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Sumitomo Corp. v. Parakopi Compania Maritima: United States Application of the Foreign Arbitral Awards Convention to Disputes Involving Only Foreign Entities

In 1958, representatives of forty-five United Nations member nations developed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[1] The Convention is an attempt "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced."[2] The courts of signatory states are required to recognize a written agreement to arbitrate and to refer the parties in an action covered by such an agreement to arbitration unless the agreement is found null and void.[3] Signatory states must also recognize arbitral awards given in other states as binding and enforce them in accordance with their own rules of procedure.[4] Thus, the Convention responds to the two basic needs of those using arbitration by providing a method for enforcing an agreement to arbitrate and a method for enforcing arbitration awards.[5] The Convention, however, does not provide for any specific means of enforcement; therefore, much of its effectiveness is dependent upon the national courts of the signatory states.[6]

In *Sumitomo Corp. v. Parakopi Compania Maritima*,[7] the United States District Court for the Southern District of New York became the first U.S. court to deal directly with the question of the applicability of the Convention to a case involving only foreign entities. The court held that

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[1] June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (effective Dec. 29, 1970) [hereinafter cited as The Convention]. *See* Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A. J. 821 (1972).

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

[3] The Convention, *supra* note 1, art. II, § 1. Article II, section 1 states 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 contractural or not, concerning a subject matter capable of settlement by arbitration.

[4] *Id.* art. III. Article III states that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . ."

[5] Quigley, *supra* note 1, at 822.

[6] *Id.*

[7] 477 F. Supp. 737 (S.D.N.Y. 1979).

the Convention, as adopted by the United States, gave federal district courts jurisdiction over arbitration disputes where both parties were foreign[8] and that principles of international comity did not require that it stay arbitration in deference to litigation pending in another country that arose out of the same dispute.[9]

In 1975, Sumitomo, a Japanese corporation, and Parakopi, a Panamanian corporation with its principal place of business in Greece, entered into a purchase agreement under which Sumitomo built and sold to Parakopi a bulk carrier.[10] The agreement contained a clause that all nontechnical disputes were to be settled by arbitration in New York.[11] The purchase price of the vessel was fixed in terms of Japanese yen.[12] In 1979, as a result of the sharp rise in value of the yen against the dollar, Parakopi commenced an action in Greece to be relieved of its obligations under the contract on the grounds of unforeseeable circumstances and fraudulent concealment by Sumitomo of knowledge that the yen would increase in value.[13] Sumitomo served a demand for arbitration and, after Parakopi's refusal to appoint a third arbitrator, commenced this action for an order to compel arbitration and for the appointment of a third arbitrator.[14]

Parakopi presented four defenses to Sumitomo's petition. First, Parakopi asserted that the parties had entered into a stipulation that precluded Sumitomo from taking any action to proceed to arbitration until after a hearing in the action Parakopi had filed in Greece.[15] Second, Parakopi alleged that Sumitomo's proper remedy was to seek a stay of the suit in Greece from a Greek court.[16] Third, Parakopi asserted that the court lacked subject matter jurisdiction because both Sumitomo and Parakopi were foreign entities.[17] Finally Parakopi argued that even if the court did have jurisdiction, it should defer to the Greek litigation for reasons of comity.[18]

The court dispensed with Parakopi's first defense on the basis of its factual finding that the stipulation by Sumitomo to submit to a hearing in Greece was conditioned on the appointment by Parakopi of an arbitrator and selection of a third arbitrator.[19] Because Parakopi had pre-

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[8] *Id.* at 741.
[9] *Id.* at 742.
[10] *Id.* at 738.
[11] *Id.*
[12] *Id.* at 739.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at 740. In support of its holding the court quoted a telex from Sumitomo to its New York counsel. *Id.* at n.5. This communication clearly suggested that Sumitomo's stipulation was conditional:

WE HAVE . . . DECIDED TO ACCEPT [PARAKOPI'S] REQUEST FOR

vented the second condition from being met by ordering its arbitrator to refuse to select a third arbitrator, Sumitomo was not bound by the stipulation.[20]

The second defense, that Sumitomo's proper remedy was to apply for a stay from the Greek court, was premised on Parakopi's assertion that Sumitomo did not have an arbitrable claim because Parakopi had fully performed all of its contractual obligations.[21] The court noted that this argument went to the merits of the dispute between the parties and therefore was not a defense to the clause in the contract compelling the parties to arbitrate disputes.[22] The issue of whether Parakopi had fully performed its contractual obligations was for the arbitrators to decide and as such did not constitute grounds for dismissal of the petition to compel arbitration.[23]

The court's summary rejection of Parakopi's first two defenses left it free to address the two more important issues in the case: whether the court had subject matter jurisdiction and whether it should apply the doctrine of comity. U.S. district courts have jurisdiction over actions under the Convention as part of their jurisdiction over matters "aris[ing] under the laws and treaties of the United States."[24] The only prerequisite to their jurisdiction over an action to compel arbitration, therefore, is that the action be one "falling under the Convention" as adopted and implemented by the United States.[25] The Convention permits states to qualify their accession by limiting its application to only those "differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law" of the contracting state.[26] Because this limitation was adopted by the United States as part of its accession to the Convention[27] and was incorporated in section 202 of the federal legislation that implemented the Conven-

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> THE POSTPONEMENT OF THE ARBITRATION PROCEEDINGS SUBJECT TO THE FOLLOWING CONDITIONS:
> (A) [PARAKOPI] SHALL APPOINT ITS OWN ARBITRATOR . . . .
> (B) THE THIRD ARBITRATOR SHALL BE APPOINTED PRIOR TO THE EXTENDED COURT HEARING DATE.
> IF THE PLAINTIFF DOES NOT CONSENT TO THE ABOVE CONDITIONS, WE CAN NOT ACCEPT ITS REQUEST ABOVE MENTIONED.

Id. (brackets in original).

[20] *Id.*

[21] *Id.* at 741.

[22] *Id.*

[23] *Id.*

[24] 9 U.S.C. § 203 (1976).

[25] *See id.* This section also provides that the district courts have jurisdiction without regard to the amount in controversy. *Id.*

[26] The Convention, *supra* note 1, art. I, § 3.

[27] *Id.* The United States declaration stated that:

> 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.
>
> 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.

tion,[28] a determination as to whether an action falls under the Convention for purposes of subject matter jurisdiction often turns upon whether that action can be considered to be one that is "commercial" under section 202.[29] This section, however, does not contain any definition of the term "commercial."

Parakopi argued that the definition of "commerce" contained in section 1 of the Federal Arbitration Act of 1925[30] should be used as the definition of "commercial" in section 202.[31] The Federal Arbitration Act of 1925 constitutes Chapter 1 of the Federal Arbitration Act. The implementing legislation for the Convention, including section 202, constitutes Chapter 2 of this same Act. Because courts had previously found that the definition of "commerce" contained in section 1 of the 1925 Act made the 1925 Act inapplicable to disputes involving only foreign entities,[32] Parakopi argued that the definition of "commercial" in section 202 should be similarly construed to exclude disputes involving only foreign entities from the scope of the Convention and, therefore, from the scope of the court's jurisdiction over disputes falling under the Convention.[33]

The court, however, found that the language of the two sections did

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Although the United States took part in the development of the Convention in 1958, it did not become a member at that time, largely because of a general distrust of arbitral agreements. Quigley, *supra* note 1, at 821; *accord*, Note, *United Nations Foreign Arbitral Awards Convention: United States Accession*, 2 CAL. W. INT'L L.J. 67, 70 (1971). English courts traditionally had refused to enforce irrevocable arbitration agreements because they considered them to be attempts to oust the jurisdiction of the courts. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974). This view was adopted by American courts as part of the common law. *Id.* Changes in American legal attitudes towards arbitration and pressure from private interest groups, including the American Bar Association Committee on International Unification of Private Law and the American Arbitration Association, finally resulted in United States accession to the Convention in 1971. Note, *supra*, at 68, 70-72. The United States accession marked the first time that the United States had become a party to a multilateral treaty dealing with arbitration, although it had been a party to a number of bilateral treaties dealing with the subject. *Id.* at 67. The Senate approved the United States accession by a vote of 57 to 0. 114 CONG. REC. 29,605 (1968).

[28] 9 U.S.C. §§ 201-208 (1976).

[29] *See id.* § 202. Section 202 states that:

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

[30] 9 U.S.C. §§ 1-14 (1976). Section 1 states that:

> "[C]ommerce," as herein defined, means commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any state or foreign nation, or between the District of Columbia and any state or Territory or foreign nation. . . .

[31] 477 F. Supp. at 740.

[32] *See, e.g.*, The Volsinio, 32 F.2d 357, 358 (E.D.N.Y. 1929).

[33] 477 F. Supp. at 740.

not support Parakopi's contention.[34] The two sections do not use precisely the same term: section 1 refers to "commerce" whereas the word "commercial" is used in section 202.[35] Further, the court found that section 202 uses the term "commercial" in a "substantive" sense while section 1 does not define "commerce" substantively, but only in "geographical" terms.[36] Thus, the section 1 definition refers to "commerce among the several states or with foreign nations," but section 202 refers to "legal relationships" that can be considered to be commercial.[37] One section is concerned with the area and the parties involved, and the other with the type of transaction. Section 202 does not make reference to section 1, but rather to relationships considered commercial under the national law of the United States.[38] Because section 202 explicitly excludes purely domestic transactions from the coverage of the Convention, it would seem that if Congress had also intended to exclude purely foreign transactions it would have explicitly done so.[39]

The court also noted that because section 1 is part of the 1925 Act, which existed prior to the United States' accession to the Convention, section 1 should apply to proceedings brought under section 202 of Chapter 2 only to the extent that it does not conflict with the provisions of Chapter 2 or the Convention.[40] The court reasoned that the policies underlying the Convention and its adoption in the United States—encouragement of recognition and enforcement of arbitration agreements in international contracts and unification of the standards by which such agreements are observed and enforced—were inconsistent with Parakopi's interpretation of "commercial."[41] In support of its position, the court noted that U.S. courts had applied the Convention to situations involving only foreign entities previously, although they had not addressed the question of the propriety of doing so.[42] It therefore con-

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Compare* 9 U.S.C. § 1 *with* 9 U.S.C. § 202 (1976).

[38] 477 F. Supp. at 740. *See* 9 U.S.C. § 202 (1976).

[39] 477 F. Supp. at 741.

[40] *Id. See* 9 U.S.C. § 208 (1976). Section 208 states that "[c]hapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." Congress had originally planned to amend Chapter 1 in order to implement the Convention, but concern that this would create conflicts as to which sections would cover the Convention and which would be applied to the Federal Arbitration Act of 1925 caused them to create a new Chapter 2 instead. Note, *supra* note 27, at 73. *See* S. REP. NO. 702, 91st Cong., 2d Sess. 5 (1970) (hearing before Committee on Foreign Relations, Feb. 9, 1970) (statement of Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law) [hereinafter cited as SENATE REPORT].

[41] 477 F. Supp. at 741.

[42] *Id. See, e.g.*, Beromun Aktiengesellschaft v. Societa Industriale Agricola "Tresse," 471 F. Supp. 1163 (S.D.N.Y. 1979) (action to compel arbitration involving Liechtenstein corporation and Italian partnership); Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978) (action by Swiss corporation seeking enforcement of arbitral award against Nigerian government); Ferrara S.p.A. v. United Grain Growers, Ltd., 441 F. Supp. 778

cluded that arbitration disputes between foreign entities do fall under the Convention and are within the subject matter jurisdiction of the federal district courts.[43]

The *Parakopi* court is supported in its finding that "commercial" as used in section 202 refers to the type of legal transaction involved in a particular dispute by the fact that this is the sense in which it was used in the Convention. The option to limit application of the Convention to legal relationships considered commercial was originally placed in the Convention to remove a barrier to accession by nations having separate civil and commercial codes which allow arbitration only of matters falling within their commercial codes because, absent this reservation, the Convention is applicable to all arbitrations, regardless of the legal nature of the underlying dispute.[44] The United States adopted the reservation in order to preserve the principle that primary jurisdiction over domestic questions rests with the individual states.[45] It also appears that those American cases that have discussed the meaning of the term "commercial" as it is used in section 202 have considered it to be a substantive limitation on the kinds of international transactions that fall under the Convention, rather than one placing limits on those who can be parties to the action.[46]

The legislative history of the implementing legislation, however, indicates that the definition of "commerce" contained in section 1 probably was considered to be the national law definition of "commercial" for purposes of the reservation.[47] A representative for the Department of State, in testimony before the Senate Committee on Foreign Relations, stated that "[i]t was not, of course, necessary to make any reference to the national law of the United States in the first sentence of section 202 be-

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(S.D.N.Y.), *aff'd mem.*, 580 F.2d 1044 (2d Cir. 1978) (action to compel arbitration involving Canadian corporation and two Italian companies); Antco Shipping Co. v. Siderman S.p.A., 417 F. Supp. 207 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 93 (2d Cir. 1977) (action to compel arbitration involving Italian shipowner and Bahamian corporation).

[43] 477 F. Supp. at 741.

[44] McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735, 743 & n.37 (1971); *accord* Quigley, *supra* note 1, at 823.

[45] Note, *supra* note 27, at 74. *See* SENATE REPORT, *supra* note 40, at 6 (statement of Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law):

> Paragraph 1 of article I of the Convention provides that the Convention applies to the recognition and enforcement of arbitral awards without any limitation as to the nature of the relationship that gave rise to the award. It might, for example, be a question of family status. . . .
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> [T]he United States will file such a declaration because our purpose in adhering to the Convention is for the beneficial effects it will produce for the foreign commerce of the United States and not to make any changes with respect to matters that are traditionally within the jurisdiction of the 50 States of the Union.

[46] *See, e.g.*, Island Territory of Curacoa v. Solitron Devices, Inc., 356 F. Supp. 1, 12-13 (D.C.N.Y.), *aff'd*, 489 F.2d 1313, *cert. denied*, 416 U.S. 986 (1973) (construction and leasing contracts are "commercial"); Metropolitan World Tanker Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional, 427 F. Supp. 2, 4 (D.C.N.Y. 1975) (a written provision in any maritime transaction is "commercial").

[47] McMahon, *supra* note 44, at 743-44.

cause the definition of commerce contained in section 1 of the original Arbitration Act [of 1925] is the national law definition for the purposes of the declaration."[48] Those authorities writing about the Convention generally also assumed that this was to be the definition.[49] Nevertheless, use of the section 1 definition is clearly inadequate. Under the terms of section 1 an arbitration agreement or award between two foreign nationals arising out of a transaction having no connection with the United States would not fall within the definition of "commerce," and yet the whole purpose of the Convention is to bind signatory nations to the recognition and enforcement of such awards.[50] Where provisions of Chapter 1 are inconsistent with the Convention, the Convention is controlling[51] and, therefore, this aspect of "commerce" as defined by section 1 would not be relevant in deciding whether a transaction was "commercial" within the meaning of section 202, even if the rest of the definition of commerce in section 1 were controlling.[52]

Further, if the restrictive definition of "commercial" suggested by Parakopi were the correct one, there would have been little advantage in the United States becoming a member of the Convention. The only time that an arbitral dispute would fall under the Convention under that definition would be when the dispute was between an American citizen and a foreign entity, and disputes of that nature already could be dealt with under Chapter 1 of the Arbitration Act.[53] Thus, the *Parakopi* court had considerable support for its finding that application of the Convention to disputes involving only foreign entities was necessary in order to further the policies underlying the Convention and U.S. accession to it.[54]

Parakopi's fourth argument was that the court should stay or dismiss the proceeding in deference to the pending litigation in Greece because of principles of international comity.[55] In *Hilton v. Guyot*,[56] the first and most famous American case to consider the relationship of comity to the recognition and enforcement of foreign judicial acts, the United

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[48] SENATE REPORT, *supra* note 40, at 6 (statement of Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law).

[49] *See, e.g.*, Note, *supra* note 27, at 74-75:

> There was no need to provide for a definition of foreign commerce in Section 202 because there is already a definition in Section 1 of the original Arbitration Act. That definition refers both to interstate and foreign commerce. Therefore, Section 202 only needed the limitation that the new legislation applied to foreign [and not to domestic] commerce.

[50] *See* McMahon, *supra* note 44, at 744.

[51] 9 U.S.C. § 208 (1976).

[52] *See* McMahon, *supra* note 44, at 744.

[53] *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-21 (1974).

[54] 477 F. Supp. at 741.

[55] *Id.*

[56] 159 U.S. 113 (1895). *Hilton* involved an attempt by a French company to enforce a judgement obtained by it against an American in the French courts. The court found that, because the French did not recognize foreign judgements as conclusive, there was a lack of reciprocity which allowed the American courts to review the French judgement upon the merits in a new trial. *Id.* at 227.

States Supreme Court defined 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, and to the rights of its own citizens or of other persons who are under the protection of its laws."[57] From this definition, it is apparent that the decision as to whether comity requires deference to a foreign judgment involves a balancing of the policies for and against its application. Absent fraud, U.S. courts have generally applied the doctrine of comity where the foreign court is a court of competent jurisdiction[58] because comity is viewed as contributing to the promotion of justice and better relations between nations.[59] A court need not apply the doctrine, however, where it would be against public policy to do so.[60]

The *Parakopi* court found that the doctrine of comity did not require that it stay the proceeding to compel arbitration in favor of the litigation pending in Greece.[61] In *Cornfeld v. Investors Overseas Services, Ltd.*,[62] the same federal district court, in an opinion written by Judge Werker, who also authored *Parakopi*, found that comity was applicable to require dismissal in deference to a proceeding pending in a foreign court.[63] A comparison of Judge Werker's reasoning in these two cases illustrates the policy factors that a court may consider significant in deciding whether or not to apply the doctrine of comity.

Cornfeld involved an indemnity action brought by a U.S. citizen pursuant to an indemnification clause contained in a contract with a Canadian corporation.[64] The Canadian corporation was already the subject of liquidation proceedings in Canada and it moved to have the action dismissed on the basis of international comity.[65] The court found comity applicable for several reasons. The United States had traditionally given comity to Canadian judgments because Canada, like the

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[57] *Id.* at 164.

[58] *Id.* at 165. *See* Cornfeld v. Investors Overseas Services, Ltd., 471 F. Supp. 1255, 1259 (S.D.N.Y. 1979); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971).

[59] Hilton v. Guyot, 159 U.S. at 165 (1895).

[60] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117, Comment c (1971):

> Judgements rendered in foreign nations are not entitled to the protection of full faith and credit. A State of the United States is therefore free to refuse enforcement to such a judgement on the ground that the original claim on which the judgement is based is contrary to its public policy. A judgement rendered in a foreign nation, however, will, if valid, usually be given the same effect as a sister State judgement . . . . The fact that suit on the original claim could not have been maintained in a State of the United States does not mean that a judgement rendered on the claim in a foreign nation will necessarily be refused enforcement by the courts of that State. In fact, enforcement will usually be accorded the judgement except in situations where the original claim is repugnant to fundamental notions of what is decent and just in the state where enforcement is sought.

[61] 477 F. Supp. at 742.

[62] 471 F. Supp. 1255 (S.D.N.Y. 1979).

[63] *Id.* at 1260.

[64] *Id.* at 1257.

[65] *Id.*

United States, is a common law jurisdiction. Therefore there was no concern about the adequacy of procedural safeguards in the determination of the parties' rights.[66] More importantly, the liquidation proceeding pending in Canada was extremely complex; it had been going on for several years and had become transnational in scope.[67] The court stated:

> From a practical standpoint, recognition is a necessity if the liquidators are to continue in their difficult task of recouping the assets of the fund that may exist in countries all over the world, and their efforts to recover the assets of a world-wide community of investors is manifestly 'consistent' with the general policy of the United States.[68]

The court also found that the public policy of the State of New York, of the United States, and of Canada, as manifested in the American and Canadian bankruptcy laws, would be furthered by deference to the Canadian proceeding.[69] Both the United States[70] and Canadian[71] bankruptcy laws provide for stay of actions after commencement of bankruptcy proceedings, and the Revised Bankruptcy Act[72] of the United States expressly implements principles of international comity.[73] Applying comity would allow the assets of the bankrupt to be efficiently and fairly distributed among creditors in a single proceeding, rather than "erratically being dissipated in a number of different lawsuits."[74]

In contrast to the complicated proceeding involved in *Cornfeld*, the *Parakopi* court noted that all that had transpired in the Greek litigation was the filing of a complaint.[75] Because the Greek court had not yet reviewed the merits of the dispute, "compelling Parakopi to arbitration at this juncture would not in any way waste or duplicate the efforts of the Greek courts."[76]

The court also found that in the instant case the public policy of New York, of the United States and of Greece would not be served by applying the doctrine of comity because the public policy involved was one strongly in favor of arbitration.[77] Both Greece and the United States are signatories to the Convention and therefore have adopted its goal of

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66 *Id.* at 1259.

67 *Id.* at 1258.

68 *Id.* at 1262 (quoting ITT v. Cornfeld, 462 F. Supp. 209, 217 (S.D.N.Y. 1978)).

69 *Id.* at 1260.

70 *See* Bankruptcy Act of 1898, ch. 541, § 11, 30 Stat. 549 (1898) (repealed 1979); FED. R. BANKR. 401(a) (1976).

71 *See* Winding-Up Act, CAN. REV. STAT., c. W-10, § 21 (1970).

72 *See* 11 U.S.C. §§ 304(b), 304(c)(5), 305(a) (Supp. III 1980).

73 471 F. Supp. at 1260.

74 *Id.*

75 477 F. Supp. at 742.

76 *Id.*

77 *Id.* The strength of the United States policy in favor of arbitration is demonstrated by the holding in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). In that case the United States Supreme Court dismissed a proceeding in which the plaintiff claimed violations of section 10(b) of the Securities Exchange Act of 1935 and Rule 10b-5 because the parties had agreed to arbitrate any controversies in accordance with the rules of the International Chamber of Commerce in Paris. *Id.* at 521. Even the strong public policies behind Rule 10b-5 were not sufficient to outweigh the importance of the enforcement of agreements to arbitrate:

promoting international arbitration through recognition and enforcement of arbitral agreements.[78] This goal would not be furthered in any way by deferring to litigation in Greece that had been commenced partly for the purpose of avoiding arbitration.[79] U.S. courts in interstate situations have repeatedly refused to allow a party to circumvent a valid arbitration clause by commencing litigation in a state court because of the disastrous effects that this would have on the utility of arbitration.[80] The *Parakopi* court reasoned that this policy is equally applicable to an international situation.[81]

Parakopi points out a major gap in the legislation implementing U.S. accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards—the lack of a definition of "commercial" as it is used in section 202 of that legislation. The court in *Parakopi* filled that gap to a certain extent by interpreting that term in a manner consistent with the purposes and goals of the Convention. The failure of Congress to define "commercial," however, adds uncertainty to the scope of the Convention as adopted by the United States. This uncertainty works against the purposes of arbitration and the Convention by permitting a party who wishes to avoid arbitration to make enforcement expensive and time-consuming by litigating the meaning of "commercial."[82] Although it is unlikely that other plaintiffs will make the argument that the definition of "commercial" excludes disputes involving only foreign entities, it is very likely that they will make other arguments based on the ambiguity in the meaning of that term. For instance, they may argue that the particular transaction out of which their dispute arose should not be considered to be one that is "commercial" within the meaning of section 202.[83]

The *Parakopi* court's refusal to apply the doctrine of comity to defeat arbitration is also consistent with the purposes and goals of the Convention. In order for the Convention to be effective, the signatory nations must adopt policies that encourage parties to carry out their arbitration

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> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement . . . would not only allow [a party] to repudiate its solemn promise, but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our own terms, governed by our laws, and resolved in our courts."

Id. at 519 (quoting from The Breman v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1971)).

78 477 F. Supp. at 742.

79 *Id.*

80 *Id. See, e.g.*, Commonwealth Edison Co. v. Gulf Oil Corp., 400 F. Supp. 888, 890 (N.D. Ill. 1975), *aff'd*, 541 F.2d 1263 (7th Cir. 1975) (clear congressional purpose that when selected by parties to a contract arbitration be speedy and not subject to delay and obstruction by courts); Burger Chef Systems, Inc. v. Baldwin, Inc., 365 F. Supp. 1229, 1233-34 (S.D.N.Y. 1973) (any other procedure than stay or dismissal "would render arbitration agreements nugatory.").

81 477 F. Supp. at 742.

82 McMahon, *supra* note 44, at 744-45.

83 *See id.*

agreements.[84] Finding the doctrine of comity applicable in *Parakopi* would have had the opposite effect. Such a holding would encourage parties to an arbitration agreement to file suit in one country in order to avoid enforcement of their agreement in another country. Therefore, as the *Parakopi* decision suggests, the enforcement of arbitration agreements must take precedence over concerns of international comity when the two cannot be reconciled.

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[84] *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) (One concern of those drafting the Convention was that "courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.").