drawn in the government's favor. That distinction accounts for the result in *Vasquez*, where the government's evidence placed a weapon in one or both of two locations—defendant's apartment or on his person—and the Court assumed that the jury could have found that the weapon had been in either or both. If the jury found the weapon in his apartment, and on that basis convicted for "use," such a conviction was improper under *Bailey*; if the jury found the weapon on his person and convicted for carrying, such a conviction was proper. The Court assumed that the jury believed the weapon was in both places, but because there was no way to determine on which basis the jury had actually convicted, reversal was required. In this case, accepting the government's evidence, there was only one place where each weapon was said to have been found, and there is no basis for assuming that the jury concluded that any of the weapons had been found elsewhere or, as Rodriguez suggests at one point, not found at all. (Rodriguez Reply Mem. 7) That location—the back seat where both Jacinto Alberto Vasquez and Manuel Rodriguez were seated—would compel a conviction for "carrying" under the standards of *Pimentel* even though it would not permit a conviction for "use" under the standards of *Bailey*.

Independently, Manuel Rodriguez too would be convicted on the same *Pinkerton* theory that upholds Araujo's conviction.

Because the jury verdict necessarily was based on facts that would convict Rodriguez of "carrying" a weapon, his conviction as well must stand.

* * *

For the above reasons, the writs are denied and the petitions dismissed.

SO ORDERED.

PEPSICO INC. and Pepsi-Cola Panamericana, S.A., Petitioners,

v.

OFICINA CENTRAL DE ASESORIA Y AYUDA TECNICA, C.A., C.A. Embotelladora Antimano, Embotelladora Aragua, S.A., Embotelladora Barinas, S.A., Embotelladora Carabobo, S.A., C.A. Embotelladora Caracas, Embotelladora Caroni, S.A., C.A. Embotelladora Coro, Gaseosas Orientales, S.A., Embotelladora Guarico, S.A., Embotelladora Guayana, S.A., Hit De Venezuela, S.A., Embotelladora La Perla, S.A., C.A. Embotelladora Lara, Embotelladora Maturin, S.A., C.A. Embotelladora Nacional, Embotelladora Orinoco, S.A., C.A. Embotelladora Tachira, C.A. Embotelladora Valera, Respondents.

No. 96 Civ. 7817 (JSR).

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

Oct. 28, 1996.

United States soft drink corporations petitioned to compel arbitration of contract disputes with Venezuela bottling corporations, and to enjoin Venezuela corporations from further litigating disputes in Venezuela courts. Venezuela corporations responded by asking district court to decline jurisdiction as matter of international comity. The District Court, Rakoff, J., held that, although Court would retain jurisdiction in order not to derogate its duty and invite fraud, it would stay proceedings in order to allow Venezuela court, if it should so choose, to determine in pending Venezuela action the threshold question under Venezuela law of whether arbitration agreement was inoperative or inapplicable to dispute over calculation of liquidated damages.

So ordered.

1. Federal Courts ⇐65

Although district court, in order not to derogate its duty or to invite fraud, would

retain jurisdiction over underlying action by United States soft drink corporations to compel arbitration of contract disputes with Venezuela bottling corporations, court would stay proceedings in order to allow Venezuela court, if it should so choose, to determine in action pending before it the threshold question under Venezuela law of whether arbitration agreement was inoperative or inapplicable to dispute over calculation of liquidated damages, for purposes of arbitration referral provision of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards; such stay would save judicial time and resources, and was consistent with parties' reasonable expectations. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. II, § 3, 9 U.S.C.A. § 201 note.

2. Arbitration ⇐2.2

Bottling contract between United States soft drink corporations and Venezuela bottling corporations, providing that contract would be governed by Venezuela law but arbitration in accordance with contract would apply substantive law of New York, contemplated that matters subject to determination by court, such as threshold disputes over arbitrability, would be governed by Venezuela law, while matters to be determined by arbitrators would be governed by New York law.

Cravath Swaine & Moore by Thomas Barr, Sandra Goldstein, Katherine Forrest, New York City, for petitioners.

Rogers & Wells by James Benedict, Marlin Seidel, New York City, for respondents.

MEMORANDUM ORDER

RAKOFF, District Judge.

By order to show cause, petitioners move for immediate determination of a Petition filed October 16, 1996 that seeks to compel arbitration of respondents' contractual disputes with petitioners and to enjoin respondents from further litigating those disputes in the courts of Venezuela. Respondents, in turn, ask the Court to decline jurisdiction as a matter of international comity. After full consideration of the parties' written submissions and oral arguments, the Court denies the motion for immediate relief but retains jurisdiction of the underlying Petition, subject to a 60-day stay of proceedings to allow the Venezuelan court to determine, if it chooses, a threshold question of Venezuelan law.

The essential facts may be stated briefly. Petitioner PepsiCo Inc., a North Carolina corporation with its principal place of business in Purchase, New York, wholly owns co-petitioner Pepsi-Cola Panamericana, S.A., a Venezuelan corporation with general offices in Caracas, Venezuela. Respondent Oficina Central De Asesoria y Ayuda Tecnica, C.A. ("OCAAT") is a Venezuelan corporation that represents, manages and controls the co-respondent bottling companies (the "Cisneros bottling companies"), which are Venezuelan companies owned by Diego Cisneros, a Venezuelan citizen. As of January 1, 1988, petitioners, by written contract, granted each Cisneros bottling company the exclusive right to bottle Pepsi-Cola in its respective area of Venezuela for a term of 15 years.

Paragraph 23 of each bottling contract provides that any party prematurely terminating the contract must pay specified liquidated damages to the other party. Paragraph 30 of each contract states in pertinent part that: "This Agreement shall be governed by the laws of the Republic of Venezuela. Any controversy or claim arising out of or relating to this contract, or the breach thereof, ... shall be finally settled by arbitration in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce.... The arbitration, including the rendering of an award, shall take place in New York, New York, United States of America.... The arbitrators shall apply the substantive law of the State of New York, United States of America ..."

By letter dated August 16, 1996, an authorized representative of the Cisneros bottling companies terminated each of these contracts, explaining that the bottling companies were defecting to Coca Cola. Petitioners responded on August 22, 1996 by demanding payment within 60 days of 56,240,446,386 bolivars (approximately $118,400,940) in liqui-

dated damages, pursuant to paragraph 23 of the contracts. Before the sixty days expired, the bottling companies, on October 1, 1996, petitioned a civil court in Caracas, Venezuela for a declaration that the amount of liquidated damages actually due petitioners was a much smaller sum. In support of the petition, the bottling companies alleged, *inter alia*, that the arbitration provision of paragraph 30 of the bottling contracts was "inoperative" because of its "obscurity and ambiguity" and because it was, in any event, "not applicable to the present case." Petitioners responded on October 11, 1996 by filing a formal request for arbitration with the International Chamber of Commerce, and then, on October 16, 1996, by filing the Petition now before this Court.

[1, 2] Respondents expresaly concede this Court's subject matter jurisdiction and power to compel arbitration in this case.[1] They nonetheless urge the Court to decline jurisdiction in favor of the Venezuelan court. In this regard, Article II.3 of the United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards, to which both the United States and Venezuela are signatories, provides that "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement [to arbitrate] shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[2] As noted, respondents, in their papers previously filed in the Venezuelan court, contend that the arbitration agreement set forth in paragraph 30 of the bottling contracts is either entirely "inoperative" or else "not applicable" to a dispute over the calculation of liquidated damages. Whether or not this is so is plainly a matter of Venezuelan law, for paragraph 30 flatly states that the contracts are governed by the laws of Venezuela.[3]

While the Court is not blind to the facially flimsy aspect of the objections to arbitrability raised in the papers respondents have filed in the Venezuelan court, respondents have submitted some authority to support their contention that the objections have arguable merit. *See Iberian Tankers Co. v. Terminales Maracaibo, C.A.*, 322 F.Supp. 73, 75 (S.D.N.Y.1971). In any event, in the absence of any challenge to the adequacy of the Venezuelan legal process (*see* Tr. 10/21/96, at 26–27; *see also Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993)) the Venezuelan court that already has the issue of arbitrability before it ought to be afforded the initial opportunity to determine this threshold question of Venezuelan law before a non-Venezuelan court is called upon to do so.[4]

It makes obvious good sense, as well as offering a considerable savings of judicial time and resources, for this Court to have the benefit of a Venezuelan court's speedy determination of a threshold question of Venezuelan law that must be resolved before this or any other court can compel arbitration in this case. Nor will any material delay be occasioned thereby, for respondents have

1. Personal jurisdiction over every respondent except possibly OCAAT is also clear. *See Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 363 (2d Cir.1964).

2. The Convention is set forth in full at 9 U.S.C. § 201. While the 1996 edition of United States Code Annotated does not list Venezuela as a signatory, *see* 9 U.S.C.A. § 201 (West Supp. 1996), petitioners have provided documents of the State Department indicating that Venezuela is in fact a signatory. *See* United States Department of State, Treaties in Force 316 (1996).

3. By contrast, New York law comes into play under paragraph 30 only after a contractual dispute is referred to arbitration. Put another way, the language of paragraph 30 clearly contemplates that matters subject to determination by a court, such as threshold disputes over arbitrability (*see First Options of Chicago, Inc. v. Kaplan*, — U.S. —, —, 115 S.Ct. 1920, 1923, 131 L.Ed.2d 985 (1995); *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 45 (2d Cir.1993)) will be governed by Venezuelan law, while matters to be determined by arbitrators will be governed by New York law.

4. While petitioners question whether respondents' petition in the Venezuelan court has formally placed this threshold issue of arbitrability before that court, they do not contest that the answer to that petition that they must file by November 21, 1996 will challenge the jurisdiction of the Venezuelan court on the ground that the underlying dispute is required to be arbitrated.

is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PEPSICO INC. and PEPSI-COLA PANAMERICANA, S.A.,

Petitioners,

-v-

OFICINA CENTRAL DE ASESORIA Y AYUDA TECNICA, C.A., C.A. EMBOTELLADORA ANTIMANO, EMBOTELLADORA ARAGUA, S.A., EMBOTELLADORA BARINAS, S.A., EMBOTELLADORA CARABOBO, S.A., C.A. EMBOTELLADORA CARACAS, EMBOTELLADORA CARONI, S.A., C.A. EMBOTELLADORA CORO, GASEOSAS ORIENTALES, S.A., EMBOTELLADORA GUARICO, S.A., EMBOTELLADORA GUAYANA, S.A., HIT DE VENEZUELA, S.A., EMBOTELLADORA LA PERLA, S.A., C.A. EMBOTELLADORA LARA, EMBOTELLADORA MATURIN, S.A., C.A. EMBOTELLADORA NACIONAL, EMBOTELLADORA ORINOCO, S.A., C.A. EMBOTELLADORA TACHIRA, C.A. EMBOTELLADORA VALERA,

Respondents.

DISTRICT COURT FILED OCT 28 1996

96 Civ. 7817 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

By order to show cause, petitioners move for immediate determination of a Petition filed October 16, 1996 that seeks to compel arbitration of respondents' contractual disputes with petitioners and to enjoin respondents from further litigating those disputes in the courts of Venezuela. Respondents, in turn, ask the Court to decline jurisdiction as a matter of international comity. After full consideration of the parties' written submissions and oral arguments, the Court denies the motion for immediate relief but retains jurisdiction of the underlying Petition, subject to a 60-day stay of proceedings to allow the Venezuelan court to determine, if it chooses, a threshold question of Venezuelan law.

The essential facts may be stated briefly. Petitioner PepsiCo Inc., a North Carolina corporation with its principal place of business in Purchase, New York, wholly owns co-petitioner Pepsi-Cola Panamericana, S.A., a Venezuelan corporation with general offices in Caracas, Venezuela. Respondent Oficina Central De Asesoria y Ayuda Tecnica, C.A. ("OCCAT") is a Venezuelan corporation that represents, manages and controls the co-respondent bottling companies (the "Cisneros bottling companies"), which are Venezuelan companies owned by Diego Cisneros, a Venezuelan citizen. As of January 1, 1988, petitioners, by written contract, granted each Cisneros bottling company the exclusive right to bottle Pepsi-Cola in its respective area of Venezuela for a term of 15 years.

Paragraph 23 of each bottling contract provides that any party prematurely terminating the contract must pay specified liquidated damages to the other party. Paragraph 30 of each contract states in pertinent part that: "This Agreement shall be governed by the laws of the Republic of Venezuela. Any controversy or claim arising out of or relating to this contract, or the breach thereof, . . . shall be finally settled by arbitration in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce. . . . The arbitration, including the rendering of an award, shall take place in New York, New York, United States of America. . . . The arbitrators shall apply the substantive law of the State of New York, United States of America . . .".

By letter dated August 16, 1996, an authorized representative of the Cisneros bottling companies terminated each of these contracts, explaining that the bottling companies were defecting to Coca Cola. Petitioners responded on August 22, 1996 by demanding payment within 60 days of 56,240,446,386 bolivars (approximately $118,400,940) in liquidated damages, pursuant to paragraph 23 of the contracts. Before the sixty days expired, the bottling companies, on October 1, 1996, petitioned a civil court in Caracas, Venezuela for a declaration that the amount of liquidated damages actually due petitioners was a much smaller sum. In support of the petition, the bottling companies alleged, inter alia, that the arbitration provision of paragraph 30 of the bottling contracts was "inoperative" because of its "obscurity and ambiguity" and because it was, in any event, "not applicable to the present case." Petitioners responded on October 11, 1996 by filing a formal request for arbitration with the International Chamber of Commerce, and then, on October 16, 1996, by filing the Petition now before this Court.

Respondents expressly concede this Court's subject matter jurisdiction and power to compel arbitration in this case.[1] They nonetheless urge the Court to decline jurisdiction in favor of the Venezuelan court. In this regard, Article II.3 of the United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards, to which both the United States and Venezuela are signatories, provides that "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement [to arbitrate] . . . shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[2] As noted, respondents, in their papers previously filed in the Venezuelan court, contend that the arbitration agreement set forth in paragraph 30 of the bottling contracts is either entirely "inoperative" or else "not applicable" to a dispute over the calculation of liquidated damages. Whether or not this is so is plainly a matter of Venezuelan law, for paragraph 30 flatly states that the contracts are governed by the laws of Venezuela.[3]

While the Court is not blind to the facially flimsy aspect of the objections to arbitrability raised in the papers respondents have filed in the Venezuelan court, respondents have

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[1]Personal jurisdiction over every respondent except possibly OCAAT is also clear. See Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 363 (2d Cir. 1964).

[2]The Convention is set forth in full at 9 U.S.C. § 201. While the 1996 edition of United States Code Annotated does not list Venezuela as a signatory, see 9 U.S.C.A. § 201 (West Supp. 1996), petitioners have provided documents of the State Department indicating that Venezuela is in fact a signatory. See United States Department of State, Treaties in Force 316 (1996).

[3]By contrast, New York law comes into play under paragraph 30 only after a contractual dispute is referred to arbitration. Put another way, the language of paragraph 30 clearly contemplates that matters subject to determination by a court, such as threshold disputes over arbitrability (see First Options of Chicago, Inc. v. Kaplan, ___ U.S. ___, 115 S.Ct. 1920, 1923 (1995); Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 45 (2d Cir. 1993)) will be governed by Venezuelan law, while matters to be determined by arbitrators will be governed by New York law.

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submitted some authority to support their contention that the objections have arguable merit. See Iberian Tankers Co. v. Terminales Maracaibo, C.A., 322 F. Supp. 73, 75 (S.D.N.Y. 1971). In any event, in the absence of any challenge to the adequacy of the Venezuelan legal process (see Tr., 10/21/96, at 26-27; see also Blanco v. Banco Industrial de Venezuela, S.A., 997 F.2d 974, 981 (2d Cir. 1993)) the Venezuelan court that already has the issue of arbitrability before it ought to be afforded the initial opportunity to determine this threshold question of Venezuelan law before a non-Venezuelan court is called upon to do so.[4]

It makes obvious good sense, as well as offering a considerable savings of judicial time and resources, for this Court to have the benefit of a Venezuelan court's speedy determination of a threshold question of Venezuelan law that must be resolved before this or any other court can compel arbitration in this case. Nor will any material delay be occasioned thereby, for respondents have represented, through the sworn declaration of their Venezuelan law expert, that the Venezuelan court is required to decide such jurisdictional issues within five workings days of the November 21, 1996 date when petitioners are required to file their answering papers in the Venezuelan action. See Declaration of Oscar E. Ochoa dated Oct. 21, 1996 at ¶ 10. In addition to considerations of legal economy and international comity, such deference is also consistent with the parties'

[4] While petitioners question whether respondents' petition in the Venezuelan court has formally placed this threshold issue of arbitrability before that court, they do not contest that the answer to that petition that they must file by November 21, 1996 will challenge the jurisdiction of the Venzuelan court on the ground that the underlying dispute is required to be arbitrated.

reasonable expectations: for when they expressly agreed that these contracts, involving largely Venezuelan activities by mostly Venezuelan parties, would be governed by Venezuelan law except as to disputes submitted to arbitration, they plainly anticipated that such disputes as a court might have to decide (such as arbitrability) would quite likely be submitted to a Venezuelan court.

Accordingly, the motion for immediate determination of the Petition is denied. At the same time, this Court is mindful not only of the strong policy favoring prompt arbitration expressed in the U.N. Convention, but also of the many facial indications that respondents are utilizing dubious strategems to try to evade their plain contractual obligations. A thimblerig is still a scam even if the thimbles be courts of separate sovereigns. To entirely eschew oversight of this controversy in such circumstances would be a derogation of duty and an invitation to fraud. See Caspian Investments, Ltd. v. Viacom Holdings, Ltd., 770 F.Supp. 880, 887 (S.D.N.Y. 1991). Accordingly, notwithstanding the pendancy of the Venezuelan action, this Court will retain jurisdiction of the underlying Petition in this case, see China Trade and Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987), but stay further proceedings for a period of 60 days (i.e., through December 27, 1996). see Borden, Inc. v. Meiji Milk Prod. Co., Ltd., 919 F.2d 822, 829 (2d Cir. 1990), in order to afford the Venezuelan court the opportunity to determine, if it chooses, the threshold question of arbitrability under Venezuelan law.

SO ORDERED.

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JED S. RAKOFF, U.S.D.J.

Dated: White Plains, New York
October 28, 1996

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PEPSICO, INC. and PEPSI-COLA PANAMERICANA, S.A.,

Petitioners,

-against-

OFICINA CENTRAL DE ASESORIA Y AYUDA TECNICA, C.A., C.A. EMBOTELLADORA ANTIMANO, EMBOTELLADORA ARAGUA, S.A., EMBOTELLADORA BARINAS, S.A., EMBOTELLADORA CARABOBO, S.A., C.A. EMBOTELLADORA CARACAS, EMBOTELLADORA CARONÍ, S.A., C.A. EMBOTELLADORA CORO, GASEOSAS ORIENTALES, S.A., EMBOTELLADORA GUARICO, S.A., EMBOTELLADORA GUAYANA, S.A., HIT DE VENEZUELA, S.A., EMBOTELLADORA LA PERLA, S.A., C.A. EMBOTELLADORA LARA, EMBOTELLADORA MATURÍN, S.A., C.A. EMBOTELLADORA NACIONAL, EMBOTELLADORA ORINOCO, S.A., C.A. EMBOTELLADORA TÁCHIRA, C.A. EMBOTELLADORA VALERA,

Respondents.

96 Civ. 7817 (JSR)

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION BY PEPSICO, INC. AND PEPSI-COLA PANAMERICANA, S.A. FOR REARGUMENT AND RECONSIDERATION

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TABLE OF AUTHORITIES

PepsiCo, Inc. and Pepsi-Cola Panamericana, S.A. (referred to jointly hereinafter as "Pepsi"), petitioners in the above-captioned matter, submit this memorandum in support of their motion for reconsideration and reargument of their petition to compel arbitration and to enjoin respondents from pursuing a conflicting action in Venezuela.

INTRODUCTION

By memorandum order ("Order") dated October 28, 1996, this Court denied Pepsi's petition to compel arbitration and to enjoin respondents from pursuing a conflicting action, but retained "jurisdiction of the underlying Petition, subject to a 60-day stay of proceedings to allow the Venezuelan court to determine, if it chooses, a threshold question of Venezuelan law" regarding the arbitrability of the subject matter of the Venezuelan Action. Order at 1-2. The question of arbitrability is not, however, even before the Venezuelan court. The relief requested in the complaint in that action relates solely to the calculation of damages but does not seek any determination of arbitrability. See Venezuelan complaint, Appendix in Support of Petition ("App. in Supp."), Exhibit E at 37-42. The only way that the question of arbitrability can or will get raised in the Venezuelan Action is if Pepsi raises that defense of lack of jurisdiction in its answer. Requiring Pepsi to take action in furtherance of the conflicting Venezuelan Action and submit the issue to the Venezuelan court for resolution when Pepsi has properly commenced arbitration by filing its Request for Arbitration and nominating its arbitrator on October 14, 1996, is untenable.

Pepsi respectfully submits that there are three dispositive reasons why this Court should reconsider its Order and grant the relief requested in the underlying petition:

First, as the accompanying affidavits of Messrs. Pedro Ganem (a former President and Justice of the Supreme Court of Venezuela) and Rene Plaz Bruzual (also a former Justice of the Venezuelan Supreme Court) (referred to hereinafter as "Ganem Aff." and "Bruzual Aff.") demonstrate, a critical assumption underlying the Order--that the Venezuelan courts could or would make a "speedy determination of a threshold question of Venezuelan law" (Order at 5)--is not likely to occur. In fact, a judicial determination by the Venezuelan courts of arbitrability could well take many months, and perhaps more than a year. 1/ See infra at 3-5.

Second, there is a substantial body of case law that makes it clear that this Court must apply federal law in making a determination of arbitrability. There is no justification for deferring to the Venezuelan courts for a determination of a question this Court must decide based on federal law. See infra at 10-17. The two cases upon which the Court relied in deferring to the Venezuelan courts, First Options

1/ We also call to the Court's attention Halfway to Reform: The World Bank and the Venezuelan Justice System, published in August 1996 by the Lawyers Committee for Human Rights and The Venezuelan Program for Human Rights Education and Action. See Affidavit of Thomas D. Barr ¶ 2, submitted herewith.

of Chicago Inc. v. Kaplan, 115 S. Ct. 1920, 1923 (1995), and Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 45 (2d Cir. 1993), are not to the contrary--and, in fact, do not apply to the circumstances before the Court. See infra at 6-10.

Third, principles of comity do not require or suggest that the Court defer to the Venezuelan courts for a determination of arbitrability. Indeed, two international treaties to which both the United States and Venezuela are signatories, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "U.N. Convention") and the Inter-American Convention on International Commercial Arbitration (the "Inter-American Convention") (referred to jointly hereinafter as the "Conventions"), eliminate any comity concerns. See infra at 20-24.

I. THE AFFIDAVITS OF MESSRS. PEDRO GANEM AND RENE BRUZUAL PROVIDE FACTS THAT DISPROVE A CENTRAL ASSUMPTION UNDERLYING THE COURT'S ORDER.

The Court premised its decision in significant part upon the Declaration of Oscar E. Ochoa, submitted by respondents, which asserted that a Venezuelan court could or would decide the question of arbitrability within five working days after Pepsi files an answer in the Venezuelan Action. Order at 5. 2/ As the affidavits of

2/ Due to the strike in the Venezuelan courts that has apparently only just ended but may be resumed, Pepsi's time to answer is still unclear, but has been delayed well beyond the original November 21 estimate.

Judge Pedro Ganem (a former President and Justice of the Venezuelan Supreme Court) and Judge Rene Bruzual (also a former Justice of the Venezuelan Supreme Court) make clear, "it is not common for judges to comply with the time period provided for, and decisions regarding a lack of jurisdiction generally take a longer time." Ganem Aff. ¶ 3; Bruzual Aff. ¶ 2. There is no likelihood that the Venezuelan court of first instance can or will render a decision on the question of arbitrability within a five-day period. See Ganem Aff. ¶¶ 3, 7, 9; Bruzual Aff. ¶¶ 2-3. Accordingly, contrary to this Court's assumption that no "material delay [will] be occasioned" by deference to the Venezuelan courts (Order at 5), unacceptable delay will, in fact, be the inevitable result.

Obtaining a decision from a Venezuelan court of first instance is only the first step in obtaining a final determination of arbitrability. Review by the Venezuelan Supreme Court will inevitably follow any initial decision by the court of first instance. Ganem Aff. ¶¶ 4-5; Bruzual Aff. ¶ 2. If the Venezuelan court of first instance determines that it lacks jurisdiction (referring the matter to arbitration or to a foreign court, for instance), the Supreme Court will automatically review the decision. Id. If the court decides it has jurisdiction, the party asserting the defense may also appeal that decision to the Supreme Court. Id. Thus, without a doubt, any decision reached in this matter regarding the jurisdiction of the Venezuelan courts will be appealed to the Supreme Court. Id. That process can take anywhere from several months to more than a year. Ganem Aff ¶¶ 7-9; Bruzual Aff. ¶ 3.

The affidavit of Judge Bruzual provides further evidence of the lengthy period of time it can take to obtain a decision on a preliminary defense of a lack of jurisdiction. A chart included with Judge Bruzual's affidavit sets forth a number of cases in which such defenses have been asserted, but which have not yet been fully determined. Bruzual Aff. ¶ 3. In several instances, years have elapsed without a final decision. Id.

Long and short, there is and can be nothing quick or expedient about asking the Venezuelan courts to determine the question of arbitrability.

II. THE ISSUE OF ARBITRABILITY IS A QUESTION OF FEDERAL LAW FOR THIS COURT TO DECIDE.

The question of how long it might actually take the Venezuelan courts to reach a final determination of arbitrability is--in any case--beside the point. There is a totally independent basis for reconsidering the decision of October 28, 1996. The question of whether or not this dispute is arbitrable is one that, according to federal law and the international treaties, this Court must determine. It should not, and, indeed, we submit may not, defer that decision to a foreign court. See infra at 10-17.

Whether or not this dispute is arbitrable does not depend on whether respondents characterize their claim as one regarding the "validity" of the arbitration clause or its scope. As we demonstrate below, in either event the Conventions, the Federal Arbitration Act ("FAA") and the case law make it clear that the decision as to arbitrability should be made by this Court.

The Court relied on the choice of law clause contained in paragraph 30 of the Exclusive Bottling Appointments ("EBA's") and the cases First Options, supra, and Progressive Casualty, supra, in making its determination that Venezuelan law applies to the question of arbitrability. Order at 4. As we set forth below, Venezuelan law does not apply to this determination, but even if it did, this Court is responsible for construing Venezuelan law (Fed. R. Civ. P. 44.1). There is a significant body of case law--easily distinguishable from First Options and Progressive Casualty--providing that the determination of arbitrability is one for this Court.

A. First Options and Progressive Casualty Are Inapplicable to this Dispute.

Regardless of whether the claims regarding arbitrability are characterized as ones of validity due (in essence) to "too much" choice of law, or of scope, the holdings of First Options and Progressive Casualty provide no support for deferring to the Venezuelan courts to decide the issue of arbitrability.

Neither First Options nor Progressive Casualty is a case about determining what law applies to questions regarding the scope of an arbitration clause. These cases ask far different questions--neither of which is before this Court: First Options asks the very narrow question of who, as between the court and the arbitrators, should decide whether any agreement to arbitrate even exists between the parties (115 S. Ct. at 1923), and Progressive Casualty asks a similar question of whether any arbitration agreement even exists (991 F.2d at 44-46).

In First Options, the Kaplans (who sought to avoid arbitration) never themselves signed any agreement containing an arbitration clause. An investment company owned by the Kaplans (MKI) had signed an agreement with First Options that contained an arbitration clause. Id. at 1922. The Kaplans filed written objections to an arbitration commenced by First Options commenced against themselves and MKI, but the arbitrators determined that they had the power to rule on the merits of the dispute and with respect to the Kaplans; the arbitrators proceeded to render an award in favor of First Options, and against the Kaplans and MKI. Id. The district court confirmed the award; the Court of Appeals reversed. The Supreme Court granted certiorari to review the narrow question of who was the appropriate party to determine whether the Kaplans had ever agreed to submit the question of arbitrability to the arbitrators. Id. at 1923.

In First Options, the term "arbitrability" refers to the question of whether the Kaplans had themselves entered into a contract containing an arbitration agreement--questions regarding the scope of any arbitration agreement (a different sort of "arbitrability") were not before the Court. See, e.g., Id. at 1922-23. The Supreme Court held that the Kaplans had not entered into such an agreement and that the court should have made this determination in the first instance. Id. at 1925. The Supreme Court did find that it was appropriate to interpret state law in deciding whether or not the Kaplans had entered into a written agreement (Id. at 1924), but nowhere did the Supreme Court extend this holding to cases in which the existence of

an arbitration agreement is undisputed and the question is one of the scope. It is this latter situation which is before this Court.

If First Options could be read as expansively as the Court and respondents suggest (Order at 4), effectively requiring all questions relating to arbitrability to determined by state or local law, it would overrule an entire body of case law that is to the contrary. See, e.g., infra at 10-17. We believe that the Supreme Court did not intend this result, and we have found no other court that has read First Options to produce such a result. In this regard, Pepsi refers this Court to a number of cases in this Circuit that were decided after First Options and that continue to hold that federal law applies to questions of arbitrability. See National Union Fire Ins. v. Belco Petroleum Corp., 88 F.3d 129, 133 (2d Cir. 1996) ("Whether the parties have agreed, by virtue of an arbitration agreement covered by the FAA, to submit a dispute to arbitration is governed by federal law. 'The [FAA] creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" (citations omitted)); In Re American Fuel Corp. v. Utah Energy Dev. Co., Inc., 1996 WL 396131 at *2-3 (S.D.N.Y. July 16, 1996) (rejecting application of state law to dispute over scope of arbitration clause and instead applying federal law); see also VAC Svc. Corp. v. Service Merchandise Co., Inc., 929 F. Supp. 143, 144 (S.D.N.Y. 1996); Degaetano v. Smith Barney, Inc., 1996 WL 44226 at *3-4 (S.D.N.Y. Feb. 5, 1996) (citing First Options, the court distinguishes the issue of whether the parties agreed to arbitrate to which state law

may be applied, from the issue of the scope of an agreement, where federal law and policy is to be utilized): Gateson v. Asik-Bank, N.V., 1995 WL 387720 at *3-4 (S.D.N.Y. June 29, 1995).

Progressive Casualty similarly asked the narrow question of whether the parties before that court had ever even entered into a contract containing an arbitration clause. 991 F.2d at 44-45. In Progressive Casualty the dispute was whether one contract, which did not itself contain an arbitration clause, effectively pulled in by reference the terms of another contract which did contain such a clause. Id. In making this threshold determination of whether the parties have even agreed to arbitrate anything, the court applied general principles of state contract law. More important for present purposes, however, the court in Progressive Casualty also found that "the issue of an arbitration agreement's scope is governed by 'the federal substantive law of arbitrability'." Id. at 48 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)). The court then noted that the Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, even if the problem is one of construction of the language of the contract itself. 991 F.2d at 48; Mitsubishi, 473 U.S. at 626.

The question before this Court, as conceded by respondents, is one of scope. See, e.g., Venezuelan complaint, App. in Supp. at Ex. E at 30-31; Gonzalez Iglesias Decl. ¶ 8; Memo. in Opp. at 9. As set forth below, there is a substantial

body of case law that has not been limited or overruled by First Options or Progressive Casualty that makes it absolutely clear that this Court must apply the federal law of arbitrability to this question.

B. International Treaties and Substantial, Consistent Case Law Mandate that this Court Must Apply the Federal Law of Arbitrability to the Question Before It.

There is a substantial body of case law, developed out of the U.N. Convention, the Inter-American Convention and the FAA, that sets out the standards for rendering a decision on arbitrability of this matter.

Both the U.S. and Venezuela are signatories to the Conventions, and the FAA unambiguously requires that the district courts enforce the provisions of the Conventions. 9 U.S.C. §§ 201, 301 (1994). Once a dispute is determined to be both international and commercial in nature--as this one is--the dispute is governed by the Conventions, the FAA and the interpreting case law.

The cases cited below provide the proper guidelines for determining arbitrability in this matter. These cases are international in nature, they apply the FAA, fall under the U.N. Convention, and all hold that the federal law of arbitrability applies variously to questions regarding the scope of the arbitration agreement, its interpretation, construction, validity, revocability and enforceability: Mitsubishi, 473 U.S. at 625-26; Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974); David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd., 923 F.2d 245, 249-50

(2d Cir. 1991); Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845 (2d Cir. 1987); Campaniello Imports Ltd. v. Saporiti Italia S.p.A., 1996 WL 437907 at *8 (S.D.N.Y. Aug. 2, 1996); Hart Enter. Int'l, Inc. v. Anhui Import & Export Corp., 888 F. Supp. 587, 590 (S.D.N.Y. 1995); Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1236 (S.D.N.Y. 1992), appeal dismissed, 984 F.2d 58 (2d Cir. 1993); Matter of Ferrara, 441 F. Supp. 778, 780-81 (S.D.N.Y. 1977), aff'd, 580 F.2d 1044 (2d Cir. 1978); Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 43 (3d Cir. 1978); Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir. 1982); Prograph Int'l, Inc. v. Barhydt, 928 F. Supp. 983, 988 (N.D. Cal. 1996); Meadows Indemnity Co., Ltd. v. Baccala & Shoop Ins. Svcs., Inc., 760 F. Supp. 1036, 1040-41 (E.D.N.Y. 1991); Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Lauro, 555 F. Supp. 481, 483 (D. Virgin Isl. 1982), aff'd, 712 F.2d 50 (3d Cir. 1983). 3/

3/ There is a body of case law--not inconsistent with the principles just referred to--that can be read to apply state law to questions of arbitrability. See, e.g., Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ., 489 U.S. 468 (1989). These cases, however, relate to domestic, not international disputes. The holdings of the Supreme Court in Mitsubishi and Scherk (as quoted above in Threlkeld) make it clear that it is wrong to apply state or foreign law when interpreting arbitration agreements under the Convention. In Filanto, 789 F. Supp. at 1235, the Court recognized that in "cases controlled by chapter 1 of the Arbitration Act", state contract law may apply, but also held that international disputes are treated differently:

> "the question of whether these parties agreed to arbitrate their disputes is governed by the Arbitration Convention and its implementing legislation. That Convention, as a treaty, is the supreme law of the land, U.S. Const. art. VI cl. 2, and controls any case in any American court falling within its sphere of application. Thus, any dispute involving international commercial arbitration which meets the Convention's jurisdictional requirements, whether brought in state or federal court, must be resolved with reference to that instrument" [i.e. the Convention].

Id. at 1236. Notably, not a single case cited by respondents in support of their argument that Venezuelan law should apply to the issue of arbitrability was decided under the Conventions.

Simply put, once this Court determines that the matter before it falls under the FAA and under the Conventions, it must conduct a limited four-part inquiry: (1) is there an agreement in writing to arbitrate the subject of the dispute; (2) does the agreement provide for arbitration in the territory of a signatory country; (3) does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial; and (4) does the commercial relationship have a reasonable relation with one or more foreign states? Filanto, 789 F. Supp. at 1236; Ledee, 684 F.2d at 186-87; Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 959 (10th Cir. 1992).

The Court must itself answer these four questions. See id. If and when these questions are answered in the affirmative, the Court is required to order arbitration. Id.; Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1145 (5th Cir. 1985); Ledee, 684 F.2d at 187; Marchetto v. DeKalb Genetics Corp., 711 F. Supp. 936, 939 (N.D. Ill. 1989). The "strong presumption favoring enforcement of arbitration clauses in international commercial agreements

divests this court of substantial discretion in deciding whether to order arbitration." Marchetto, 711 F. Supp. at 938; see also Sedco, 767 F.2d at 1445-46; Ledee, 684 F.2d at 187. As the Supreme Court declared: "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).

There is no provision in the Inter-American Convention absolving a court from its duty to enforce an agreement to arbitrate if the threshold four-part inquiry is met. Under the U.N. Convention, a court may refuse to compel arbitration only if it finds the agreement is "null and void". See Art. II (3). There is no claim before this Court that the EBA's are somehow null and void. Respondents claim just the opposite--they have requested relief in the Venezuelan courts based upon the terms of the EBA's.

The task of this Court is, therefore, to make determinations with respect to the four questions set forth above, and, once it has answered them affirmatively, to compel arbitration. The Court is assisted in this by the fact that there is no dispute about three of the four questions: respondents concede that the EBA's contain an arbitration clause that provides for arbitration in the United States, which is a signatory country. See Venezuelan complaint, App. in Supp., Ex. E at 29-31; Gonzalez Iglesias Decl. ¶ 8; 9 U.S.C.A. §§ 201, 301 (Supp. 1996).

Respondents concede the existence of a commercial relationship with Pepsi. See, e.g., Venezuelan complaint, App. in Supp., Ex. E at 5. Respondents concede that the commercial relationship existed between the Venezuelan bottling companies and Pepsi-Cola Panamericana, S.A. (a Venezuelan company) and PepsiCo, Inc., a company incorporated in North Carolina and headquartered in Purchase, New York. Id. at 6. The sole remaining question for this Court is whether the subject of the dispute--the termination of the EBA's by respondents and the damages due thereby--is encompassed within the arbitration clause.

Two additional legal principles are relevant to this aspect of the Court's inquiry: first, that there is an "emphatic" federal interest in enforcing agreements to arbitrate under the Conventions. Mitsubishi, 473 U.S. at 631; see Threlkeld, 4/ 923 F.2d at 248. In Threlkeld, the Second Circuit stated that:

> "The policy in favor of arbitration is even stronger in the context of international business transactions. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629-31, 105 S. Ct. 3346, 3355-56, 87 L.Ed.2d 444 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-18, 94 S. Ct. 2449, 2455-57, 41 L.Ed.2d 270 (1974). Enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation. The parties may agree in advance as to how their disputes will be expeditiously and inexpensively resolved should their business relationship sour. See Scherk, 417 U.S. at 516-17, 94 S. Ct. at 2455-56. Stability in international trading was the engine behind the Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . . . This treaty--to which the United States is a signatory--makes it clear that the liberal federal arbitration

4/ We should note that Rogers & Wells represented the prevailing party.

policy 'applies with special force in the field of international commerce' Mitsubishi, 473 U.S. at 631, 105 S. Ct. at 3356."

Id. at 248.

Second, when determining whether the scope of the EBA's encompass this dispute, the Court is also bound to follow the case law that holds that "arbitration clauses must be interpreted broadly, and all doubts as to whether a dispute is encompassed by a particular clause must be resolved in favor of arbitration, even where the problem is the construction of the contract language itself." Oriental Commercial and Shipping Co., Ltd. v. Rosseel, N.V., 609 F. Supp. 75, 77 (S.D.N.Y. 1985) (citing Moses H. Cone Mem'l Hosp., 460 U.S. at 23-26); Threlkeld, 923 F.2d at 248 (same). In Threlkeld, the court held that "arbitration should be compelled 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute'". 923 F.2d at 250 (citations omitted).

Any common sense reading of the arbitration clause contained in the EBA's makes it clear that the dispute between the parties is arbitrable. As this Court noted, there are "many facial indications that respondents are utilizing dubious stratagems to try to evade their plain contractual obligations." Order at 6.

C. The Federal Law of Arbitrability Applies Despite the Choice of Law Clause in Paragraph 30 of the EBA's

This Court also rested its decision to defer the question of arbitrability to the Venezuelan courts on the choice of law clause contained in paragraph 30 of the EBA's. Order at 2, 4. Paragraph 30 chooses both New York and Venezuelan law--apparently choosing Venezuelan law for some purposes and New York law as the law governing the arbitration. Resolving this confusion is not, however, required in order to determine the question of arbitrability before this Court. As we have stated above (supra at 10-15), the Court is bound to apply federal law to the question before it--rendering both Venezuelan and New York law irrelevant.

For instance, in Becker, there was a German choice of law clause in the contract between the parties. 585 F.2d at 42. Becker involved an international dispute between two parties whose countries of residence (Germany and the United States) were signatories of the U.N. Convention. The court there stated:

> "There has been much discussion by the parties concerning the applicability of German law or Pennsylvania law in the resolution of this dispute. It may well be that the question of which law is to be applied will have to be answered in deciding the merits of the underlying controversy. . . . When a contract involves 'commerce', as this one does, whether a 'suit or proceeding is referable to arbitration . . . under an agreement (to arbitrate)' pursuant to the Federal Arbitration Act, 9 U.S.C. § 3, or to the [U.N. Convention] is clearly a matter of federal substantive law."

Id. at 43; see also Rhone Mediterranee, 555 F. Supp. at 483-84 (federal law determines arbitrability question, despite Italian choice of law clause); Threlkeld, 923 F.2d at 248; Riley, 969 F.2d at 959 (court applied federal law interpreting the U.N.

Convention to determine arbitrability, despite English choice of law clause); Linen Imports, Inc. v. Tehnoforestexport, 1993 WL 187892 at n.1 (S.D.N.Y. May 19, 1993) (applying federal arbitration law to question of arbitrability despite existence of Romanian choice of law clause); cf. Michele Amoruso E Figli v. Fisheries Dev. Corp., 499 F. Supp. 1074, 1080 (S.D.N.Y. 1980) (Judge Weinfeld, relying on Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) and Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959), stated that in cases brought in federal court involving arbitration provisions evidencing a transaction in commerce, "federal law is to govern their validity, enforceability and interpretation despite, as is found in the agreements at bar, a contrary choice of law provision in the arbitration clause.")

D. This Court Must Itself Answer the Question of Arbitrability Whether that is Posed As One of Validity or Scope.

The question of arbitrability has been presented to this Court in the guise of claims regarding the validity of the arbitration clause contained in paragraph 30 of the EBA's. See, e.g., 10/21/96 Hearing Tr. 13-14. Any reading of respondents' claims--both before this Court and in the Venezuelan Action--makes it perfectly clear that the arbitrability question before this Court is not genuinely one of validity but, rather, of scope.

Respondents' claims of invalidity amount to nothing more than a straw man to deflect the Court's attention from the fact that arbitrability here means nothing

more than deciding whether paragraph 30 encompasses this dispute. It is crystal clear that the dispute is really one of scope: respondents concede that they entered into valid and enforceable EBA's; they concede that paragraph 30 was a negotiated provision; on pages 29 through 31 of their complaint in the Venezuelan Action, and in their Memorandum in Opposition in this petition, they concede the existence of a written arbitration clause to which they are parties and concede that some disputes between the parties are arbitrable, but claim that this dispute is--conveniently--just not one of them. See Memorandum of Law in Support of Respondents' Opposition ("Memo. in Opp.") at 4-6, 9; Gonzalez Iglesias Decl. ¶¶ 3, 8; Venezuelan complaint, App. in Supp., Ex. E at 6-7, 29-31. Nonetheless, even if validity of the arbitration clause were the issue (which is not), that claim fails as a matter of law.

Under the Conventions, the FAA and the case law, questions regarding the "validity" of an arbitration clause or agreement are quite limited. 5/ In fact, once respondents acknowledged that they are signatories to written agreements to arbitrate under the U.N. Convention and the Inter-American Convention (which they have), those agreements to arbitrate are valid for purposes of referring the matter to arbitration by virtue of the express language of the Conventions. 6/ Respondents

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5/ See Riley, 969 F.2d at 959; Filanto, 789 F. Supp. at 1235-36; see also infra at 10-12, citing cases which stand for the proposition that federal arbitration law governs questions, inter alia, of validity.

6/ The Inter-American Convention provides that: "An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between with respect to a commercial transaction is valid. The agreement shall

clearly concede that they have entered into valid, enforceable EBA's (Venezuelan complaint, App. in Supp., Ex. E at 6-7), and that the EBA's contain arbitration clauses (id. at 29-31), and that the arbitration clause is contained in a negotiated paragraph 30 (Gonzalez Iglesias Decl. at ¶ 7; Memo. in Opp. at 5). The Convention standard applies even when the parties have agreed that a particular nation's or state's law will govern the contract. See supra at 16-17. Particular or parochial state or national laws regarding the validity or invalidity of arbitration agreements are superseded by the standards set forth in the Conventions which hold that such agreements are valid simply by virtue of their existence.

Notably, respondents do not argue that the EBA's are somehow null and void--indeed, they cannot make such an argument while they are simultaneously attempting to pursue an action in Venezuela that accepts the validity of the contract and requests a declaration regarding some of its terms. See Venezuelan complaint, App. in Supp., Ex. E. 7/

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be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications." Art. 1. The U.N. Convention similarly provides that "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Art. II. As a technical matter, the Inter-American Convention applies to this case pursuant to 9 U.S.C. § 305, although the standards under both Conventions are essentially the same.

7/ Respondents' sole contention in the Venezuelan action relates to how much they owe as a result of their abrupt and unilateral termination of what they admit was a valid contract they entered into. See, e.g. Venezuelan complaint, App. in Supp., Ex. E at 37-42.

The so-called "null and void" defense relates only to internationally recognized defenses of duress, mistake, fraud or waiver. Linon Imports, 1993 WL 187892 at n.3 ("the 'null and void' language of the Convention must be read narrowly, for the signatory nations have declared a general policy of enforceability of agreements to arbitrate."); Ledee, 684 F.2d at 187 ("the clause must be interpreted to encompass only those situations such as fraud, mistake, duress, and waiver-that can be applied neutrally on an international scale."); see also Oriental Commercial, 609 F. Supp. at 78; Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Lauro, 712 F.2d 50, 53 (3d Cir. 1983); Meadows, 760 F. Supp. at 1041, 1043. Respondents do not argue that they were subject to any sort of fraud, duress or mistake when they agreed to the arbitration provisions.

III. TRADITIONAL PRINCIPLES OF COMITY ARE INAPPLICABLE IN A MATTER FALLING UNDER INTERNATIONAL TREATIES.

In its Order, the Court cited considerations of "international comity" in support of its deference to the Venezuelan courts for a determination of arbitrability. Order at 5. In fact, and as set forth below, we submit that there are no international comity concerns before the Court since the dispute between the parties falls under international treaties that supersede or become the equivalent of local or national law. Even apart from this, however, there are no present comity concerns since the

proceedings in Venezuela have not advanced beyond the filing of a complaint and no decision has been made or action taken by the Venezuelan court. Indeed, the issue of arbitrability is not even before that court.

A. The Conventions and the FAA Override any Comity Concerns.

The law is clear that in cases governed by international treaties, normal principles of comity are inapplicable. See Evans & Sutherland Computer Corp. v. Thompson Training & Simulation, Ltd., 1994 WL 593808 at *7 (S.D.N.Y. Oct. 28, 1994); Sumitomo Corp. v. Parakopi Compania Maritima, S.A., 477 F. Supp. 737, 741-42 (S.D.N.Y. 1979), aff'd, 620 F.2d 286 (2d Cir. 1980); see also Hilton v. Guyot, 159 U.S. 113, 163 (1895). 8/

8/ The Supreme Court's decision in Hilton held that comity principles govern the effect given to foreign judgments only in the absence of a "treaty or statute of this country":

> "The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is [with respect to the effect given to foreign judgments]."

Id. at 163. The Supreme Court also noted that:

> "Chancellor Kent says: 'The effect to be given to foreign judgments is altogether a matter of comity in cases where it is not regulated by treaty.'"

Id. at 166 (citation omitted, emphasis supplied).

In Evans & Sutherland, the court rejected an argument that, on the basis of comity, it should dismiss or stay the motion to compel arbitration in deference to a pending action in the United Kingdom which sought to declare the contract null and void. 1994 WL 593808 at *6-7. The court also held that the Congressional mandate of the FAA overrode any comity concerns:

> "Having weighed the above considerations, the Court determines that a stay of this action would be inappropriate. Congress's clear intent in the Arbitration Act was 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.' Moses H. Cone Mem. Hosp., 460 U.S. at 22-23. In light of this intent, even assuming that the United Kingdom Action will offer prompt relief, the Court must avoid the 'inevitable delay' that would result from a stay. Id. at 23."

Id. at *7 (emphasis supplied).

Similarly, in Sumitomo, 477 F. Supp. at 741-42, the court rejected an argument that comity required it to defer to a pending Greek action which involved the validity of the arbitration agreement:

> "Both Greece and the United States are signatories to the Convention, and the Convention is clearly intended to foster 'recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed . . . in the signatory countries.' Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15, 94 S. Ct. 2449, 2457, 41 L.Ed.2d 270 (1974). In implementing the Convention, Congress clearly adopted the Convention's goals. These goals and the strong federal and New York policy in favor of arbitration would not in any way be furthered by recognizing and deferring to litigation pending in Greece which seeks to avoid arbitration. Accordingly, the comity defense must be rejected."

Id. at 742. 9/

Petitioners seek relief under the U.N. Convention and the Inter-American Convention pursuant to 9 U.S.C. §§ 206, 303 (1994). Petition in Support at 10. As a signatory to both conventions, Venezuela cannot take offense if this Court takes actions--compelling arbitration and enjoining pursuit of a conflicting action--consistent with those treaties.

B. There Can be No Present Comity Concerns Since the Venezuelan Court Has Not Yet, and May Never, Take Any Action.

Even apart from the law set forth above demonstrating that the presence of controlling international treaties eliminates comity concerns, no present comity concerns can exist since the Venezuelan court has not taken any action--thereby making it impossible for the Venezuelan or U.S. district court to be in any sort of conflict. See Hilton, 159 U.S. at 164 (defining comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience . . . ."); Sumitomo, 477 F. Supp. at 741-42.

9/ Evans & Sutherland and Sumitomo also highlight how inapplicable Judge Weinfeld's comity concerns in his pre-U.N. Convention decision in Iberian Tankers Co. v. Terminales Maracaibo, C.A., 323 F. Supp. 73 (S.D.N.Y 1971) (cited in Memo. in Opp. at 16, n.8 and in the Order at 5), are to this action. Iberian Tankers did not implicate an arbitration agreement under an international treaty.

In Sumitomo, the court found that the Hilton definition of comity required it to reject respondent's comity defense:

> "[i]n the instant case, no legislative, executive or judicial act of another nation is involved. Although litigation is pending in Greece, all that has transpired is the filing of a complaint. The petitioners have not yet put in answers, and the Greek courts have not yet had to review the merits of the dispute herein in issue. Hence, compelling Parakopi to arbitration at this juncture would not in any way waste or duplicate the efforts of the Greek courts".

Id. at 742.

In the matter before this Court, the Venezuelan court has taken no action that conflicts or threatens to conflict with a decision this Court might make. The Venezuelan Action has proceeded no further than the filing of the complaint. As stated above, supra at n.2, because the Venezuelan courts were closed for some time due to a strike that may shortly resume, Pepsi will not be filing an answer for some time. Moreover, even when Pepsi will have filed an answer, it is likely that no final judicial determination will be forthcoming for many months or even more than a year. See supra at 3-5. 10/

10/ In addition, it is well-settled that even when the courts of two sovereigns have conflicting jurisdiction over a dispute, the general rule of comity "requires the domestic court to exercise jurisdiction concurrently with the foreign court". Schreiner v. Wallace, 832 F. Supp. 687, 693 (S.D.N.Y. 1993) (citing China Trade & Dev. Corp. v. M.V. Choong Yong, Ltd., 837 F.2d 33, 36 (2d Cir. 1987); accord Herbstein v. Bruemmer, 743 F. Supp. 184, 187-88 (S.D.N.Y. 1990).

CONCLUSION

For all of the reasons set forth above, Pepsi requests that this Court reconsider and reverse its Order dated October 28, 1996, and grant Pepsi's motion to compel arbitration and to enjoin respondents from pursuing a conflicting action in Venezuela.

Dated: November 14, 1996

Respectfully submitted,

CRAVATH, SWAINE & MOORE,

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I, the undersigned, Liliana Brando Brando, a Public Interpreter of the Republic of Venezuela in the English language as per Certificate published in the Official Gazette of the Republic of Venezuela No. 31,174 dated February 14, 1977 and registered with the Main Public Registry Office of the Federal District under No. 192, folio 112 over, Book 2, with Credential No. AIL-392 dated February 10, 1977, do hereby certify that the attached document which was submitted to me for its translation into English, reads as follows: ———————————————

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PEPSICO INC. and PEPSI-COLA PANAMERICANA, S.A., Petitioners, -against- OFICINA CENTRAL DE ASESORIA Y AYUDA TECNICA, C.A., C.A. EMBOTELLADORA ANTIMANO EMBOTELLADORA ARAGUA, S.A., EMBOTELLADORA BARINAS, S.A., EMBOTELLADORA CARABOBO, S.A., C.A. EMBOTELLADORA CARACAS, EMBOTELLADORA CARONI, S.A., C.A. EMBOTELLADORA CORO, GASEOSAS ORIENTALES, S.A., EMBOTELLADORA GUARICO, S.A., EMBOTELLADORA GUAYANA, S.A., HIT DE VENEZUELA, S.A., EMBOTELLADORA LA PERLA, S.A., C.A. EMBOTELLADORA LARA, EMBOTELLADORA MATURIN, S.A., C.A. EMBOTELLADORA NACIONAL, EMBOTELLADORA ORINOCO, S.A., C.A. EMBOTELLADORA TACHIRA, C.A. EMBOTELLADORA VALERA, Respondents.	96 Civ. 7817 (JSR) AFFIDAVIT OF RENE PLAZ BRUZUAL

CITY OF CARACAS	)	Republic of Venezuela*	)
	) ss:	City of Caracas*	) ss
COUNTRY OF VENEZUELA	)	Embassy of the*	)
		United States of America*	)

RENE PLAZ BRUZUAL, being duly sworn, deposes and states:

1. I was Justice of the Venezuelan Supreme Court from 1985 until my retirement in 1994. I was President of the Civil Cassation Branch of the Supreme Court of Venezuela for the period 1991-1992. I received my law degree in 1951 and have been in private practice, except for

* [This text is in English language in the original document]

the periods already referred when I was a Justice of the Supreme Court. Additionally, I have been Associated Judge in different Civil and Commercial Courts of First and Second (Appeal) Instance, member of the Board of Directors of the Federal District Lawyers' Bar for two annual terms and Alternate Member of the Judicial Council. I am a member of the Federal District Lawyers' Bar and the Institute for Social Welfare of Lawyers.

2. The Venezuelan Civil Procedure Code (Articles 59 and 346) allows a party to assert the lack of jurisdiction as a preliminary defense, when a particular matter should be referred to arbitration or to another court. According to Article 349 of the Civil Procedure Code, the judge of first instance should decide the validity of such a defense on the fifth working day after the twenty working day period to answer the claim and assert the defense. Notwithstanding this provision, it is not common for judges to comply with the time period provided for, and decisions regarding a lack of jurisdiction issue generally take a longer time. It is not possible to determine in advance the length of time that a judge in a court of first instance will actually take to decide such a defense. If a judge of first instance does determine that he lacks jurisdiction, such decision must be reviewed by the Political-Administrative Branch of the Supreme Court. Likewise, if the judge of first instance decides that the lack of jurisdiction does not exist, the interested party can appeal through the "regulation of jurisdiction" recourse and the issue would have to be decided by the Political-Administrative Branch of the Supreme Court. In any of the two cases, the period for the Political-Administrative Branch of the Supreme Court to review the matter (10 working days from the receipt of the files).

3. Notwithstanding the above, based upon my experience and general knowledge, the Supreme Court does not decide about the lack of jurisdiction defense within ten working days from receipt of the file. Normally it takes a much longer period of time for the Supreme Court to render a decision on such a question. There is no way to determine exactly how long a decision would actually take, but it could be months or years. As an example, I enclose a list of fifteen (15) files that I have seen last week in the Political-Administrative Branch of the Supreme Court of Justice, related to cases in which the preliminary defense of lack of jurisdiction has been posed and remains undecided as of today. The attached list indicates the number of each file, the plaintiff, the

defendant, the date on which the lack of jurisdiction preliminary defense was posed and the date on which the files reached the Political-Administrative Branch of the Court.

(Signed illegible)

RENE PLAZ BRUZUAL

Sworn to before me this 12 day of November 1996.

(Signed) James Blanford

Notary Public of the United States of America.

(There is a rubber stamp that reads:) JAMES B. BLANFORD, Consul General. [There is a seal in English that reads:] EMBASSY OF THE UNITED STATES OF AMERICA - CARACAS -

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Nº of File	PLAINTIFF	DEFENDANT	Date of preliminary defense filing	Date of receipt of file by Supreme Court
11655	Gabriela Ciaffetelli Volpe	Gladys Betancourt de Briceño	04-05-95	05-03-95
11633	Marlene Herrera Solorzano	Efraín Rosas	03-28-95	04-27-95
12725	Norah Marlene Mendoza de Perazo	Yerda Jesús Carneiro Martínez & Cruz Manuel León González	05-02-95	01-18-96
12596	William Roberto Acosta Pulgar	Pelicio Hipólito Abreu	02-07-96	04-30-96
12316	María del Tránsito Méndez Martínez & Rogelio Chacón	Marco Calvopiña	05-05-95	01-16-96
12597	Giuseppe Carusso	Pedro Pablo Astudillo & Elodia Luciani de Astudillo	02-15-96	04-30-96
12591	María Teresa Peñalosa de Rodríguez	Lourdes Jiménez Figuera	12-05-95	04-30-96
12658	Clodilda Rosa Yajure de Rivero	César Salazar	10-05-95	05-28-96
12667	Sociedad Civil Unidad Legal	Josefina Fernández	12-20-95	05-28-96
10112	José Antonio Cardozo	Manuel Alarcón	05-11-93	10-01-93
10990	Armand Jean Paul Hubert	Franco-Metro Caracas (FRAMECA), Spie Batignolles, CGEE Alsthom & C.A. Metro de Caracas	04-06-90	09-20-94
11850	José Méndez Camino	Hugo Núñez Cáceres	05-23-95	07-06-95
12104	María Genoveva Zarpe de Arteaga	Aura Cecilia Rivas de Medina	10-04-95	10-25-95
12198	Ramona Elena Peña de León	Rafael Gallardo Gallardo	04-10-95	11-22-95
11274	Crucifissa Ardagna de Bonomi, María Josefina de Bonomi, Gaetana Bonomi & Esteban Bonomi	Altagracia Sano	01-26-94	12-06-94

(Signed:) René Plaz Bruzual

The foregoing is a true translation which I make at the request of the interested party in Caracas, this 12th day of November, 1996.-

[Translator's note: words in brackets are translator notes]-

I, the undersigned, Liliana Brando Brando, a Public Interpreter of the Republic of Venezuela in the English language as per Certificate published in the Official Gazette of the Republic of Venezuela No. 31.174 dated February 14, 1977 and registered with the Main Public Registry Office of the Federal District under No. 192, folio 112 over, Book 2, with Credential No. AJ/L-392 dated February 10, 1977, do hereby certify that the attached document which was submitted to me for its translation into English, reads as follows.

[There is on the upper left margin a rubber stamp in English language, the text of which is copied below for the sake of continuity:]

Republic of Venezuela)
City of Caracas) ss
Embassy of the)
United States of America)
[Translation follows:]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PEPSICO INC and PEPSI-COLA PANAMERICANA, S.A., Petitioners,

-against-

OFICINA CENTRAL DE ASESORIA Y AYUDA TECNICA, C.A., C.A. EMBOTELLADORA ANTIMANO EMBOTELLADORA ARAGUA, S.A., EMBOTELLADORA BARINAS, S.A., EMBOTELLADORA CARABOBO, S.A., C.A. EMBOTELLADORA CARACAS, EMBOTELLADORA CARONI, S.A., C.A. EMBOTELLADORA CORO, GASEOSAS ORIENTALES, S.A., EMBOTELLADORA GUARICO, S.A., EMBOTELLADORA GUAYANA, S.A., HIT DE VENEZUELA, S.A., EMBOTELLADORA LA PERLA, S.A., C.A. EMBOTELLADORA LARA, EMBOTELLADORA MATURIN, S.A., C.A. EMBOTELLADORA NACIONAL, EMBOTELLADORA ORINOCO, S.A., C.A. EMBOTELLADORA TACHIRA, C.A. EMBOTELLADORA VALERA,

Respondents.

96 Civ. 7817 (JSR)

AFFIDAVIT OF PEDRO ALID ZOPPI GANEM

CITY OF CARACAS)
) ss:
COUNTRY OF VENEZUELA)

PEDRO ALID ZOPPI GANEM, being duly sworn, deposes and states:

1. I am a former President of the Supreme Court of Venezuela. I served as President on that Court for three one year terms, that from 1986-87, and two from 1990-92. Prior to serving as President, I was a Justice of the Supreme Court in the Political-Administrative Branch from 1984 until I became President of the Court in 1986. I also served as a Justice of the Court from 1987-1990 and from 1992 until my retirement in 1994. I received my law degree in 1949 and, apart from a brief time in private practice, I was a judge in several courts until my appointment to the Supreme Court. I have written a number of articles and notes on legal topics and authored the following legal texts: Preliminary Defenses and Other Issues; Preventive Measures, and Solution to Errors in the Civil Procedure Code, Parts I and II. I am a member of the Federal District Lawyers' Bar and the Institute for Social Welfare of Lawyers.

2. My professional career has been dedicated primarily to the study of Venezuelan procedure regulations and, in particular, the Venezuela Code of Civil Procedure.

3. The Venezuelan Civil Procedure Code (Articles 59 and 346) allows a party to assert a preliminary defense of a lack of jurisdiction when a particular matter should be referred to arbitration or to a foreign court. According to the provisions in the Civil Procedure Code, the judge of first instance should decide the validity of such a defense on the fifth working days after the twenty working day period to answer the claim and assert the defense. Notwithstanding this provision, it is not common for judges to comply with the time period provided for, and decisions regarding a lack of jurisdiction generally take a longer time. It is not possible to determine in advance the length of time that a judge in a court of first instance will actually take to decide such a defense.

4. If a judge does determine that the Venezuelan courts lack jurisdiction because the matter should be referred to arbitration or to a foreign court, the Political-Administrative Branch of the Supreme Court (the Branch of which I was a member) must undertake to review that decision. This compulsory review is governed by Articles 6, 59 and 62 of the Code of Civil Procedure. Review will be caused by a mandatory consultation made by the lower Court or even taken by the Supreme Court acting on its own.

5. If, however, the judge of first instance determines that the Venezuelan courts do have jurisdiction over the matter, therefore deciding that the matter is not arbitrable or does not belong

before a foreign court, that decision is also appealable through the "regulation" recourse. The party who asserted the defense of a lack of jurisdiction may use such recourse against this decision to the Political-Administrative Branch of the Supreme Court and said Branch of the Supreme Court will decide the matter.

6. The Venezuelan Civil Procedure Code governs the length of time a judge in the court of first instance should take to send the file to the Supreme Court (six working days from the date the decision is issued) and the length of time that the Political-Administrative Branch of the Supreme Court should take to review the matter (10 working days from the receipt of the file).

7. Notwithstanding these time frames contained in the Civil Procedure Code, based upon my experience and general knowledge, the Supreme Court has never completed a review of a decision regarding the defense of lack of jurisdiction within ten working days from receipt of the file. Normally it takes a much longer period of time for the Supreme Court to render a decision on such a question. There is no way to determine exactly how long a decision would actually take, but it could be months.

8. This type of delay is normal and frequent because of the structure of the Supreme Court. The Supreme Court is split into Branches, each of the Branches having five members. Cases of lack of jurisdiction are assigned to the Political-Administrative Branch of the Supreme Court and for every case, a "presiding judge" from that Branch must be appointed. This judge is in charge of drafting the decision of the Court. The remaining four members of the Branch review the decision once it has been submitted to them by the presiding judge. In accordance with the Supreme Court Act of Venezuela, the four judges have up to fifteen working days to issue their opinion on the decision. A majority of judges in the Branch (three members) must approve the decision. If the vote is not unanimous, any dissenting judge has fifteen more working days within which to draft a dissenting opinion (see Articles 59 and 63 of the Venezuelan Supreme Court Act). If, however, a decision drafted by a presiding judge is not approved by a majority of the Branch, a new presiding judge for the case must be appointed, causing additional delays.

9. Considering all of these provisions together, there are a number of reasons why a final determination of a defense based on a lack of jurisdiction is surely certain to take far longer than the time periods provided for in the Civil Procedure Code. Based on my experience

general knowledge, a final decision on a question of lack of jurisdiction would likely take between two and fourteen months, without accounting for additional delays due, for instance, to judicial vacation periods (from August 15 - September 15 and from December 24 - January 6), vacations taken by the presiding judge, illness, etc.

(Signed illegible)

PEDRO ALID ZOPPI GANEM

08 NOV 1996

Sworn to before me this _ day of

November 1996.

(Signed illegible)

Notary Public of the
United States of America

KATHLEEN M. HENNESSEY

[There are rubber stamps in English that read:] KATHLEEN M. HENNESSEY, Consul of the United States of America.- [There is a seal in English that reads:] EMBASSY OF THE UNITED STATES OF AMERICA - CARACAS.-

[There is text in the English language that transcribed for the sake of continuity reads:]

SUBSCRIBED AND SWORN TO

BEFORE ME THIS 08 NOV 1996

The foregoing is a true translation which I make at the request of the attorney of party in Caracas, this 11th day of November, 1996.-

[Translator's note: words in brackets are translator notes].-