

1984

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Recommended Citation

Adam Lessing, *Sauer-Getriebe KG v. White Hydraulics, Inc.: Applicability of the Federal Arbitration Act to International Commercial Arbitration*, 2 INT'L TAX & BUS. LAW. 331 (1984).

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Sauer-Getriebe KG v. White Hydraulics, Inc.: Applicability of the Federal Arbitration Act to International Commercial Arbitration

by
Adam Lessing†

INTRODUCTION

The number of U.S. cases involving international arbitration issues has grown due to increased reliance on international arbitration by American businesses engaged in international trade.¹ Chapter 1 of the Federal Arbitration Act (hereinafter the Arbitration Act)² governs all controversies concerning domestic arbitration practice, but does not necessarily apply to all cases involving international arbitration. International cases are generally governed by the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the Convention).³ Chapter 2 of the Arbitration Act is the operative statute im-

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1. See, e.g., Stein & Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685 (1983).

2. The Arbitration Act, 9 U.S.C. §§ 1-14 (1982), was enacted in 1925 to counter widespread judicial hostility to arbitration. The Arbitration Act applies to written arbitration agreements in transactions involving maritime, interstate, and international commerce as defined in 9 U.S.C. § 1.

3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 [hereinafter cited as the Convention]. For general literature on the Convention, see A.J. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* (1981) and G. GAJA, *INTERNATIONAL COMMERCIAL ARBITRATION, NEW YORK CONVENTION (OCEANA)*. The Convention was adopted at a Conference conducted under the auspices of the United Nations Economic and Social Council (ECOSOC) and was aimed at providing a more effective framework for international arbitration than the 1923 Geneva Protocol (Sept. 24, 1923, 27 L.N.T.S. 158) and the 1927 Geneva Convention for the Execution of Foreign Arbitral Awards (Sept. 26, 1927, 92 L.N.T.S. 302). The United States ratified the Convention in 1970, effective Dec. 29, 1970. To implement the Convention, a second chapter was added to the Arbitration Act, 9 U.S.C. §§ 201-208 (1976). For general discussions of the implementing act see Aksen, *American Arbitration Arrives in the Age of Aquarius, United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U. L. REV. 1 (1971); Domke, *The United States Implementation of the United Nations Arbitral Convention*, 19 AM. J. COMP. L. 575 (1971); McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COMM. 735 (1971).

plementing the Convention in the United States. Chapter 1 applies to all situations falling under the Convention unless the applicable chapter 1 provisions are "in conflict" with either Arbitration Act chapter 2 or the Convention.⁴ As a result, in each international arbitration case presented, courts must interpret the purposes and ambiguous language of the Convention in order to ascertain whether or not it is "in conflict" with chapter 1. A complex relationship therefore arises between the Convention and the general provisions of chapter 1, producing much uncertainty in the application of the two chapters of the Arbitration Act.

Recent U.S. Court of Appeals decisions in several circuits have compounded the problem by avoiding this "conflict" issue, treating cases falling under the Convention as if they were simply domestic cases.⁵ In *Sauer-Getriebe KG v. White Hydraulics, Inc.*,⁶ the Seventh Circuit granted a German distributor's motion for a preliminary injunction pending the outcome of an International Chamber of Commerce (ICC) arbitration of the underlying dispute in London. The court uniformly applied standards appropriate under Arbitration Act chapter 1 to several issues which, in fact, are preempted by the Convention. This Article will identify the legal issues raised by *Sauer-Getriebe* and explore the extent to which Arbitration Act chapter 1, as shaped by the most recent court decisions, is applicable to international arbitration cases in the United States.

I

FACTS AND PROCEDURAL HISTORY OF *SAUER-GETRIEBE*

The dispute in *Sauer-Getriebe* arose out of a distributorship agreement between an American manufacturer of motors, White Hydraulics, Inc., and a German limited partnership, Sauer-Getriebe KG.⁷ The agreement specified an obligation by White Hydraulics to convey any "rights necessary for the manufacture of th[e] . . . motors" to Sauer-Getriebe upon the occurrence of certain events.⁸ The contract contained a clause providing for arbitration in London under the ICC rules.⁹ When informed that White

4. 9 U.S.C. § 208 (1982).

5. See *Sperry International Trade, Inc. v. Government of Israel*, 670 F.2d 8 (2d Cir. 1982) (arbitration in New York involving the Government of Israel concerning breach of commercial agreement); *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983) (Korean party, arbitration in Seoul). See also *Tampina Oil Co. v. Latina Trading Co.*, 558 F. Supp. 1201 (S.D.N.Y. 1983) (no indication of nationality of parties or type of transaction, arbitration in London); *Parcel Tankers Inc. v. Formosa Plastics Corp.*, 569 F. Supp. 1459 (S.D. Tex. 1983) (no indication of nationality of parties or foreign relations of the transaction, ICC arbitration in London).

6. 715 F.2d 348 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 976 (1984).

7. See 715 F.2d at 349-52.

8. *Id.* at 349.

9. *Id.* at 352. The trial court misunderstood the effect of the Paris seat of the International Chamber of Commerce (ICC), which it mistakenly read as International Commerce Commission. The trial court enjoined Sauer-Getriebe from pursuing arbitration in London since it was of the opinion that Paris, as the seat of the ICC, was the agreed upon place of

Hydraulics was negotiating to sell its assets, Sauer-Getriebe filed a complaint in the U.S. District Court for the Northern District of Indiana, asserting its intention to arbitrate and seeking preliminary and permanent injunctions barring White Hydraulics from transferring any manufacturing rights, pending the outcome of the arbitration. White Hydraulics counterclaimed, seeking a declaratory judgment that the contract was unenforceable due, *inter alia*, to a violation of the antitrust provisions of the Sherman Act.¹⁰ The trial court denied the request for injunctive relief, enjoined Sauer-Getriebe from pursuing the arbitration, and dismissed the counterclaim.¹¹ On appeal, the Seventh Circuit affirmed the dismissal of the counterclaim, but vacated the remainder of the judgment, remanding the case with directions to enjoin White Hydraulics from repudiating the contract and from transferring any contractual right claimed by Sauer-Getriebe "until the arbitration is completed and this lawsuit (including any appeals) is terminated."¹²

II

THE ISSUES RAISED BY SAUER-GETRIEBE

The *Sauer-Getriebe* court's reasoning raises several issues concerning the law properly applicable under the Convention to United States disputes regarding international arbitration agreements. Beyond the preliminary question of whether the Convention was applicable at all,¹³ the defenses advanced by White Hydraulics require inquiry into whether the separability doctrine applies under the Convention¹⁴ and whether a claim of waiver¹⁵ or the prohibition against arbitration of antitrust claims¹⁶ prevent judicial referral to arbitration under the Convention. Finally, Sauer-Getriebe's motion for a preliminary injunction raises the issue of whether court-ordered injunctive relief is available in international arbitration under the Convention.¹⁷ These queries are discussed and analyzed below.

A. Applicability of the New York Convention to Sauer-Getriebe

A number of factors determine the applicability of the Convention's provisions to a particular arbitration agreement. Unfortunately, article II

arbitration. See 715 F.2d at 352. This misconception has no impact on the substantive issues discussed herein. For descriptions of the effects of the ensuing ICC arbitration, see generally *Symposium: ICC Arbitration*, 14 J. INT'L L. & ECON. 379 (1980); Stein & Wotman, *supra* note 1.

10. Sherman Antitrust Act of July 2, 1890, *codified* at 15 U.S.C. §§ 1-7 (1982).
11. 715 F.2d at 349.
12. *Id.* at 352.
13. See *infra* Section III.A.
14. See *infra* Section III.B.
15. See *infra* Section III.D.
16. See *infra* Section III.C.
17. See *infra* Section III.E.

of the Convention,¹⁸ the central provision concerning arbitration agreements, does not specify which agreements come within its purview.¹⁹ The implementing provisions of Arbitration Act chapter 2, however, specify that, "an arbitration agreement . . . arising out of a legal relationship, whether contractual or not, which is considered as *commercial*, including a transaction, contract or agreement described in section 2 of this title falls under the Convention."²⁰ In addition, chapter 2 excludes purely domestic cases from coverage, providing that:

An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.²¹

Thus, whether the Convention applies to a given case is initially determined by responses to three different inquiries:

- (i) Is there an arbitration agreement?
- (ii) If so, does the agreement arise out of a relationship considered as "commercial"? and
- (iii) Is a foreign citizen a party to the underlying agreement or does the relationship otherwise have some reasonable relation with foreign property, enforcement, or States?

As to the first inquiry, an arbitration agreement will be found to exist only if there is a showing that there was a contract between the parties which contains a valid arbitration clause under general contract law principles. For example, in *Beromun AG v. Societa Industriale "Tresse"*,²² the court concluded that, since "no meeting of the minds had occurred," there was "no agreement to arbitrate."²³ Accordingly, the court had no subject

18. Convention, *supra* note 3, art. II:

(1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

(2) The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

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

19. This failure to specify the field of application of article II is probably due to the considerable time pressure under which article II was drafted. See A.J. VAN DEN BERG, *supra* note 3, at 56.

20. 9 U.S.C. § 202 (1982) (emphasis added).

21. *Id.*

22. 471 F. Supp. 1163 (S.D.N.Y. 1979) (suit to compel arbitration of dispute arising from alleged breach of contract).

23. *Id.* at 1171.

matter jurisdiction over the controversy under chapter 2.²⁴ The agreement in *Sauer-Getriebe* satisfies this first requirement, as the validity of the arbitration clause in the contract between the parties was never disputed under general contract principles.²⁵

The "commercial relationship" standard of Arbitration Act chapter 2 is neither described therein nor equivalent to the definition of "commerce" in Arbitration Act chapter 1.²⁶ In light of the lack of a clear definition,²⁷ courts would be justified in applying the broad interpretation "commerce" has received in various other contexts under the Convention.²⁸ As the *Sauer-Getriebe* contract conveyed the rights necessary to manufacture motors,²⁹ it presumably would be considered a "commercial" agreement regardless of the definition chosen.

The third requirement, that one party to the underlying relationship be a foreign citizen or that the transaction have a "reasonable relationship with one or more foreign states," is partially clarified in chapter 2, provid-

24. *Id.* at 1172. See also *Becker Autoradio U.S.A. v. Becker Autoradiowerk GmbH*, 585 F.2d 39 (3d Cir. 1978) (a dispute arising out of an alleged renewal of an agreement which contained an arbitration clause was held a dispute "arising under the original contract" and thus subject to arbitration). The *Becker* court probably applied a less stringent standard in deciding whether there was an arbitration agreement, since it declined to determine whether there had been a renewal of the original agreement and, thus, of the arbitration clause.

It is unclear whether the agreement must be in writing to satisfy the threshold inquiry of 9 U.S.C. § 202. Although *Beromun* states that it must, claiming "9 U.S.C. § 202 incorporates 9 U.S.C. § 2 which requires a writing" (*Beromun*, 471 F. Supp. at 1170), this interpretation appears to misread § 202, which provides only that "[an] arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." But see *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186 (1st Cir. 1982) (agreement must be in writing). This issue is of little practical significance since, even if § 202 does not require a writing, article II(1) of the Convention is applicable and conditions enforcement under the Convention on the existence of an agreement in writing. See text of article II, *supra* note 18.

An alleged subsequent rescission or other ground of invalidity of the arbitration agreement does not prevent application of the Convention, since broad arbitration clauses encompass disputes arising out of alleged attempts to wind up the agreement regardless of whether they are termed rescissions, cancellations, or terminations. See, e.g., *Fuller Co. v. Compagnie des Bauxites de Guinee*, 421 F. Supp. 938, 944-49 (W.D. Pa. 1976) (effect of alleged termination of agreement is for arbitrator to decide).

25. As to the validity of the contract itself, see *infra*, Part III.B.

26. See *Sumitomo Corp. v. Parakopi Compagnia Maritima*, 477 F. Supp. 737, 740-41 (S.D.N.Y. 1979).

27. See Note, *Sumitomo Co. v. Parakopi Compagnia Maritima: United States Application of Foreign Arbitral Award Convention to Disputes Involving Only Foreign Entities*, 5 N.C.J. INT'L L. & COMM. REG. 469, 478 (1980).

28. Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A.J. 821, 823 (1972). See, e.g., *Island Territory of Curaçao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 12-13 (D.C.N.Y.), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1973) (contract requiring a foreign government to construct certain buildings and a manufacturing corporation to lease them for its operations and employ local residents is "commercial" under the Convention). See also *Siderius Inc. v. Compania de Acero del Pacifico*, 453 F. Supp. 22 (S.D.N.Y. 1978) (dispute involving the quality of goods purchased and sold between two corporations is clearly "commercial" under the Convention).

29. See *supra* text accompanying note 8.

ing that a corporation is deemed to be a citizen of the United States if it is incorporated or has its principal place of business in the United States.³⁰ Further, the "reasonable relationship" standard has been held to be identical to the standard contained in U.C.C. section 1-105.³¹ Thus, cases interpreting U.C.C. section 1-105 can be relied upon to determine the reach of the Convention under Arbitration Act section 202. A probing inquiry into the scope of this requirement, however, is not necessary in the instant case. As Sauer-Getriebe KG is a German limited partnership,³² one party to the relationship is a foreign citizen, satisfying the standard.

In addition to the three preliminary inquiries, the Convention's field of application to a particular situation is further delimited by two reservations made by the United States in ratifying the Convention.³³ The first reservation introduces a reciprocity criterion for the enforcement of arbitral awards;³⁴ the second limits the application of the Convention to commercial relationships.³⁵ These reservations add nothing to determining the applicability of the Convention to arbitration agreements. The first reservation, by its own terms, only applies to arbitration awards, not agreements.³⁶ The second reservation, concerning the commercial nature of the underlying relationship, merely duplicates the second "applicability test" outlined above.³⁷

30. 9 U.S.C. § 202 (1982). See, e.g., *Coastal States Trading Inc. v. Zenith Navigation S.A.*, 446 F. Supp. 330 (S.D.N.Y. 1977) (Convention inapplicable since Panamanian Corporation with main office in U.S. is U.S. citizen for purposes of § 202).

31. See *Fuller Co. v. Compagnie des Bauxites de Guinée*, 421 F. Supp. 938, 941-44 (W.D. Pa. 1976). See also S. REP. NO. 702, 91ST CONG., 2d Sess. at 6 (1970) (Statement of Richard D. Kearney, Chairman of the Secretary of State's Advisory Panel on Private International Law). U.C.C. § 1-105(15) provides:

LOCATION OF THE PARTIES AS A REASONABLE RELATIONSHIP. In some situations, the fact of whether one or all of the parties, in terms of domicile or place of business, are present within the state may be significant and justify concluding that the state of such domicile or place of business has a reasonable relationship to the transaction.

32. See *supra* text accompanying note 7.

33. Article I(3) of the Convention allows for the possibility of certain reservations by States party to the Convention.

34. "The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State." Convention, *supra* note 3, United States Reservation, 21 U.S.T. at 2566, reprinted in 9 U.S.C.A. § 201 n.29 (West Supp. 1982).

35. "The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States." *Id.* This reservation was made in order to restrict the field of application of the Convention to interstate commerce. See S. REP. NO. 702, *supra* note 31, at 6.

36. *Fuller*, 421 F. Supp. at 938, 941 n.3. But see *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186 (1st Cir. 1982) (formulating the inquiry under § 202 to include "[d]oes the agreement provide for arbitration in the territory of a signatory of the Convention?"). See also A.J. VAN DEN BERG, *supra* note 3, at 60 (reservation should apply by analogy to arbitration agreements so as to mandate only referral to arbitration in Contracting States).

37. In addition, if the Convention applies, it can exclude certain agreements from its field of application by its own provisions. Thus, for example, article XIV provides: "[a] Contracting

Thus, since the dispute in *Sauer-Getriebe* concerned an arbitration agreement arising from a commercial relationship involving a foreign partnership, the three controlling inquiries are answered in the affirmative. The court should have applied the provisions of the Convention to the arbitration dispute, under Arbitration Act chapter 2, rather than basing its decision on chapter 1.³⁸

*B. Applicability of the Separability Doctrine to Cases
Arising Under the Convention*

The first defense raised by White Hydraulics in *Sauer-Getriebe* claimed that the distributorship contract was invalid³⁹ and, therefore, the arbitration clause was without effect. The court disposed of the argument by stating that the arbitration agreement and the contract were separate concerns, that there is "nothing that require[s] that courts rather than arbitrators decide the validity of contracts," and that the arbitration clause was broad enough to encompass the dispute.⁴⁰

Although there is no clear indication in the opinion of the basis for this "separability" finding, the language and cases cited in the opinion suggest the court applied the rule of *Prima Paint Mfg. Co. v. Flood and Conklin Mfg. Co.*⁴¹ *Prima Paint* held that, under the Arbitration Act, an arbitration clause is separable from its host contract.⁴² As a result, in order for a court to assume subject matter jurisdiction over the controversy, a claim of invalidity must be directed to the arbitration clause itself, rather than to the

State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention." It has been argued that article XIV creates a reciprocity criterion for arbitration agreements. See Note, *Enforcing Arbitration Agreements and Awards Not Subject to the New York Convention*, 23 VA. J. INT'L L. 75, 80 n.16, 82-83 (1982). See also *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948, 952-53 (S.D. Ohio 1981); *Andros Compania Maritima v. Andre & Cie.*, 430 F. Supp. 88, 90 n.3 (S.D.N.Y. 1977). Courts have generally avoided this issue by ascertaining that all foreign countries concerned were parties to the Convention. The issue did not arise in *Sauer-Getriebe*, as the Federal Republic of Germany and Great Britain are parties to the Convention. The language of the arbitration clause in the contract expressly provided that arbitration was to take place in Britain. 715 F.2d at 350.

38. It is doubtful that the Convention itself mandates such an extensive field of application. Cf. A.J. VAN DEN BERG, *supra* note 3, at 56-71; G. GAJA, *supra* note 3, at I.A.2. However, American courts must follow 9 U.S.C. § 202 which requires application of the Convention as implemented by chapter 2. Cf. *Bergesen v. Joseph Muller Corp.*, 548 F. Supp. 655 (S.D.N.Y. 1982) *aff'd* 710 F.2d 928 (2d Cir. 1983) ("Congress, in the guise of ratifying or implementing the Convention, could not include provisions contrary to the express and unambiguous enactments of the latter instrument . . .").

39. White Hydraulics claimed vagueness, want of consideration, unconscionability, inequitability of the terms, and illegality under the Sherman Act. 715 F.2d at 349.

40. *Id.* at 350.

41. 388 U.S. 395 (1967). The court in *Sauer-Getriebe* cited *In Re Oil Spill by the Amoco Cadiz*, 659 F.2d 789, 794 (7th Cir. 1981), which relies on *Prima Paint* for its "separability" holding. The court also cited *Hellenic Lines, Ltd. The Louis Dreyfus Corp.*, 372 F.2d 753 (2d Cir. 1967) which was decided while *Prima Paint* was pending in the Supreme Court. See *Hellenic Lines*, 372 F.2d at 756 n.2.

42. 388 U.S. at 402.

contract as a whole.⁴³ Where invalidity of the entire underlying contract is asserted, the sole issue for the court under *Prima Paint* is whether the arbitration clause is broad enough to encompass the dispute in question.⁴⁴ If it is, then the invalidity question is for the arbitrator to decide.

The *Prima Paint* rule was recently re-affirmed in dicta by the U.S. Supreme Court⁴⁵ and has been consistently applied in cases arising under the Arbitration Act.⁴⁶ No court has yet directly held that *Prima Paint* applies to cases covered by the Convention, although decisions involving the Convention have made reference to "separability".⁴⁷ As the following analysis shows, the Convention is believed neutral with respect to the issue of separability,⁴⁸ so that application of the doctrine is not inconsistent with the Convention.

The judicial enforcement of arbitration agreements is governed through Convention article II(3).⁴⁹ If invalidity of the underlying contract is claimed, the relevant inquiry is whether this invalidity renders the arbitration agreement "null and void, inoperative or incapable of being performed."⁵⁰ It is generally recognized that the Convention does not specify which conditions render an arbitration agreement "null and void".⁵¹

Under the relevant federal law, since the Convention does not define the terms, Arbitration Act section 208 mandates the application of Arbitration Act chapter 1,⁵² and therefore of the separability doctrine which applies under chapter 1 to the issue of which conditions render an arbitration agreement "null and void".

However, not all grounds which would permit denial of enforcement of an arbitration agreement under section 2 of chapter 1 are given effect under

43. *Id.* at 403-04. *Prima Paint* is based on the language of 9 U.S.C. § 4 which instructs the court to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue [The] statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally." *Id.*

44. *See Prima Paint*, 388 U.S. at 406.

45. *See Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 24 (1983).

46. *See, e.g., Wilson Wear, Inc. v. United Merchants and Manufacturers, Inc.*, 713 F.2d 324 (7th Cir. 1983); *International Union of Operating Engineers v. Carl A. Morse, Inc.*, 529 F.2d 574 (7th Cir. 1974).

47. *See, e.g., Becker Autoradio U.S.A. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 46-47 (3d Cir. 1978) (dispute regarding termination of contract is arbitrable).

48. *See id.*, at 46. *But see* 1 P. SCHLÖSSER, *DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT*, Nr. 316 (arguing that article V(1)(a) implies separability by providing for the possibility that different laws may apply to the underlying contract and the arbitration clause).

49. *See* text of article II, *supra* note 18.

50. *See, e.g., Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982).

51. *See A.J. VAN DEN BERG, supra* note 3, at 155.

52. The relevant part of chapter 1, 9 U.S.C. § 2, provides: "A written [arbitration agreement in an agreement involving commerce or a maritime agreement] . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

article II(3) of the Convention. Following the Supreme Court's landmark decision in *Scherk v. Alberto-Culver Co.*,⁵³ the courts have set a more restrictive standard providing that only those grounds for the revocation of a contract which "can be applied neutrally on an international scale" are applicable under article II(3).⁵⁴

The separability standard of *Prima Paint* is a neutral standard, as it looks only to whether the arbitration clause is sufficiently broad to encompass the dispute in question. This determination turns upon the intent of the parties as reflected in the language of the arbitration clause itself, a standard which can be applied internationally on a neutral basis. Thus, the *Sauer-Getriebe* court acted in compliance with article II(3) of the Convention and Arbitration Act chapter 2 when it applied the separability doctrine to find that the dispute regarding the invalidity of the underlying contract as a whole fell within the scope of the arbitration agreement. Accordingly, the court was justified under the Convention and under federal law in denying White Hydraulics' motion to refuse referral to arbitration.

C. Arbitrability of U.S. Antitrust Infringement Claims Under the Convention

In light of White Hydraulics' claim that the contract was void due to an infringement of the Sherman Act, the court's reversal of the stay of arbitration⁵⁵ raises the question of whether antitrust claims can be referred to arbitration under the Convention.⁵⁶ As seen in the following analysis, it appears they can, and should be, referred.

U.S. Cases Under the Convention and the "Permeation Doctrine". The issue of the arbitrability of antitrust claims under the Convention arises

53. 417 U.S. 506 (1971). See *infra* text accompanying note 73.

54. *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982); *I.T.A.D. Associates, Inc. v. Podar Brothers*, 636 F.2d 75, 77 (4th Cir. 1981).

55. See *supra* text accompanying notes 9-10.

56. The court denied a stay of the arbitration without providing its reasoning. It is possible that the claim was "insubstantial" thus not precluding referral of the arbitrable issues to arbitration under the permeation doctrine (see *infra* text accompanying note 71), since the antitrust counterclaim was dismissed. See *supra* text accompanying notes 11-12. However, the opinion does not provide any basis for such a conclusion, much less any clue as to whether the court considers this doctrine applicable to cases under the Convention. As a result, the inquiries herein extend beyond the issues expressly addressed in the opinion.

Although the question at issue was framed as whether or not the arbitration should be stayed, this involves the same issue of whether arbitration could be compelled under 9 U.S.C. § 4 or court action stayed under 9 U.S.C. § 3. See *Société Générale de Surveillance S.A. v. Raytheon European Management and Systems Co.*, 643 F.2d 863, 868 (1st Cir. 1981).

For a discussion of the arbitrability of antitrust claims, see generally Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072 (1969); Aksen, *Arbitration and Antitrust—Are They Compatible?*, 44 N.Y.U. L. REV. 1097 (1969); Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981); Note, *Antitrust and Arbitration in International Commerce*, 17 HARV. INT'L L.J. 111 (1976) [hereinafter cited as Note, *Antitrust*].

under article II(1) which states that, as a precondition to referral of a claim to arbitration, the matter submitted must be "capable of settlement by arbitration."⁵⁷ The prevailing view is that the arbitrability criterion in article II(1) is to be read in connection with article V(2)(a),⁵⁸ which permits denial of recognition and enforcement if "the subject matter of the difference is not capable of settlement by arbitration *under the law of [the country] where recognition and enforcement is sought.*"⁵⁹ The issue of arbitrability must therefore be decided with reference to the substantive laws of the forum where the arbitration agreement is to be enforced.⁶⁰

U.S. cases addressing the arbitrability of antitrust issues under the Convention provide mixed guidance at best, ignoring American international public policy.⁶¹ A close examination of those cases which do address the issue reveals that they find little support in either statute or case law. In *Soci t  Nationale v. General Tire & Rubber Co.*,⁶² for example, the court provided no authority for its statement that, "to permit arbitration by an international tribunal of a Sherman Act claim would be particularly inappropriate considering the public interest in private enforcement of the antitrust laws."⁶³ In *Overseas Motors Inc. v. Import Motors Limited Inc.*,⁶⁴ the court was asked to determine the effect of an arbitration award rendered in Zurich, Switzerland on subsequent antitrust litigation between the parties. The court stated that antitrust claims were not subject to arbitration and, therefore, their determination by an arbitral forum could have no res judicata effect.⁶⁵ However, as the court determined that the claims involved were not in the nature of antitrust issues, its comment is mere dictum.⁶⁶

A further opinion addressing the issue of whether a claimant can be referred to international arbitration in the face of antitrust infringement

57. See text of article II, *supra* note 18.

58. See G. GAJA, *supra* note 3, at I.B.2 and note 43.

59. Convention, *supra* note 3, article V(2)(a)(emphasis added).

60. Gaja, *Problems of Applicability of International Conventions on Commercial Arbitration*, in COMMERCIAL ARBITRATION, ESSAYS IN MEMORIAM EUGENIO MINOLI 191, 206 (1974); A.J. VAN DEN BERG, *supra* note 3, at 152; BERTHEAU, DAS NEW YORKER ABKOMMEN VOM 10 JUNI 1958  BER DIE ANERKENNUNG UND VOLLSTRECKUNG AUSL NDISCHER SCHIEDSSPR CHE 28, 36-37 (1965).

61. Accord G. DELAUME, TRANSNATIONAL CONTRACTS,   6.10 at 29 (1983) (issue of arbitrability of antitrust issues under the Convention still in question and subject to future judicial pronouncement). But see A.J. VAN DEN BERG, *supra* note 3, at 369 (antitrust issues are "typical example" of non-arbitrable subject matter under art. V(2)).

62. 430 F. Supp. 1332 (S.D.N.Y. 1977).

63. *Id.* at 1334. Accordingly, its precedential value seems limited.

64. 375 F. Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir. 1975), *cert. denied*, 423 U.S. 987 (1975).

65. 375 F. Supp. at 518.

66. *Id.* at 518-24. The court further determined that the decision of the arbitrator had only a limited collateral estoppel effect on the subsequent suit in the United States. Since this decision, however, did not involve the *arbitrability* of antitrust issues, but the collateral estoppel effect to be given to a foreign arbitral decision in a domestic antitrust suit, it is of no relevance to the issue in question. But see, Note, *Antitrust*, *supra* note 56, at 113 (application of non-arbitrability rule in international context was premise of decision in *Overseas Motors*).

claims suffers from the same deficiency as *Sauer-Getriebe*.⁶⁷ Although the suit involved a Belgian party and arbitration was to take place in Coutrai, Belgium, the court claimed the case was governed “exclusively by 9 U.S.C. §§ 1–14.”⁶⁸ The applicability of the Convention through Arbitration Act chapter 2 was not examined.

In the domestic area, however, the law is well settled. A long line of American decisions expounds a judicially created exception to purely domestic arbitration under chapter 1 of the Arbitration Act in the area of trade regulation. According to this judicial doctrine, antitrust issues are not subject to arbitration under the Arbitration Act.⁶⁹ Two corollaries qualify this rule. Under the “permeation doctrine”, if a claim presents arbitrable issues as well as (non-arbitrable) antitrust issues, arbitration of the entire claim will be stayed until the court has resolved the antitrust issues, but *only* if the non-arbitrable and arbitrable claims are so inextricably intertwined that an arbitrator “could not easily separate the antitrust issues from the other arbitrable issues and could not easily decide the arbitrable issues without inquiry into the antitrust issues.”⁷⁰ Second, a court will not apply the permeation doctrine to stay arbitration of the entire claim “unless the antitrust charges appear to have a relatively good chance for success.”⁷¹

Application of these domestic standards to *Sauer-Getriebe* would lead to the conclusion that the antitrust claim was not arbitrable—unless it had no “relatively good chance for success”—because of the absolute prohibition on arbitration of antitrust issues. At most, the other claims, such as the unconscionability issues,⁷² would properly have been referred to arbitration.

67. *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976).

68. *Id.* at 680–81. As a result, the court refused to refer the antitrust claims to arbitration.

69. *See University Life Insurance Co. of America v. Unimarc Ltd.*, 699 F.2d 846, 850–51 (7th Cir. 1983); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976); *Hunt v. Mobil Oil*, 410 F. Supp. 10, 25 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 68 (2d Cir. 1976), *cert. denied*, 434 U.S. 984 (1976); *American Safety Equipment v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

70. *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116, 118 (7th Cir. 1978). *See also Lee v. Ply*Gem Industries, Inc.*, 593 F.2d 1266, 1274–75 (D.C. Cir. 1979), *cert. denied*, 441 U.S. 967 (1978); *Big Apple Cookie Co. v. Springwater Cookie Co.*, 517 F. Supp. 367, 368–80 (S.D. Ohio 1981).

The permeation doctrine is not uniformly applied. *See, e.g., Cunningham v. Dean Witter Reynolds, Inc.*, 550 F. Supp. 578 (E.D. Cal. 1982) (as mixed claims were present, arbitration was denied as to all claims). *But see Roueche v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 554 F. Supp. 338, 340 (D. Hawaii 1983) (rejecting “intertwining doctrine” insofar as it entails denying arbitration of all claims).

71. *Applied Digital Technology*, 576 F.2d at 118. *See also University Life*, 699 F.2d at 851–53; *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874, 876 (2d Cir. 1976); *Janmort Leasing, Inc. v. Econo-Car International*, 475 F. Supp. 1282, 1291 (E.D.N.Y. 1979). The court may then direct that arbitration of the non-antitrust claims proceed before resolution of the antitrust issues.

72. *See supra* note 39.

International Policy: A Role for U.S. Courts. The application of solely domestic standards is inappropriate in international arbitration cases. A strong federal policy, enunciated by the Supreme Court in *Scherk v. Alberto-Culver Co.*,⁷³ favors arbitration in "truly international agreements."⁷⁴ *Scherk* therefore mandates a narrower non-arbitrability standard in international disputes than in domestic cases. For example, *Scherk* upheld the arbitrability of a securities dispute in an international agreement, notwithstanding the longstanding policy stated in *Wilko v. Swan*⁷⁵ against arbitration of such disputes under the Arbitration Act provisions.⁷⁶

The issue in *Sauer-Getriebe*, therefore, is not whether the "policy favoring judicial rather than arbitral resolution of antitrust issues is significantly stronger than that with regard to securities issues."⁷⁷ Such an analysis compares only the pertinent domestic policies. Rather, the inquiry should focus on the *international* public policy of the United States with respect to the arbitrability of antitrust issues.

Recently, American courts have addressed the question of whether public policy requires that antitrust issues arising in international contexts be heard by American courts. In *Mannington Mills, Inc. v. Congoleum Corp.*,⁷⁸ the Court of Appeals for the Third Circuit was confronted with the question of whether jurisdiction conferred by the Sherman Act should be exercised to decide a claim by an American manufacturer that a second American manufacturer had secured various foreign patents by fraud.⁷⁹ The court found that, "sensitivity to the principles of international comity" was required,⁸⁰ and utilized a balancing test patterned after the test set forth by the Court of Appeals for the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*⁸¹ Under this test, "international public policy" in antitrust cases mandates an American court's decision of an

73. 417 U.S. 506 (1971).

74. *Id.* at 515. Although *Scherk* was not decided under the Convention, the Court stated that the United States' adoption and ratification of the Convention "provide strongly persuasive evidence of congressional policy consistent with the decision we reach today." *Id.* at 520 n.15.

75. See *Wilko v. Swan*, 346 U.S. 427 (1953).

76. The Court in *Scherk* noted:

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction

A parochial refusal by the courts of one country to enforce an international arbitration agreement would . . . frustrate these purposes

417 U.S. at 516-17.

77. Note, *Antitrust*, *supra* note 56, at 115.

78. 595 F.2d 1287 (3d Cir. 1979). See generally Comment, *Antitrust Law: Extraterritoriality—Mannington Mills v. Congoleum Corp.*, 20 HARV. INT'L L.J. 667 (1979).

79. 595 F.2d at 1291-92.

80. *Id.* at 1297.

81. 549 F.2d 597 (9th Cir. 1976). The test was recently applied in *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 687-88 (S.D.N.Y. 1979), and *Montreal Trading Ltd. v. AMAX, Inc.*, 661 F.2d 864, 869-70 (10th Cir. 1981).

underlying controversy only if a balancing of certain factors tips in favor of such judicial action. These factors include the availability of a remedy abroad, the effect on foreign relations if the court exercises jurisdiction, the relative importance of the conduct in the United States compared to that abroad, and the intent to harm or affect American commerce.⁸²

82. The *Timberlane* court stated:

The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 614. Applying this test, the court in *Mannington Mills* stated:

The factors we believe should be considered include:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

595 F.2d at 1297-98.

It has been noted by several commentators that, while the *Timberlane* court used the test to determine whether there was jurisdiction, the *Mannington Mills* court determined first that there was jurisdiction, but then balanced the factors noted above to determine whether jurisdiction should be exercised. See, e.g., *Dominicus Americana*, 473 F. Supp at 687-88. For a discussion concerning the differences in the lists of criteria, see Lowenfeld, *Antitrust, Interest Analysis and the New Conflict of Laws* (Book Review), 95 HARV. L. REV. 1977 (1982) ("all the criteria define and illustrate the concept of reasonableness"). For other lists of suggested relevant factors, see 2 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 349 (2d ed., 1981); RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

In the field of American exports, Congress has recently approved this reading of the international public policy in antitrust cases. Title IV of the Export Trading Company Act of 1982 (ETCA), Pub. L. No. 97-290, 96 Stat. 1233 (1982), contains the Foreign Trade Antitrust Improvements Act of 1982 (ETCA §§ 402-403). Sections 402 and 403 limit, respectively, the reach of the Sherman Act and the FTC Act in export trade. Section 402 amends the Sherman Act by providing for a new section therein, codified at 15 U.S.C. § 6a (1983). The effect of the section is to overrule cases such as *Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982), *vacated*, 460 U.S. 1007 (1983) and *Dominicus Americana*, *supra* note 81, so as to further limit the reach of the Sherman Act. Bruce & Pierce, *Understanding the Export Trading Company Act and Using (or Avoiding) its Antitrust Exemptions*, 38 BUS. LAW. 975, 986-87 (1983). On the other hand, *Timberlane* and *Mannington Mills* are not affected by ETCA. *Id.* at 989.

The simple application of U.S. domestic policy to international cases involving antitrust issues precludes any such balancing considerations, since it denies the jurisdiction of the foreign arbitral forum. This approach does not conform to the requirements of *Timberlane* and *Mannington Mills*, nor does it take into account the strong policy, enunciated in *Scherk*, favoring arbitration in the international context. This policy mandates a narrow reading of the non-arbitrability criterion in the Convention to the extent that "not even the parochial interests of the nation may be the measure of interpretation."⁸³

Impact of Arbitral Jurisdiction Over Antitrust Issues. Arbitration of antitrust issues arising in an international context does not require that American courts abdicate all control over their resolution. Article V(2)(b) of the Convention permits Contracting States to deny recognition and enforcement to an arbitral award if "the recognition or enforcement of the award would be contrary to the public policy of that country." Thus, in applying this provision, the court in *Laminoirs-Tréfileries-Cableries de Lens v. Southwire Co.* denied enforcement to a portion of an award which included excessive interest payments to the plaintiff.⁸⁴ In *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*,⁸⁵ the court envisioned the application of article V(2)(b) to antitrust issues, stating that a "court sitting in the United States might, for example, be expected to decline enforcement of an award involving arbitration of an antitrust claim"⁸⁶ It therefore seems reasonably clear that an award failing to correctly apply the American antitrust laws would "violate the country's most basic notions of morality and justice,"⁸⁷ so as to warrant denying enforcement under article V(2)(b).

Shifting judicial policy from a general prohibition against arbitration of antitrust issues to one of subsequent review and "control" of the result would reconcile the conflict between domestic and international standards. In addition, judicial control at the award enforcement stage rather than at

83. *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982). *Ledee* held that an agreement to arbitrate falling under the Convention was enforceable notwithstanding the fact that the Puerto Rico Dealers Act, which applied to the contract, expressly voided all arbitration clauses in such contracts.

84. 484 F. Supp. 1063 (N.D. Ga. 1980). The arbitral tribunal had awarded 14.5% and 15.5% interest per annum.

85. 508 F.2d 969 (2d Cir. 1974).

86. *Id.* at 974. The court continued: "it might well be that the special considerations and policies underlying a 'truly international agreement' . . . call for a narrower view of nonarbitrability in the international context." *Id.* (citing *Scherk*, 417 U.S. 506, 515 (1974)). *But see* Note, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards*, 7 CAL. W. INT'L L.J. 228, 234 nn.42 & 45 (1977) (apparently reading *Parsons* as effectively denying the arbitrability of antitrust claims under the Convention). *See also* Domke, *The United States Implementation of the United Nations Arbitral Convention*, 19 AM. J. COMP. L. 575, 580-82 (doubtful whether award dealing with antitrust issues can be enforced in view of article V(2)(b), questioning whether antitrust issues are "commercial" as required therein).

87. *See* 508 F.2d at 974.

the outset would have several advantages. Only substantial errors in the application of antitrust laws would make it necessary to disturb the forum agreement of the parties; a minor error by the arbitration tribunal would not likely rise to the "contrary to public policy" standard of article V(2)(b). Frivolous antitrust claims aimed at delaying the arbitration would be discouraged due to their ineffectiveness, in contrast to the current practice under the permeation doctrine, which permits the party willing to proceed with the arbitration to be "embroiled in lawsuits"⁸⁸ prior to arbitration.

Enforcement control would not be limited to cases where the award is enforced in the United States. For example, a party claiming that the antitrust violations of the other party have not been adequately addressed by the arbitral tribunal can bring suit in the United States. A court may then, if it finds that antitrust laws have been violated, deny the award *res judicata* effect as to these claims.

Thus, allowing international arbitration of antitrust claims permits American courts to take into account the strong policy favoring arbitration in international agreements and to apply the balancing test called for by *Timberlane* and *Mannington Mills*. At the same time, the ultimate control of American courts over the enforcement of American antitrust law allows them to uphold the international public policy of the United States in the antitrust field. In this manner, while antitrust claims can be referred to arbitration under the Convention, awards which fail to correctly apply American antitrust laws can be denied recognition and enforcement under the Convention.⁸⁹

D. Waiver as a Ground for Denying Referral Under the Convention

In *Sauer-Getriebe*, the court faced two issues concerning a party's potential waiver of its rights under the arbitration agreement. The first was whether Sauer-Getriebe had waived its right to arbitration by filing a complaint and applying for an injunction.⁹⁰ Referring to Rule 8(5) of the ICC Rules, which provides that the parties are at liberty to apply to the courts for interim measures,⁹¹ the court found that Sauer-Getriebe "did not invoke the litigation machinery inconsistently with its right to arbitration,"

88. *Cooper v. Ateliers de la Motobecane S.A.*, 57 N.Y.2d 408, 415, 442 N.E.2d 1239, 1243, 456 N.Y.S.2d 728, 732 (1982).

89. There is, therefore, no need to inquire whether the permeation doctrine applies under article II(3). In view of the text of article II(3) and the mandatory nature of referral under the Convention (*see* *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037 (3d Cir. 1974); *I.T.A.D. Associates Inc. v. Podar Brothers*, 636 F.2d at 77), it would not appear that the solution mandated by the permeation doctrine—delay of referral to arbitration until the antitrust issues are decided by the court—should be applicable. *See* *Cunningham v. Dean Witter Reynolds, Inc.*, 550 F. Supp. 578, 580-85 (E.D. Cal. 1982) (similar analysis regarding the Arbitration Act).

90. 715 F.2d at 350.

91. *See* INTERNATIONAL CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION (1975), art. 8(5); *reprinted in* 1 Y.B. COMM. ARB. 157 (1977).

since it stated in its complaint that it intended to submit the claim to arbitration.⁹²

The second question was whether, by waiting four months after the filing of the complaint before filing an arbitration request with the ICC, Sauer-Getriebe waived its right to arbitrate. The court found that it did not, as White Hydraulics had not been prejudiced by the four month delay.⁹³

Unfortunately, the question of waiver cannot be dismissed so summarily. The proper inquiries concern the waiver effect of Sauer-Getriebe's actions under chapter 1 of the Arbitration Act, and whether this result is "in conflict" with the Convention.

Waiver Under Arbitration Act Chapter 1. The effect of the provisions of Arbitration Act chapter 1 concerning a party's potential waiver of an arbitration agreement is unclear. Section 3 of the Arbitration Act provides that a stay of a legal action pending arbitration may be denied by a court if "the applicant for the stay is not in *default* in proceeding with such arbitration."⁹⁴ The courts have identified three categories of situations which may support a claim of "default". Within each category, two separate issues arise. First, the court must decide whether the question of waiver is for the court or the arbitrator to decide. Second, if the court decides that judicial determination of the claim is appropriate, it must further determine whether the facts substantively constitute a party's waiver of its right to arbitration.⁹⁵

The first category of instances which may constitute "default" consists of cases in which a party actively participates in a lawsuit or takes other action "inconsistent with its right to arbitration."⁹⁶ While most actions of this type concern "participation in a lawsuit" issues,⁹⁷ other activities, such as the writing of a letter stating that the party was "ready to litigate or arbitrate the issue at your pleasure" have also been considered to give rise to this type of waiver.⁹⁸ Most courts have found that this category of

92. 715 F.2d at 350 & n.1.

93. *Id.*

94. 9 U.S.C. § 3 (1982) (emphasis added).

95. Calkins, *Waiver of the Right to Arbitrate: An Issue for the Court or the Arbitrator?*, 37 *ARB. J.* 10, 11 (1982).

96. *In re Mercury Construction Corp.*, 656 F.2d 933, 939 (4th Cir. 1981) (citing *N & D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722, 728 (8th Cir. 1976)), *aff'd sub nom.*, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

97. *See, e.g., In re Mercury*, 656 F.2d 933; *Garner Lumber Co. v. Randolph E. Valensi, Lange, Inc.*, 393 F. Supp. 161, 162, (W.D.N.C. 1974), *aff'd* 513 F.2d 1171 (4th Cir. 1975).

98. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 712 F.2d 270, 271 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 509 (1983). The exact delimitation of this area is, however, extremely unclear. *Compare Prudential Lines v. EXXON Corp.*, 704 F.2d 59 (2d Cir. 1983) (delay in demanding arbitration in face of provision in agreement analyzed under laches doctrine) *with Prudential Lines*, 704 F.2d at 69 (Wyatt, J, *diss.*) (similar situation treating issue as "waiver").

waiver is subject to judicial, rather than arbitral, determination,⁹⁹ although a strong minority of cases holds otherwise.¹⁰⁰

No unanimity exists as to which actions courts will consider "substantial invocation of the litigation machinery" sufficient to constitute waiver.¹⁰¹ One court recently stated that the issue must be decided on a case-by-case basis.¹⁰² Some courts have further narrowed this category by requiring that the party resisting arbitration on the ground of waiver demonstrate prejudice caused by the other party's actions.¹⁰³ Most courts agree that application for a judicial injunction setting forth a party's intention to arbitrate, such as that filed by Sauer-Getriebe, does not constitute a waiver of the right to arbitrate.¹⁰⁴ This is consistent with the appellate result in *Sauer-Getriebe*, but not the enunciated rationale.

The second category of potential waiver concerns situations in which one party delays the demand for arbitration, most aptly described as a type of laches doctrine.¹⁰⁵ Although most courts considering the issue recently have left this question for the arbitrator to decide,¹⁰⁶ in several cases courts have ruled on the issue.¹⁰⁷ A special rule may apply to cases where evidence relevant to the issue of whether there is a valid arbitration clause has

See also ATSA of California, Inc. v. Continental Insurance Co., 702 F.2d 172, 175 (9th Cir. 1983) (timeliness of invocation of arbitration clause treated as waiver).

99. *See, e.g., Mercury Construction Corp.*, 656 F.2d at 940; *N & D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722, 728 (8th Cir. 1976); *Halcon International v. Monsanto Australia, Ltd.*, 446 F.2d 156, 161 (7th Cir.), *cert. denied*, 404 U.S. 949 (1971).

100. *See, e.g., Janmort Leasing Co., Inc. v. Econo-Car International, Inc.*, 475 F. Supp. 1282, 1290 (E.D.N.Y. 1979); *Prudential Lines*, 704 F.2d at 67 (waiver is arbitrable issue).

101. *E.C. Ernst Inc. v. Manhattan Construction Co. of Texas*, 551 F.2d 1026 (5th Cir. 1977), *on reh'g*, 559 F.2d 268, 269, *cert. denied*, 434 U.S. 1067 (1978) (defendant waived right to demand arbitration after engaging in discovery, presenting cross claims, appealing their dismissal, and filing motions over the course of two and a half years of litigation). *See also Gavlik Construction Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975) (no waiver where defendant filed a third-party complaint but engaged in no discovery and plaintiff did not show any prejudice); *American Dairy Queen Corp. v. Tantillo*, 536 F. Supp. 718 (M.D. La. 1982) (no waiver where only nine months elapsed between filing of complaint and defendant's motion to stay and defendants had engaged in little discovery).

102. *Ohio-Sealy*, 712 F.2d, at 272-73. *Compare Knorr Brake Corp. v. Harbil, Inc.*, 556 F. Supp. 489, 491-93 (N.D.Ill. 1983) (filing of answer and counterclaim not waiver) *with* *Ging v. Parker-Hunter Inc.*, 544 F. Supp. 49, 55 (W.D. Penn. 1982) (filing of counterclaim and use of discovery constituted waiver). *See also* *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 330 (4th Cir. 1971) (flexible approach).

103. *See, e.g., Midwest Window Systems v. Amcor Industries*, 630 F.2d 535, 536-37 (7th Cir. 1980); *Ging v. Parker-Hunter, Inc.*, 544 F. Supp. 49, 55 (W.D. Penn. 1982). *See also* Note, *Waiver of the Right to Compel Arbitration—A Directional Analysis*, 16 CAL. W. L. REV. 375, 389-92 (1980).

104. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopoulos*, 553 F.2d 842 (2d Cir. 1977); *Knorr Brake*, 556 F. Supp. at 492.

105. *Calkins, supra* note 95, at 11.

106. *See, e.g., Mercury Constr. Corp.*, 656 F.2d at 490; *Halcon Int'l v. Monsanto Australia Ltd.*, 446 F.2d 156, 160 (7th Cir. 1970), *cert. denied*, 404 U.S. 949 (1971); *Hartford Financial System, Inc. v. Florida Software Service, Inc.*, 550 F. Supp. 1079, 1083 (D.Me. 1982); *Singer Co. v. Tappan Co.*, 403 F. Supp. 322 (N.J. 1975), *aff'd*, 544 F.2d 513 (3d Cir. 1976).

107. *See, e.g., Roueche v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 554 F. Supp. 338, 339 (D. Hawaii 1983) (one year delay in proceeding to arbitration did not constitute laches);

been lost due to the delay of one party, even if not relevant to the merits of the case. In such a situation courts have chosen to decide the issue of laches.¹⁰⁸

No uniform rule exists in the courts as to the facts giving rise to laches. Courts deciding the issue have disallowed arbitration after varying periods of time¹⁰⁹ and have generally applied a "prejudice" standard.¹¹⁰ As the *Sauer-Getriebe* court found that only four months had elapsed and that White Hydraulics was not prejudiced, the finding that Sauer-Getriebe did not waive its right to arbitration is consistent with these opinions.

The third category of situations possibly constituting waiver consists of cases in which the arbitration agreement itself contains a time limitation in which the demand for arbitration must be made. When faced with these circumstances, courts have uniformly held that the issue of whether the demand for arbitration was timely is for the arbitrator to decide.¹¹¹ As the arbitration agreement involved in *Sauer-Getriebe* did not include such a time limit, this category of potential waiver would not have been a consideration for that court.

Waiver Under the Convention. The Convention does not specifically authorize the refusal to refer parties to arbitration on the ground of waiver. However, as one leading commentator suggests, the words "at the request of one of the parties" in article II(3) show that a party's non-invocation of the arbitration agreement in the face of a judicial proceeding "must be considered a waiver of the right to go to arbitration."¹¹² However, the Convention does not specify the last moment at which a request to refer the parties to arbitration can be made. The issue is left to the domestic laws of the

Home Life Ins. Co. v. Kaufmann, 547 F. Supp. 833, 835 (S.D.N.Y. 1982) (five month delay did not).

108. *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568 (2d Cir. 1968) (the claim of delay related to the issues the parties had agreed to submit to arbitration: the grounding of the ship and the cause of the damage to the ship; not to the two issues the court could decide, which were the making of the arbitration agreement or the failure to perform the agreement); *Conticommodity Services v. Phillip & Lion*, 613 F.2d 1222, 1226 (2d Cir. 1980) (the court held that the claim of delay did not affect the two issues the district court could decide, since it was undisputed that there was an arbitration agreement and that Conticommodity had refused to arbitrate).

109. *See Roueche*, 554 F. Supp. 338; *Home Life Ins.*, 547 F. Supp. 833.

110. *See, e.g., Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 518 F. Supp. 602 (D. Fla. 1981) (extensive post-suit actions in complex litigation instigated by Merrill Lynch were prejudicial to other party and, coupled with delay, constituted waiver), *rev'd*, 693 F.2d 1023 (11th Cir. 1982) (prejudice issue not addressed as it was determined that no delay existed); *Batson Yarn v. Saurer Allma*, 311 F. Supp. 68, 73 (D.S.C. 1970) (there was no prejudice to Batson when Saurer moved to a stay pending arbitration prior to filing any answers or taking any action in the proceedings at law).

111. *See Conticommodity Services, Inc. v. Phillip & Lion*, 613 F.2d 1222, 1225-27 (2d Cir. 1980); *Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 693 F.2d at 1027-28; *O'Neel v. National Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804, 807 (9th Cir. 1982).

112. A.J. VAN DEN BERG, *supra* note 3, at 138.

Contracting States.¹¹³ The sole relevant American case, *I.T.A.D. Associates, Inc. v. Podar Brothers*,¹¹⁴ held that there had been no waiver, despite participation in judicial proceedings. Nonetheless, the court observed that participation in litigation can amount to waiver under article II(3).¹¹⁵

In addition, acts inconsistent with the right to arbitration other than participation in judicial proceedings can generally be classified as implied offers for a rescission of the arbitration agreement.¹¹⁶ These actions amount to an “unmaking” of the arbitration agreement,¹¹⁷ justifying court action under chapter I of the Arbitration Act,¹¹⁸ as well as under article II(3) of the Convention, since the arbitration agreement is rendered “null and void.”¹¹⁹ As a waiver of this kind is based on a standard which can be “neutrally applied on an international scale,” a court would be justified in denying referral to arbitration if the facts warranted a finding of waiver under this category.¹²⁰ Thus, the court in *Sauer-Getriebe* was doctrinally sound in applying chapter I of the Arbitration Act to find that Sauer-Getriebe’s legal action did not impair its right to arbitration.

Whether the other categories of “default” creating a waiver under chapter I of the Arbitration Act retain their effectiveness under the Convention turns on whether the alleged action or inaction renders the arbitration agreement “null and void, inoperative or incapable of being performed.”¹²¹ The categories of laches and the running of a time limitation specified in the arbitration agreement do not appear to impair the validity of the arbitration agreement. “The doctrine of laches . . . will bar a party’s remedy but will not discharge its right. When the doctrine is applied, therefore, the underlying agreement becomes unenforceable but remains valid.”¹²² Similarly, the running of a time limitation in an arbitration agreement does not affect “the making of the agreement to arbitrate.”¹²³

113. *Id.* at 139.

114. 636 F.2d 75 (4th Cir. 1981) (Podar raised the issue of arbitration at initial proceedings and never retreated from that position).

115. *Id.* at 76–77. Although the court uses sweeping language (“we conclude that article II(3) contemplates the possibility of waiver of the arbitration agreement . . .”), the facts of the case show that the scope of the dictum was restricted to participation in judicial proceedings.

116. *See, e.g., Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 712 F.2d 270 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 509 (1983) (court held that Ohio-Sealy’s actions of continually offering Sealy the option of litigation or arbitration, participating in the proceedings when Sealy chose litigation, and failing to assert its right to arbitration constituted waiver of Ohio-Sealy’s right to arbitration).

117. Calkins, *supra* note 95, at 14–15.

118. *See supra* text accompanying note 96.

119. *See* text of article II(3) *supra* note 18.

120. *See Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982). *See also supra* text accompanying note 54.

121. *See* text of article II(3) *supra* note 18.

122. Calkins, *supra* note 95, at 15. *See also Halcon Int’l, Inc. v. Monsanto Australia Ltd.*, 446 F.2d 156, 159 (7th Cir. 1971), *cert. denied*, 404 U.S. 949 (1971).

123. *See Conticommodity*, 613 F.2d at 1225; *Belke*, 693 F.2d at 1023.

Since laches or the running of an agreed-upon time limitation do not render the arbitration agreement "null and void," these issues are for the arbitrator to decide under the Convention and do not permit refusal of "referral to arbitration" under article II(3). As this result is therefore "in conflict" with chapter 1, the Convention provisions control by virtue of chapter 2.¹²⁴ The court in *Sauer-Getriebe* therefore erred in even considering White Hydraulics' claim that the four month delay resulted in a waiver of the arbitration agreement. Under U.S. law and the terms of the Convention, this issue was for the arbitrator to decide.

E. Availability of Injunctive Relief Pending Arbitration

The recent flurry of cases in which American plaintiffs have sought injunctions against their trade partners after the Iranian hostage crisis¹²⁵ has demonstrated the extent to which the availability of a preliminary injunction is vital to maintaining the status quo pending the outcome of litigation in international trade. Without injunctive relief, the plaintiff might otherwise never recover on a favorable judgment. On the other hand, a request for preliminary injunction forces the defendant to appear and defend itself in a foreign, possibly hostile court—a situation which it presumably sought to avoid by providing for international arbitration. The issue of the availability of injunctive relief pending arbitration under the Convention is strained by the tension between these conflicting concerns.

The Seventh Circuit's decision on the injunction issue in *Sauer-Getriebe*¹²⁶ relied only on criteria developed by that Circuit for handling preliminary injunctions in domestic non-arbitration cases.¹²⁷ While, as demonstrated below, the court's result was correct, its legal reasoning is inadequate in light of the international scope of the case.

Injunctive Relief Under the Arbitration Act. Under chapter 1 of the Arbitration Act, the availability of injunctive relief pending arbitration is well established. In the landmark case of *Boys Markets, Inc. v. Retail Clerks Union*,¹²⁸ the U.S. Supreme Court, recognizing the necessity of injunctions pending arbitration, held that injunctions were available pending labor arbitration in view of the fact that "the effectiveness of [labor arbitration] agreements would be greatly reduced if injunctive relief were withheld."¹²⁹

124. 9 U.S.C. § 208 (1982).

125. See, e.g., *ITEK Corp. v. First National Bank of Boston*, 704 F.2d 1 (1st Cir. 1983); *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982); *KMW v. Chase Manhattan Bank*, 606 F.2d 10 (2d Cir. 1982). See also *Sperry International Trade, Inc., v. Government of Israel*, 670 F.2d 8 (2d Cir. 1982).

126. See *supra* text accompanying note 12.

127. *Wesley-Jessen Div. v. Bausch & Lomb, Inc.*, 698 F.2d 862 (7th Cir. 1983) (trademark infringement and unfair competition case involving review of a grant of a preliminary injunction without arbitration issues).

128. 398 U.S. 235 (1970).

129. *Id.* at 249.

In line with this policy, courts have generally held that, under chapter 1 of the Arbitration Act, a preliminary injunction can be issued by the court before or pending arbitration proceedings.¹³⁰ While some courts have found it necessary to refer to specific agreements of the parties concerning the issuance of a preliminary injunction,¹³¹ there is no reason to limit the availability of preliminary injunctions to these circumstances, since a contractual clause providing for the availability of injunctive relief is "merely declaratory of existing legal rights."¹³²

Injunctive Relief Under the Convention. Doubts have arisen as to the availability under the Convention of interim judicial measures pending arbitration.¹³³ A line of cases beginning with *McCreary Tire & Rubber Co. v. CEAT S.p.A.*¹³⁴ through, most recently, *Cooper v. Ateliers de la Motobecane S.A.*,¹³⁵ holds that the Convention precludes a court from granting provisional remedies pending arbitration.¹³⁶ While these decisions uniformly dealt with requests for attachment rather than with preliminary injunctions, their reasoning is applicable to issues concerning other forms of interim measures, thus casting doubt on the availability of injunctive relief in international arbitration cases.

The decisions denying the availability of pre-award attachment generally have two bases. First, courts feel referral to arbitration under the Convention strips them of jurisdiction and, therefore, attachment could not be ordered pending arbitration.¹³⁷ The second argument is that the purpose of the Convention would be frustrated by permitting the "vagaries of state law"¹³⁸ to interfere with the international arbitration process selected by the parties. Both arguments are equally applicable, and erroneous, regarding requests for injunctions or attachments.¹³⁹

130. See, e.g., *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972); *Albatross S.S. Co. v. Manning Bros.*, 95 F. Supp. 459, 463 (S.D.N.Y. 1951) ("Courts . . . may exercise those powers required to preserve the status quo of the subject matter in controversy pending the enforcement of the arbitration provisions"); *Klein Sleep Products, Inc. v. Hillside Bedding Co.*, 563 F. Supp. 904, 906 (S.D.N.Y. 1982) (court has the power in proper circumstances to issue injunctive relief pending arbitration).

131. See, e.g., *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468 (2d Cir. 1980) (enjoining termination of distributorship pending arbitration).

132. *Erving*, 468 F.2d at 1067.

133. See McDonell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 COLUM. J. TRANSNAT'L L. 273 (1984); Note, *Pre-Arbitration Attachment: Is it Available in International Disputes?*, 1 REV. LIT. 211 (1981); Note, *Pre-Award Attachment Under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 VA. J. INT'L L. 785 (1981); Note, *Attachment Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 36 WASH. & LEE L. REV. 1135 (1979).

134. 501 F.2d 1032 (3d Cir. 1974).

135. 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728 (1982).

136. See Lessing, *Cooper v. Ateliers de la Motobecane: Pre-Award Attachment Under the New York Convention*, 1 INT'L TAX & BUS. LAW. 230 (1983).

137. *Id.*, at 236-38.

138. *McCreary*, 501 F.2d at 1038.

139. *Stein & Wotman*, *supra* note 1, at 1689-90.

Judicial Jurisdiction Concurrent with Referral to Arbitration. The argument that the Convention removes arbitral disputes from the jurisdiction of the courts is based on *McCreary*.¹⁴⁰ The court in *McCreary* used ambiguous language to support its decision to vacate a foreign attachment obtained by a party to an international arbitration agreement.¹⁴¹ Other courts have subsequently interpreted the decision to mean that, under the Convention, an action brought in contravention of an arbitration agreement must be dismissed rather than stayed.¹⁴²

This claim has no foundation in either the language¹⁴³ or the purpose¹⁴⁴ of the Convention. In addition, this *McCreary* jurisdictional argument has been undermined by the decision of the same circuit in *Rhone Mediterranée Compagnia v. Lauro*.¹⁴⁵ By specifically holding that a stay was appropriate under the Convention, the Third Circuit has effectively overruled *McCreary* to the extent that that case may have held otherwise.¹⁴⁶

Injunctive Relief Not Precluded by Convention. A more troubling issue is the courts' concern regarding whether, by permitting preliminary injunctions, American courts frustrate the purpose of the Convention. The grant of court injunctions would entail a party contracting to settle disputes by arbitration becoming "embroiled in a lawsuit."¹⁴⁷ Moreover, since the issuance of a preliminary injunction requires that an American court assess the likelihood of success on the merits,¹⁴⁸ the court would have to address the merits of the dispute.

However, the issue should not be whether the purpose of the Convention, as construed by the courts, argues against the availability of injunctive

140. *McCreary*, 501 F.2d 1032.

141. "The Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate." *Id.* at 1038.

142. *See Siderius, Inc. v. Compania de Acero del Pacifico*, 453 F. Supp. 22, 25 & n.6 (S.D.N.Y. 1978); *Cordoba Shipping Co. Ltd. v. Maro Shipping Ltd.*, 495 F. Supp. 183, 188 (D. Conn. 1980); *Cooper v. Ateliers de la Motobecane S.A.*, 57 N.Y.2d at 411, 442 N.E.2d at 1240, 456 N.Y.S.2d at 729.

143. The fact that article II(3) of the Convention uses the phrase "refer the parties to arbitration" rather than the term "stay" can be explained by the fact that the "stay" as known in the common law systems is not necessarily available in other legal systems. *See Carolina Power & Light v. Uranex*, 451 F. Supp. 1044, 1051-52 (N.D.Cal. 1977), *accord* A.J. VAN DEN BERG, *Commentary*, 7 Y.B. COMM. ARB. 290, 299 (1982). *See also* Lessing, *supra* note 136, at 238-42 (appropriate action under the Convention is a stay, due to subsidiary application of 9 U.S.C. § 3).

144. *See* G. GAJA, *supra* note 3, at I.B.1.

145. 555 F.Supp. 481, 486 (D.V.I. 1982), *aff'd*, 712 F.2d 50 (3d Cir. 1983) (suit by insurer against owner of vessel should not be dismissed because of arbitration clause but rather stayed pending arbitration in Naples, Italy).

146. *Rhone Mediterranée Compagnia v. Lauro*, 555 F. Supp. 481, 486 (D.V.I. 1983), *aff'd*, 712 F.2d 50 (3d Cir. 1983). ("Defendants argue that *McCreary* holds that if a controversy must be referred to arbitration under the Convention, then a court is divested of its subject matter jurisdiction over the action. We disagree.")

147. *Cooper v. Ateliers de la Motobecane S.A.*, 57 N.Y.2d at 415, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732.

148. 43 C.J.S. INJUNCTIONS § 17.

relief, but whether the Convention forbids domestic courts from granting this type of relief. The proper question is whether an application for an injunction is an action in a matter "in respect of which the parties have made an [arbitration] agreement" within the meaning given to these terms by article II(3) of the Convention.¹⁴⁹ If so, the parties must be referred to arbitration¹⁵⁰ and application for injunctive relief made to the arbitrator. If not, section 208 of the Arbitration Act mandates the application of chapter I, under which injunctive relief is available.¹⁵¹

Article II(3) is ambiguous as to which "actions" are governed by the Convention.¹⁵² In an analogous area, the enforcement of arbitral awards, the Convention states that, while the *conditions* for the enforcement of the award are governed by its provisions, the *procedure* for enforcement is governed by the law of the forum.¹⁵³ Procedural "actions" relating to the enforcement of arbitration awards, including motions for attachment,¹⁵⁴ are therefore available as provided for by local law.

As evidenced by its history, the provision in article III referring procedural matters to the law of the forum was introduced because the procedural laws of the Contracting States were too diverse to permit uniform regulation.¹⁵⁵ This purpose militates in favor of an analogous application of this provision to arbitration agreements, so as to make preliminary injunctions available under the diverse laws of the local fora.

The subsequent practice of the parties to the Convention and the history of the Convention¹⁵⁶ also show that article II(3) can be applied by

149. See text of article II(3), *supra* note 18.

150. *McCreary*, 501 F.2d at 1037; *I.T.A.D.*, 636 F.2d at 77; *Ledee*, 684 F.2d at 187.

151. See *supra* text accompanying notes 128-132

152. The ordinary meaning of "action", a useful interpretive tool, is unfortunately too vague to be relied upon for guidance.

153. Convention, *supra* note 3, at art. III. ("Each contracting state shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles.")

154. See, e.g., *McCreary*, 501 F.2d at 1038 ("Quite possibly . . . foreign attachment may be available for the enforcement of an arbitration award.")

155. Article III is based on article I of the Geneva Convention. 92 L.N.T.S. 302. Article I of the Geneva Convention provided for the application of forum law to procedural issues since a uniform rule was impracticable in view of the diversity of the procedural laws of the Contracting States. Draft Protocol on the Execution of Foreign Arbitral Awards, Report of the Committee of Legal Experts and Text of its Draft, 8 LEAGUE OF NATIONS O.J. 890, 894 (1927); O. GREMINGER, DIE GENFER ABKOMMEN VON 1923 UND 1927 ÜBER DIE PRIVATE INTERNATIONALE SCHIEDSGERICHTSBARKEIT, 47 (1957). The provision was carried over in the drafts for the New York Convention and finally placed in article III. For authority recognizing the use of preparatory materials as an interpretive aid, see *infra* note 156.

156. The interpretation of the Convention is governed by the Vienna Convention on the Law of Treaties, done May 23, 1969, U.N. Doc. A/Conf.39/27, reprinted in 8 I.L.M. 679 (1969), 63 AM. J. INT'L L. 875 (1969), entered into force Jan. 27, 1980 [hereinafter cited as the Vienna Convention]. Since the Vienna Convention's provisions on interpretation (arts. 31-33) are a codification of existing customary international law they are applicable to international claims arising in the United States, even though the United States is not presently a party to the Vienna Convention. See H.F. KÖCK, VERTRAGSINTERPRETATION UND VERTRAGSRECHT-SKONVENTION 79 n.4 (1976); G. RESS & C. SCHREUER, RELATIONSHIP BETWEEN INTERNA-

analogy to the area of arbitration agreements,¹⁵⁷ so as to provide for the application of local law to the issues of the availability of both pre-award attachments and preliminary injunctions.¹⁵⁸

The subsequent practice of the parties under article II(3) reflects the co-existence of injunctive relief and arbitration. Several parties to the Convention have adhered to the European Convention on International Commercial Arbitration,¹⁵⁹ which provides that parties to an arbitration governed by its terms are at liberty to apply to a court for interim relief.¹⁶⁰ This demonstrates that the parties to the European Convention did not deem the issuance of preliminary relief by a court to be violative of article II(3)'s mandate to refer the parties to arbitration. Further, the United Nations Commission on International Trade Law (UNCITRAL) has developed a set of rules for ad hoc arbitration in international trade,¹⁶¹ taking into account the development of the Convention.¹⁶² Rule 26(3) provides that the parties may apply to a court for the issuance of interim measures of protection.¹⁶³

The history of article II(3) also confirms this interpretation. Article 5 of the 1923 Geneva Protocol,¹⁶⁴ the precursor of article II(3) of the Convention,¹⁶⁵ was read as not precluding interim measures by the courts.¹⁶⁶ Further, statements by delegates at the Conference which drafted the Convention permit the inference that article II(3) was only intended to preclude court action on the merits.¹⁶⁷

TIONAL PUBLIC LAW AND CONSTITUTIONAL LAW IN THE INTERPRETATION OF INTERNATIONAL TREATIES 10-12 (23 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 1982). An interpretation of the New York Convention must therefore start from the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Vienna Convention, art. 31(1). It may further take into account the context of the terms and any subsequent practice of the parties. *Id.*, art. 31(3)(b). As a supplementary means of interpretation, recourse may be had to the preparatory materials. *Id.*, art. 32.

157. *Accord* A.J. VAN DEN BERG, *supra* note 3, at 143.

158. *See generally* Lessing, *supra* note 136, at 242-52.

159. European Convention on International Commercial Arbitration, April 21, 1961, 484 U.N.T.S. 364. *See generally* Benjamin, *The European Convention on International Commercial Arbitration*, [1961] BRIT. Y.B. INT'L L. 478.

160. Article VI(4) states: "A request for interim measures or measures of conservation shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to court."

161. UNCITRAL Rules, *reprinted* in 2 Y.B. COMM. ARB. 161 (1977).

162. Sanders, *Commentary on UNCITRAL Arbitration*, 2 Y.B. COMM. ARB. 173 (1977).

163. "A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement."

164. Protocol on Arbitration Clauses, *done* Sept. 24, 1923, 27 L.N.T.S. 158.

165. For drafts and discussion of article II, see U.N. Doc. E/Conf.26/L.52 (1958); U.N. Doc. E/Conf.26/L.54; U.N. Doc. E./Conf.26/SR.21 at 17-23.

166. Nussbaum, *Treaties on Commercial Arbitration—A Test of International Private Law Legislation*, 56 HARV. L. REV. 219, 225 n.39 (1942); O. GREMINGER, *supra* note 158, at 30.

167. *See, e.g.*, U.N. Doc. E/Conf.26/SR.21 at 22 (statement by Mr. Bakhtov, Russian delegate) ("Courts should not adjudicate where there has been an agreement to arbitrate, but should facilitate the arbitration originally agreed upon.")

Thus, article II(3) does not preclude court action on matters other than the merits of the dispute. While an American court must consider the merits in deciding on an application for a preliminary injunction, the arbitrators are not bound by the court's findings.¹⁶⁸ Article II(3) is therefore not contravened in this respect. As express provisions and the history of the Convention do not prevent the issuance of an injunction pending international arbitration, an injunction is available, in line with the subsequent practice of parties to the Convention subject to the standards of the Arbitration Act. The court in *Sauer-Getriebe* should have reached its conclusion on these grounds, rather than the solely domestic orientation it exhibited.

CONCLUSION

Several problems arise in a case involving an international arbitration agreement. The first problem concerns the applicability of the New York Convention. As the Convention does not specify its field of application regarding arbitration agreements, the precise framework for determining the applicability of the Convention provided by the United States' implementing act must be examined. If the Convention is applicable, courts must determine the extent to which the general provisions of the Arbitration Act are applicable. To this end, the courts must interpret the language and the purpose of the Convention in order to determine to what extent the provisions of Arbitration Act chapter 1 are in conflict with the provisions of the Convention and, thus, are not applicable. The court in *Sauer-Getriebe* failed to undertake this analysis.

When confronted with a claim that a contract underlying an arbitration agreement is void, a court must apply the separability standard mandated by judicial doctrine under chapter 1 of the Arbitration Act, since interpretation of the Convention reveals that the Convention is neutral with respect to this issue. Concerning the issue of waiver, analysis reveals that, to a large extent, the law developed under the Arbitration Act applies to the Convention as well. Similarly, since the Convention leaves procedural matters concerning the enforcement of arbitration awards or agreements to the law of the local forum, the availability of preliminary injunctive relief under the Arbitration Act is applicable under the Convention as well. Regarding the doctrine of non-arbitrability of antitrust disputes, however, the narrow reading of the provisions of the Convention, mandated by the Supreme Court's concern for the needs of international trade, compels the rejection of employing purely domestic Arbitration Act doctrine in international cases.

Many U.S. cases, including *Sauer-Getriebe*, have *de facto* applied several of the "correct" substantive standards in international situations, often reaching a proper result. However, their failure to identify the reasons for

168. See, e.g., *Sauer-Getriebe*, 715 F.2d at 351.

such applications must be criticized. Only the reasoned and well-founded application of the provisions of the Arbitration Act to cases falling under the Convention can provide the international business community with the level of certainty concerning the law American courts will apply necessary to create the “almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”¹⁶⁹

169. *Scherk*, 417 U.S. at 516.