urges us to interpret the Convention narrowly based on the fact that, as stated in a Presidential Proclamation dated September 1, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, the 1970 accession by the United States to the Convention adopted both reservations of Article I(3). The fact

2. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

that the United States acceded to the Convention with a declaration of reservations provides little reason for us to construe the accession in narrow terms. Had the United States acceded to the Convention without these two reservations, the scope of the Convention doubtless would have had wider impact. Comment, *International Commercial Arbitration Under the United Nations Convention and the Amended Federal Arbitration Statute*, 47 Wash.L.Rev. 441 (1972). Nonetheless, the treaty language should be interpreted broadly to effectuate its recognition and enforcement purposes. *See Scherk*, 417 U.S. at 520 n. 15, 94 S.Ct. at 2457 n. 15 (the Convention's goal was "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts"); *Reed v. Wiser*, 555 F.2d 1079, 1088 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *cf. Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (Rakta)*, 508 F.2d 969, 974 (2d Cir.1974) (defenses to enforcement of foreign awards under the Convention are narrowly construed).

V

We now turn to the argument that the implementing statute was not intended to cover awards rendered within the United States. Section 202 of Title 9 of the United States Code which is entitled "Agreement or award falling under the Convention," provides in relevant part:

> An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

The legislative history of this provision indicates that it was intended to ensure that "an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not enforceable under the Convention in [United States] courts unless it has a reasonable relation with a foreign state." H.R.Rep. No. 91-1181, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.Code Cong. & Ad.News 3601, 3602. Inasmuch as it was apparently left to each state to define which awards were to be considered nondomestic, *see Pisar* at 18, Congress spelled out its definition of that concept in section 202. Had Congress desired to exclude arbitral awards involving two foreign parties rendered within the United States from enforcement by our courts it could readily have done so. It did not. *See Sumitomo Corp. v. Parakopi Compania Maritima*, 477 F.Supp. 737, 741 (S.D. N.Y.1979), *aff'd mem.*, 620 F.2d 286 (2d Cir.1980); Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw.U.L.Rev. 1, 16 (1971) (Under implementing legislation Convention should apply when foreign contacts are substantial, i.e., "where a foreign person or corporation is a party to an agreement involving foreign performance, or where the business deal has some other 'reasonable relation with one or more foreign states.'"); *see also* McMahon at 740–43 (questioning whether section 202 covers awards similar to that in the present case).

Additional support for the view that awards rendered in the United States may qualify for enforcement under the Convention is found in the remaining sections of the implementing statute. It has been held that section 203 of the statute provides jurisdiction for disputes involving two aliens. *See Sumitomo Corp.*, 477 F.Supp. at 740–41. Section 204 supplies venue for such an action and section 206 states that "[a] court having jurisdiction under this chapter may direct that arbitration be held ... at any place therein provided for, *whether that place is within or without the United States*" (emphasis supplied). It would be anomalous to hold that a district court could direct two aliens to arbitration within the United States under the statute, but that it could not enforce the resulting award under legislation which, in large part, was enacted for just that purpose.

Muller's further contention that it could not have been the aim of Congress to apply

the Convention to this transaction because it would remove too broad a class of awards from enforcement under the Federal Arbitration Act, 9 U.S.C. §§ 1–13, is unpersuasive. That this particular award might also have been enforced under the Federal Arbitration Act is not significant. There is no reason to assume that Congress did not intend to provide overlapping coverage between the Convention and the Federal Arbitration Act. Similarly, Muller's argument that Bergesen only sought enforcement under the terms of the Convention because it has a longer statute of limitations than other laws under which Bergesen could have sued is irrelevant. Since the statutes overlap in this case Bergesen has more than one remedy available and may choose the most advantageous.

VI

Finally, Muller asserts that Bergesen's petition for enforcement was technically insufficient and did not meet the requirements of the Convention. Bergesen submitted the affidavit of Harry Constas, chairman of the arbitration panel, certifying the award and the charter parties on which it was based. Under Article IV(1) of the Convention

> [t]o obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application supply:
>
> (a) The duly authenticated original award or a duly certified copy thereof;
>
> (b) The original agreement referred to in article II or a duly certified copy thereof.

Muller would have us read this provision as requiring either a duly authenticated original or a duly certified copy *of* a *duly authenticated* original. Such an interpretation is unnecessarily restrictive and at odds with a common sense reading of the provision. Copies of the award and the agreement which have been certified by a member of the arbitration panel provide a sufficient basis upon which to enforce the award and such were supplied in this case.

The judgment is affirmed.

June ROTH, Plaintiff-Appellant,

v.

Nathan PRITIKIN and Patrick M. McGrady, Jr., Defendants-Appellees.

No. 1322, Docket 83-7013.

United States Court of Appeals, Second Circuit.

Argued June 2, 1983.

Decided June 20, 1983.

Free-lance writer of recipes incorporated in book brought action to recover portion of royalties realized from book's sale. The United States District Court for the Southern District of New York, Thomas P. Griesa, J., found that plaintiff had no interest in the copyright of the book and dismissed her complaint, and she appealed. The Court of Appeals, Irving R. Kaufman, Circuit Judge, held that: (1) conclusion that plaintiff entered into lawful contract, consenting to accept $3,000 in return for creating recipes with no interest in copyright pursuant to law extant at time agreement was executed, was not clearly erroneous; and (2) rules of 1978 Copyright Act governing work-for-hire agreement are applicable prospectively, and not retroactively.

Affirmed.

1. Copyrights and Intellectual Property ⇐41

Conclusion that free-lance writer, who created recipes incorporated into book, entered into lawful contract, consenting to accept $3,000 in return for creating recipes with no interest in copyright pursuant to law extant at time agreement was executed, was not clearly erroneous. 17 U.S.C.A. § 101 et seq.

2. Copyrights and Intellectual Property ⇐41.1

Under copyright law in effect at time of oral contract pursuant to which free-lance created recipes incorporated into

AJIL no1 vol 78 (1984)
pp 219- 221

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).

between two foreign entities.[3] In this respect, appellant raised three principal arguments. Appellant's first argument concerned the scope of Article I(1) of the Convention, which provides as follows:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards *not considered as domestic awards in the State where their recognition and enforcement are sought* [emphasis added].

Appellant contended that the award should not be considered a "foreign" award within the meaning of the second sentence of Article I(1) because it failed to qualify as an award "not considered as domestic." The court of appeals disagreed. Based on a review of the Convention's *travaux préparatoires*,[4] the court concluded that the treaty's failure to define "nondomestic" awards appeared to be deliberate "in order to cover as wide a variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of 'nondomestic' in conformity with its own national law."[5] With this in mind, the court adopted the view that

> awards "not considered as domestic" denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.[6]

Such broad construction, the court noted, was in accord with the intended purpose of the treaty to "encourage" the confirmation of international arbitration awards.[7]

Appellant's second contention was that the court should interpret the Convention narrowly, based on the fact that when the United States acceded to the Convention in 1970, it adopted a reservation to Article I(3), which provided that any nation may, "on the basis of reciprocity," declare that it will apply the Convention only to those awards made in the territory of another contracting state. The court dismissed this contention summarily by again referring to the essential purpose of the treaty.

Appellant's final argument was that the statute implementing the Convention in the United States (9 U.S.C. §§201–208) was not intended to include awards rendered in the United States. The relevant provision that defines the concept of "nondomestic" awards for purposes of U.S. law (9 U.S.C. §202) provides as follows:

[3] This issue had been previously posed but left unresolved in the Second Circuit. *See, e.g.*, Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 699 n.11 (2d Cir. 1978).

[4] *See* G. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (1958); Contini, *International Commercial Arbitration*, 8 AM. J. COMP. L. 283 (1959).

[5] 710 F.2d 928, 932. [6] *Id.*

[7] *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

> 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 the relationship involved property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

The court observed that this provision simply does not address arbitral awards between two foreign parties rendered in the United States. The obvious conclusion was that if Congress had desired to exclude such awards from enforcement, "it could readily have done so."[8] Moreover, the court noted that it has been held that section 203 of the implementing statute provides jurisdiction for disputes involving two aliens[9] and that under section 206 a court having such jurisdiction may direct that arbitration be held "within or without the United States." Thus, the court reasoned, "[i]t would be anomalous to hold that a district court could direct two aliens to arbitration within the United States under the statute, but that it could not enforce the resulting award under legislation which, in large part, was enacted for just that purpose."[10]

At the outset of this wholly persuasive decision, the court noted that though arbitration streamlines otherwise costly dispute resolution, an effective international agreement on enforcement of arbitral awards long eluded the business world until the emergence of the New York Convention. By broadly construing a particularly controversial clause of the Convention, the Second Circuit has taken a critical step that will foster confidence in arbitration—within or without the United States—as an attractive alternative to judicial dispute resolution. This decision by the Second Circuit stands in contrast to the narrow interpretation given by the Federal Supreme Court (Bundesgericht) of Switzerland. *Sozialistische Libysche Arabische Volks-Jamahiriya v. Libyan American Oil Company*,[11] in which it refused to enforce a Swiss-based arbitral award against the Government of Libya on grounds that it lacked jurisdiction.

Immunity of international organizations—waiver of immunity—International Organizations Immunities Act

MENDARO v. WORLD BANK. 717 F.2d 610.
U.S. Court of Appeals, D.C. Cir., Sept. 27, 1983.

Appellant, Susana Mendaro, brought suit against her former employer, the International Bank for Reconstruction and Development (also known as the World Bank) in federal court under Title VII of the Civil Rights Act of 1964,[1] alleging various employment-related grievances. The district court dismissed her action on the ground that the Bank's Articles of Agreement[2] did not, as appellant had argued, waive the Bank's immunity from suit as granted by the

[8] 710 F.2d at 933.
[9] *See* Sumitomo Corp. v. Patrakopi Compania Marnima, 477 F.Supp. 737, 740–41 (S.D.N.Y. 1979).
[10] 710 F.2d at 933.
[11] No. P 627/79/ha (Schweizerisches Bundesgericht, June 19, 1980).
[1] 42 U.S.C. §§2000–2000e-17 (1976 & Supp. V 1981).
[2] Dec. 27, 1945, 60 Stat. 1440, TIAS No. 1502, 2 U.N.T.S. 134.