

THE NEW YORK CONVENTION AND ITS INTERPRETATION BY THE SUPREME COURT

By Lionel M. Schooler

The New York Convention ensures that arbitral awards in one country will be honored by most of the world's nations.

The U.S. delegation to the 1958 conference in New York City that drafted the Convention raised concerns about the proposed so-called federal state clause, which required adherence to the Convention by a contracting state as well as the obligation of that state to only favorably recommend the Convention to its “member States.” The delegation, concerned about this clause’s feasibility within the U.S. federal-state system and the possibility that states would not uniformly adopt arbitration rules under the Convention, expressed more support for bilateral treaties than multilateral treaties.

Over the next decade, however, as American businesses became involved in international commerce and international arbitration increased, U.S. business leaders grew increasingly concerned about their ability to enforce arbitral awards outside the United States. President Lyndon B. Johnson requested

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congressional approval of the Convention, which the Senate finally ratified in 1968. Congress thereafter enacted Chapter Two of the Federal Arbitration Act (FAA) to implement the Convention, and the Convention took effect in the United States at the end of 1970.

THE SUPREME COURT URGED THE JUDICIARY TO “SHAKE OFF THE OLD JUDICIAL HOSTILITY TO ARBITRATION.”

The *Mitsubishi* case. The Supreme Court’s first opportunity to review and apply the Convention occurred in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

Invoking the FAA and the New York Convention, Mitsubishi Motors sued Soler Chrysler-Plymouth to compel arbitration and filed a request for arbitration before the Japan Commercial Arbitration Association. The district court ruled that the international character of the

arrangement between Mitsubishi Motors and Soler compelled arbitration of the counterclaims, including its antitrust claim. The court of appeals reversed, holding that the Convention did not support arbitration of an American statutory antitrust claim despite the existence of an international transaction that otherwise fit within the framework established by the New York Convention.

The Supreme Court stated that in furtherance of the purposes of the Convention, a U.S. court could, at the request of one of the parties, refer the parties to arbitration, “unless the agreement upon which arbitration was based was determined to be void, inoperative or incapable of being performed.” The Court noted that once the United States had acceded to adoption of the Convention in 1970, federal policy applied with special force in the field of international commerce. The Court rejected the notion that an international arbitration tribunal would be incapable of adequately applying American statutory law. It inveighed the judicial system to “shake off the old judicial hostility to arbitration” and discard its “customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal.”

The second application. The Supreme Court next applied the

New York Convention in *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528 (1995), which involved the enforceability of foreign arbitration clauses in maritime bills of lading. The bill of lading for the transaction called for Japanese law to govern the relationship of the parties and for any dispute arising from the relationship to be referred to arbitration in Tokyo. The producer sued for the destruction of its goods, and the carrier sought arbitration of the dispute pursuant to the foreign arbitration clause and the FAA.

The Supreme Court upheld the arbitration clause and rejected the claimant's assertion that the terms of the Convention applicable to the Carriage of Goods by Sea Act had the effect of diminishing or nullifying the value of its claim. The Court noted that the petitioner was basing its argument on Chapter Two of the FAA, which to the Court was based in part on the New York Convention. The Court pointedly noted that the principal thrust of the New York Convention was to legitimize enforcement of arbitration as a means of dispute resolution in international transactions.

The third foray. The Supreme Court's most recent substantive consideration of the New York Convention occurred in *BG Group PLC v. Republic of Argentina*, 572 U.S. 25 (2014). Based on an investment treaty between the United Kingdom and Argentina, BG Group PLC was awarded an exclusive license to distribute natural gas in Buenos Aires. BG Group sought to invoke the investment treaty to require arbitration of a pricing dispute. The treaty called for submitting a dispute to the "competent tribunal" in whose

territory the investment was made (i.e., a local court in Argentina); the treaty also allowed arbitration of the dispute "after a period of 18 months" from submission of the dispute to the local tribunal if the local tribunal had not by then rendered a final decision. At about the same time, Argentina's president issued a decree staying the execution authority of Argentinian courts to allow "renegotiation" of existing contracts and barring companies that were currently litigating complaints from renegotiating. The practical effect was to hinder indefinitely BG Group's recourse to the local judiciary and thus to an arbitral forum.

BG Group sought to initiate arbitration of its claims. The arbitration tribunal declared that it had jurisdiction to consider the merits, based on its determinations that BG Group was an investor covered by the treaty and that its investment was protected by the treaty. The tribunal further determined that Argentina's own conduct had waived or excused the local litigation requirement. On the merits, the

tribunal awarded BG Group \$185 million.

BG Group sought to enforce the award under the FAA and the New York Convention in federal court in Washington, D.C. The Supreme Court determined that the wording of the agreement indicated the parties' decision to have arbitrators decide arbitrability. It further held that the local litigation requirement was a procedural condition, susceptible to arbitral interpretation in the first instance. Proceeding to the wording of the treaty itself, the Court stated that a U.S. court was authorized, pursuant to the New York Convention, to interpret such intent applying the presumptions supplied by American law. It concluded that the American principle of authorizing arbitrators to interpret and apply procedural provisions governed. The Court further stated that it was unwilling to deviate from the ordinary interpretive approach permitted by the Convention and, therefore, would not construe the wording of the treaty as a substantive provision requiring completion before any arbitration could commence. ■

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