ordinarily would be collaterally estopped from relitigating this issue.

[9, 10] However, the Supreme Court has recognized that the use of collateral estoppel "offensively" by a plaintiff may implicate fairness concerns not present when the doctrine is used as an affirmative defense, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329–331, 99 S.Ct. 645, 650–52, 58 L.Ed.2d 552 (1979), and accordingly has granted district courts "broad discretion" to permit or deny its application. *Id.* at 331, 99 S.Ct. at 652. In this case, since the Court has before it the same parties who appeared at the Fair Housing Board, these concerns are somewhat lessened. There is, though, one particular item in the record that troubles the Court; namely, the fact that the person presiding at the hearing may have inadvertently misled the defendant as to the consequences of the Board's decision:

> "Ms. Roman: ... In the event it is not settled at this level, I want you to know that the next procedure would be either conciliation or into Federal Court".
>
> . . . . .
>
> "Ms. Roman: ... Either of you have a right to appeal the decision of the Board into the Federal Court with that decision. Either side". Tr. at 101, 102.

These comments may well have left Mr. Harte with the mistaken impression that he could "appeal" the Board's decision to this Court. However, the remarks were made at the very conclusion of the hearing, so the fact that Mr. Harte may have believed that an appeal to this court was possible thus could not have affected his defense at that proceeding. In any event, competent counsel would have known that such a procedure was impossible. Furthermore, Mr. Harte was represented at all times by counsel, which significantly mitigates, in the Court's view, any possible unfairness towards him. In sum, the Court believes that the use of offensive collateral estoppel would not be unfair in this case. Accordingly, plaintiff's motion for partial summary judgment on liability is granted.

Counsel are to appear for jury selection on May 27, 1991, to try the issue of plaintiff's damages, as well as plaintiff's liability and damages on defendant's counterclaim.

SO ORDERED.

Application of YORK HANNOVER HOLDING A.G., Plaintiff,

v.

AMERICAN ARBITRATION ASSOCIATION, Defendant,

and

McDermott International, Inc., McDermott Overseas Investment Company N.V., McDermott International Trading (Holland 1) B.V., McDermott International Trading (Holland 2) B.V., McDermott International Trading (Holland 3) B.V., McDermott International Trading (Holland 4) B.V. and McDermott International Trading (Holland 5) B.V., Intervenors–Defendants.

In re ARBITRATION BETWEEN YORK HANNOVER HOLDING, A.G. AND McDERMOTT INTERNATIONAL, INC., et al.

No. 92 Civ. 1643 (CSH).

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

June 22, 1992.

Party to arbitration sought to remove from state court action brought by the other party challenging constitution of arbitration panel. The District Court, Haight, J., held that: (1) state court action related to the arbitration agreement between the parties so that action was removable under the terms of the Convention on Recognition and Enforcement of Foreign Arbitral Award, and (2) original [illegible]

in the state court action consented to removal.

Motion to remand denied.

1. **Removal of Cases ⇐19(1)**

Removal of action challenging constitution of arbitration panel from state to federal court was not governed by general removal statute but, rather, by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C.A. § 205; 28 U.S.C.A. § 1441.

2. **Removal of Cases ⇐19(1)**

Cases construing the general removal statute are instructive in evaluating removal procedure under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C.A. § 205; 28 U.S.C.A. § 1441.

3. **Removal of Cases ⇐17**

Circumstances of one party's intervention in state court action brought by other party to arbitration against the arbitration association challenging constitution of the arbitration panel did not preclude intervening party from removing the action to federal court. 9 U.S.C.A. § 205.

4. **Removal of Cases ⇐82**

Defendant adequately consented to removal where it was given notice of removal which it signed after adding the phrase "Has No Objection To" above the phrase "Consented To." 9 U.S.C.A. § 205.

5. **Removal of Cases ⇐19(1)**

Petition filed in state court by one party to arbitration against arbitration association challenging constitution of the arbitration panel related to the arbitration agreement and thus was subject to removal under the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). 9 U.S.C.A. § 205.

6. **Removal of Cases ⇐19(1)**

Provision of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) for removal to federal court does not apply only to state court action seeking to enforce an arbitration agreement or to enforce or set aside an arbitral award. 9 U.S.C.A. § 205.

Lacher & Lovell-Taylor, New York City (Gerald Moss and Andreas F. Lowenfeld, of counsel), for plaintiff.

Fieldman Berman & Hay, New York City, for intervenors-defendants.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Following removal of this action from state court, plaintiff moves for remand.

Background

Plaintiff York Hannover Holding, A.G. ("York") and intervenors-defendants McDermott International, Inc. and related companies (hereinafter collectively "McDermott") are engaged in a significant commercial arbitration administered by the American Arbitration Association ("AAA"). The underlying contract between York and McDermott provided for arbitration of disputes in New York under the AAA's Commercial Arbitration Rules. The arbitration clause in the contract further provided that each party would appoint an arbitrator and the two party-appointed arbitrators would appoint a third, neutral arbitrator who would be chairman of the arbitration panel. Failing agreement by the party-appointed arbitrators, the AAA would appoint the chairman. In point of fact, the arbitrators appointed by the parties could not agree on the panel chairman, and the AAA appointed him. The arbitration clause further provided that the parties consented to the jurisdiction of this Court "for the enforcement of this Agreement." The AAA's rules, by which the parties agreed to be bound in the arbitration clause, provide: "Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration." Rule 47(b).

During the hearings but before award the arbitrator appointed by York resigned, complaining of misconduct by the chairman of the panel. The arbitrator appointed by

d in a letter dated December
ssed to the AAA case adminis-
letter expressed the hope that
ld "re-examine this entire pro-
bring about "an immediate
the arbitration panel.

to the resignation of York's
e AAA convened an adminis-
rence on January 16, 1992.
d McDermott were represent-
l at conference. After a
nge of correspondence, the
parties a letter dated Janu-
ppointing a different individu-
party-appointed arbitrator.
d February 3, 1992 the AAA
arties that it had reaffirmed
nt of the original neutral ar-
anel chairman.

satisfied with the AAA's re-
complaint of its original arbi-
e conduct of the panel chair-
ingly York filed a petition
reme Court of the State of
w York County, seeking or-
the AAA to remove the pan-
g the arbitration pending a
e petition. York's petition
e AAA as respondent. At
stat court (Greenfield, J.)
AAA did not appear. Coun-
mott appeared and sought
vene and to file opposition
Greenfield granted McDer-
ntervene from the bench and
riefing schedule.

hen removed the case to this
mott alleges federal ques-
based upon the Convention
ition and Enforcement of
able Awards of June 10,
by the United States and
mestic law by Pub.L. 91-
31, 1970, 84 Stat. 692, as
ed at 9 U.S.C. §§ 201-207
n").

cDermott tendered the no-
to the AAA's general coun-
under the typed statement
American Arbitration As-
AAA's counsel added the
Objection To" above the
phrase "Consented To" and signed the notice of removal. In an affidavit previously filed with the state court, the AAA's counsel had stated that "in order to preserve its impartial status," it "does not wish to participate in this litigation and has encouraged the real party to the arbitration to move to intervene herein." By "real party" the AAA meant McDermott. Counsel's affidavit went on to say that the AAA "has no interest in the outcome of the arbitration and will abide by the decision of the court." Counsel for the AAA had earlier written to counsel for York, stating in response to the state court order to show cause:

> As the impartial administrator of the arbitration the AAA does not generally appear or participate in judicial proceedings relating to the arbitration. The AAA should not have been named as a party-defendant. Section 47(b) of the Rules provides that the AAA is not a "necessary party".

In these circumstances, York moves to remand the case to state court. McDermott opposes remand. The AAA has filed no papers. Counsel for York submits an affidavit quoting counsel for the AAA as saying that it has no objection to remand.

Discussion

[1] The parties agree that the arbitration agreement at bar, between foreign corporations and providing for arbitration in New York, falls under the Convention. *See* 9 U.S.C. § 202. Accordingly removal of the action from state to federal court is governed not by the general removal statute, 28 U.S.C. §§ 1441 *et seq.*, but by 9 U.S.C. § 205, which provides in pertinent part:

> Where the subject matter of an action or proceeding pending in a state court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The

mott claims a
rk in the arbi-
s a stake in the
nitration panel,
ed conforms to
es are bound by
e court petition
rators from of-
ration hearing.
re directly and
te court action.

o intervene had
les of Civil Pro-
n of right would
2). At the very
on would be ap-
)(2). I need not
e, as noted, Jus-
rder or interven-
e effect of that
nott with the full
vileges of a party
right to remove
I reject the sug-
pers that McDer-
led Justice Green-
ntentions so as to
emoving the case.

status as an inter-
nitiating removal.
t is entitled to re-
1441(a) where it is
lefendants' joinder
1A *Moore's Feder-*
at 517-19 (1991).

therefore depends
as original respon-
e requisite consent
ed by McDermott.
U.S.C. § 1441(a) so
nt in a multi-defen-
over removal sug-
efendant. *See, e.g.*,
Osco Drug, Inc.,
ass.1988) ("The rule
defendant an abso-
. A defendant who
se must, therefore,
other defendants to
tition.")

unanimous consent
s not apply to "nom-

inal or formal parties," whose wishes "may be disregarded." 14A Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3731 at 507–08 (1985). The parties devote considerable effort to debating whether the AAA is a nominal party. I need not resolve the issue. Assuming in York's favor that the AAA is not a nominal party, its consent to removal is sufficiently evidenced by the endorsement its general counsel made upon the notice of removal prepared by counsel for McDermott.

[4] As noted, McDermott tendered to the AAA a notice of removal citing that it was "Consented To" by the AAA. Counsel for the AAA did not strike the phrase "Consented To." She let it stand, but wrote above that phrase: "Has No Objection To." York argues strenuously that the juxtaposition of these phrases is fraught with significance. I disagree. What emerges from these proceedings is the AAA's absolute determination to preserve total neutrality. The AAA desires to remain a Switzerland surrounded by warring entities, the better to discharge its useful function as a source of alternative dispute resolution. I think it likely that the AAA's counsel added the phrase "Has No Objection To," to the phrase "Consented To" because the former phrase sounds passive to the ear and the latter phrase sounds active. In any event, these semantic distinctions come to nothing. The AAA consented to McDermott's removal because it had no objection. Conversely, the AAA had no objection because it consented. The propriety of removal cannot be made to depend on such linguistic niceties.

The distinction comes to nothing because even if the AAA's counsel had stricken out the phrase "Consented To" and substituted the phrase "Has No Objection," it would have sufficed to permit removal. *See, e.g., Colin K. v. Schmidt*, 528 F.Supp. 355, 358–59 (D.R.I.1981) (oral statement at conference by counsel for non-signing defendants that they "would have no objection to" the removal petition and "agreed that the issues were more appropriately before the federal court" satisfied the requirement of unanimity of consent among defendants); *Sicinski v. Reliance Funding Corp.*, 461 F.Supp. 649, 652 (S.D.N.Y.1978) (petition signed by only one defendant satisfied where petition represented that co-defendant consented to removal). York cites no authority to the contrary. I conclude that McDermott's removal petition is not procedurally defective.

I must therefore consider York's alternative argument, that removal is not justified under 9 U.S.C. § 205. I reject that contention as well.

[5, 6] Section 205 allows removal if the subject matter of the state court action "relates to an arbitration agreement ... falling under the Convention ..." While the parties do not cite a case on all fours with the case at bar, and I have found none, I conclude without difficulty that the petition York filed in state court "relates to [the] arbitration agreement" between itself and McDermott. A sufficient relationship exists between the provisions of the arbitration agreement and what York seeks to accomplish in the action. The arbitration agreement provides for the manner in which the arbitrators are appointed. That provision is supplemented by the parties' agreement to be bound by the AAA rules. In consequence, the appointment process as directed by the rules forms an integral part of the arbitration agreement. York seeks by its action to reverse the AAA's implementation of those rules and expel from office the presently appointed arbitrators. It cannot be reasonably argued that the action does not "relate" to the parties' arbitration agreement.

York contends that § 205 applies only to state court actions seeking to enforce an arbitration agreement or to enforce or set aside an arbitral award. No case law or legislative history is cited for so narrow a construction, which is inconsistent with the plain language of the statute. If Congress had intended to limit removal to state court proceedings to compel arbitration or confirm or vacate an award, it could easily have said so.

While the cases construing § 205 are sparse, such authority as there is supports a broader construction of the word "re-

lates." This Court has assumed § 205 removal jurisdiction over state court actions involving parties not bound by arbitration agreements, where the state court claims involved the same subject matter as claims being asserted in pending arbitrations. *Cam S.A. v. ICC Tankers, Inc.*, No. 88 Civ. 9274, 1989 WL 51815 (S.D.N.Y., May 10, 1989); *Dale Metals Corp. v. Kiwa Chemical Industry Co.*, 442 F.Supp. 78, 80, 81 n. 1 (S.D.N.Y.1977). *See also Matter of Ferrara S.p.A.*, 441 F.Supp. 778, 779–80 and 80 n. 2 (S.D.N.Y.1977), *aff'd*, 580 F.2d 1044 (2d Cir.1978) (petition to stay pending arbitration removed under § 205).

For the foregoing reason, York's petition to remand this action to state court is denied.

It is SO ORDERED.

Joaquine MARTORELL, #87A8465, Plaintiff,

v.

James McELWEE, Senior Parole Officer, James White, Parole Officer, William Goggins, Parole Officer, Anthony K. Umina, Commissioner, N.Y.S. Parole Board, Eugene S. Callender, Commissioner, N.Y.S. Parole Board, Rodriguez Rivera, Chairman, N.Y.S. Parole Board, Defendants.

No. 91 Civ. 4147 (CSH).

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

July 2, 1992.

State prisoner brought civil rights action challenging length of his confinement. The District Court, Haight, J., held that where there are no ongoing conditions of confinement implicated and any award of damages would be entirely dependent upon resolution of validity of duration of state prisoner's confinement, he must first exhaust state remedies.

Stayed.

1. Civil Rights ⇐194
Habeas Corpus ⇐319

Federal civil rights statute permits state prisoner to bring action before the federal courts immediately, but habeas corpus requires exhaustion of available state remedies before court can consider the matter. 28 U.S.C.A. § 2254(b); 42 U.S.C.A. § 1983.

2. Civil Rights ⇐135

State prisoner could not use federal civil rights action to challenge duration of his confinement or to obtain his release on parole. 42 U.S.C.A. § 1983.

3. Civil Rights ⇐209

Where no ongoing conditions of confinement are implicated in civil rights complaint and any award of damages to state prisoner would be entirely dependent upon the resolution of the validity of the duration of his confinement, he must first exhaust state remedies as required by habeas corpus statute. 28 U.S.C.A. § 2254(b); 42 U.S.C.A. § 1983.

4. Action ⇐69(5)
Federal Civil Procedure ⇐1788.5

Court which determined that state prisoner whose civil rights claims for damages were dependent upon resolution of validity of the duration of his claim was required to first exhaust his state remedies as required by the federal habeas corpus statute would stay action pending exhaustion rather than dismissing it. 28 U.S.C.A. § 2254(b); 42 U.S.C.A. § 1983.

Joaquine Martorell, pro se.

Robert Abrams, Atty. Gen. of the State of N.Y., New York City (Susan A. Winston, of counsel), for defendants.

INTERNATIONAL
ARBITRATION REPORT

July 1992 Vol. 7, #7

INTERVENING DEFENDANT JUSTIFIED IN REMOVING ACTION

NEW YORK — An intervening defendant in judicial proceedings related to arbitration is entitled to initiate removal of the action from state to federal court if it is able to secure the original defendant's joinder, U.S. District Judge Charles S. Haight Jr. of the Southern District of New York ruled in dismissing a plaintiff's motion for remand (York Hanover Holding A.G. v. American Arbitration Association and McDermott International Inc., et al., No. 92 Civ. 1643 [CSH], S.D. N.Y.).

Following a commercial dispute, York Hanover Holding A.G. and McDermott International Inc. entered arbitration under the American Arbitration Association (AAA). During the hearings, York's appointed arbitrator quit after alleging misconduct by the panel chairman. The arbitrator urged the AAA to recast the panel.

When the AAA instead reaffirmed the panel chairman, York filed a petition asking the New York County Supreme Court to compel the recasting. Counsel for the AAA, exercising a contractual clause stating that "the AAA is . . . [not] a necessary party in judicial proceedings related to the arbitration," did not attend the petition hearing, where counsel for McDermott persuaded Justice Edward J. Greenfield to grant the party status as an intervening defendant.

McDermott subsequently invoked statutory provision 9 United States Code at 205 of the Convention on the Recognition and Enforcement of Foreign Arbitrable Awards and removed the action from Justice Greenfield's state court to Judge Haight's federal court. Counsel for the AAA signatured McDermott's notice of removal, testifying that the AAA "consented to" and "ha[d] no objection to" it. Neither did the AAA object to York's motion to remand the case.

INTERNATIONAL
ARBITRATION REPORT

Vol. 7, #7 July 1992

Motion For Remand Denied

In a June 22 opinion, Judge Haight rejected both York's procedural and substantive arguments for remand.

York argued that the removal was procedurally incorrect because McDermott, rather than the AAA, initiated it and because the AAA did not join in the petition as required by statutory provision 205. Judge Haight wrote, "Neither contention withstands scrutiny."

The judge found that McDermott is entitled to initiate removal of the action as an intervening party granted full defendants rights by Justice Greenfield. Judge Haight wrote also, "The AAA's [requisite] consent to removal is sufficiently evidenced by the endorsement its counsel made on the notice." That AAA's counsel appended the phrase "has no objection to" below the phrase "consented to" "comes to nothing," he said. Alone or together, both phrases "suffice to permit removal," the judge concluded.

York also argued that statutory provision 205, which allows removal if the matter in the judicial proceedings "relates to arbitration," applies only to state court actions seeking to enforce an agreement, and not to actions such as this contesting a panel's constitution.

Judge Haight again disagreed. Dismissing York's argument as contrary to both the statutes' legislative history and language, the judge found that "a sufficient relationship exists between the . . . arbitration and what York seeks to accomplish in this action" for the statute to apply.

York is represented by Gerald Moss of Lacher & Lovell-Taylor and Andreas F. Lowenfeld of New York. Counsel for McDermott is Fleidman, Berman & Hay of New York.

LOUISIANA JUDGE REFUSES TO BACK DOWN FROM ARBITRATION ORDER

A Louisiana federal judge has refused to amend his earlier order that parties involved in an insurance coverage dispute must arbitrate their claim, as provided for by an arbitration clause in the underlying insurance policy (McDermott International Inc. v. Lloyds Underwriters of London, et al. (See March 1992, Page 3).

Plaintiff McDermott International Inc., had asked that the jurist amend his decision of last February, or to certify his order for appeal.