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Brian Sampson

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STAYING THE ENFORCEMENT OF FOREIGN COMMERCIAL ARBITRAL AWARDS: A FEDERAL PRACTICE CONTRAVENING THE PURPOSES OF THE NEW YORK CONVENTION

I. INTRODUCTION

On September 30, 1970, the United States acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958.¹

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was 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 in the signatory countries.²

Since the United States accession to the New York Convention, federal courts have affirmed its initial purpose to encourage the recognition and enforcement of international commercial arbitral awards. However, federal courts have not created a unified standard for determining when to apply Article VI of the Convention to stay enforcement of an award which is under judicial review by the competent authority in the state where the award was rendered.³ "The issue of whether or not

1. 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention] (the New York Convention entered into force for the original signatories on June 7, 1959 and entered into force for the United States on December 29, 1970); *see also* Pub. L. No. 91-368, § 3274, 84 Stat. 692 (1970) (codified by incorporation into the Federal Arbitration Act at 9 U.S.C. §§ 201-208 (July 31, 1970)). Subject to limited exceptions, the New York Convention applies to "awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" or 'non-domestic' awards rendered in the State of enforcement. New York Convention, Article I.

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

3. Article VI states:

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award

to adjourn enforcement under Article VI of the Convention is a relatively undeveloped area of the law. Few courts of appeals have spoken on the issue, and district courts have resolved it in divergent ways. Guidance as to when it is appropriate to stay enforcement of an award . . . is virtually non-existent.⁴ Consequently, federal courts have shown a near absolute deference to the courts of the jurisdiction of origin. The Federal courts tend to base rulings on an *ad hoc* determination that, absent frivolous litigation by a party to have the award set aside by a competent authority in the jurisdiction of origin, an automatic stay shall be imposed.⁵ At the time the New York Convention was incorporated into the Federal Arbitration Act, commentators had already recognized the need for federal courts to establish a common law for United States enforcement of international arbitral awards.⁶

The purpose of this Note is to illustrate the lack of a definitive federal standard and how this absence has led to a federal practice contravening the purposes of the New York Convention. Part I of this Note lays a foundation for the discussion that follows by underscoring the importance, purpose and history of the New York Convention as it relates to international arbitration. Part III presents a canvas and analysis of federal case law directly addressing Article VI of the Convention. Part IV summarizes federal case law and posits that the failure of federal courts to accept the importance of party autonomy is the foundation of their inability to create a standard promoting the goals of the New York Convention.

and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

New York Convention, *supra* note 1; See also *infra* note 25 (text of Article V(1)(e)).

4. *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 317 (2d Cir. 1998) (citations omitted) (see *infra* Part III.E for a full case description); see also Michael H. Strub, Jr., Note, *Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 TEX. L. REV. 1031 (April 1990) (illustrating the nonexistence of a federal standard for staying enforcement under the New York Convention).

5. Compare *infra* Parts III.A., B. and C., with Part III.D.

6. See Gerald Aksen, *American Arbitration Accession 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, 26 (1971).

II. BACKGROUND AND PURPOSE OF THE NEW YORK CONVENTION AND ARTICLE VI

A. *The Development of International Commercial Arbitration*

International business persons, and lawyers alike exhibit a growing reliance upon arbitration as a dispute resolution mechanism.⁷ Some of the advantages offered by arbitration over the uncertainty of foreign litigation include predictability, reduced expense, informality, speedy determination and neutrality of determination.⁸ Furthermore, arbitration is predicated upon the intentions of the parties affected, allowing those parties to tailor the parameters of a resolution to the particularities of their relationship.⁹

Nevertheless, arbitration is an ineffectual method of international dispute resolution if the party against whom enforcement is sought does not have assets sufficient to satisfy the arbitral award in the state where the decision was rendered and if no foreign state enforces the award. If enforcement does

7. The popularity of arbitration is illustrated by the fact that "[b]etween 1979 and 1990, the International Chamber of Commerce alone received 3,500 [arbitration] cases, as many as it had received between 1923 and 1978" Amber Lee Smith, *Finding Information About International Commercial Arbitration*, in INTRODUCTION TO TRANSNATIONAL LEGAL TRANSACTION, 335 (Marilyn J. Raisch & Roberta I. Shaffer eds., 1995). From 1987 to 1995 alone the number of cases before the International Chamber of Commerce (ICC) increased from 285 to 427. Stephen T. Ostrowski & Yuval Shany, Note, *Chromalloy: United States Law and International Arbitration at the Crossroads*, 73 N.Y.U. L. REV. 1650, 1693 n.1 (citing to *News from the Court*, ICC INT'L CT. ARB. BULL., Dec. 1996, at 4, 5). "In 1998, the American Arbitration Association's International Center for Dispute Resolution (Center), . . . experienced a continued increase in the number of new cases filed with the Center. Approximately 380 cases were filed in 1998, representing an eleven percent increase in case filings from 1997. Marc J. Goldstein, *International Commercial Arbitration*, 33 INT'L LAW. 389, 400 (Summer 1999).

8. See Aksen, *supra* note 6, at 2-3; Robert B. von Mehren, *Enforcement of Foreign Arbitral Awards in the United States*, 771 P.L.I./COMM. 147, 155 (Feb. 1998) ("the gradual harmonization and internationalization of arbitration practices and the development of a community of international arbitrators . . . has made the international arbitral forum a much more familiar and perhaps a more predictable place than the foreign courtroom.") *Id.*

9. See generally PHILIPPE FOUCHARD ET AL., GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, paras. 44-50 (Emmanuel Gaillard & John Savage eds., 1999) ("The contract between the parties is the fundamental constituent of international arbitration. It is the parties' common intention which confers powers upon the arbitrators." *Id.* at para. 46 (yet, the authors note that although party autonomy governs, the influence of international arbitral institutions shapes the procedures by which arbitration is conducted)).

not occur than there is no incentive for the parties to contract for, or participate in, an arbitral proceeding. As such, arbitration has only recently gained favor by international business interests located in the United States.¹⁰

In the past, American judges exhibited a resistance to arbitration based merely upon the residual effects of an unwritten rule established by English judges as early as the 17th century.¹¹ However, overcrowding of the federal docket in the 1980's eventually led federal "judges to welcome arbitration as a means of, in effect, 'contracting out' cases that might otherwise have to be litigated."¹² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹³ epitomizes the newly adopted policy of the federal courts and reflects a bias in favor of arbitration as a form of dispute resolution:

Here [the presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions] is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation's accession . . . to the [New York] Convention . . . and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act, that federal policy applies with special force in the field of international commerce.¹⁴

The *Mitsubishi Motors Corp.* Court recognized that at the enforcement stage, the courts in the state of enforcement will have the opportunity to review whether federal law was properly applied.¹⁵ However, Justice Harry Blackmun, writing for the Supreme Court, went on to say that "it will be necessary for national courts to subordinate domestic notions of

10. See generally Smith, *supra* note 7; Ostrowski, *supra* note 7.

11. See Jose A. Cabranes, *An Address to the Association of the Bar of the City of New York* (Oct. 25, 1997), reprinted in 70 N.Y. ST. B.J. 22 (Mar./Apr. 1998) (English judges were influenced by the monetary advantages of a crowded docket and thus ruled against enforcement of arbitration awards); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 n.14 (1985) (enforcing a choice of forum clause to arbitrate a dispute concerning federal antitrust law before an arbitral panel located in Japan).

12. Cabranes, *supra* note 11, at 23.

13. 473 U.S. 614.

14. *Id.* at 631 (citation omitted).

15. *Id.* at 638; see *infra* note 25 (Article V(2)(b) allows the enforcing court to refuse enforcement of the award if it would be contrary to the public policy of the enforcing court's country).

arbitrability to the international policy favoring commercial arbitration."¹⁶

B. Adoption of the New York Convention

Currently, the New York Convention consists of 121 members, of which 24 are original signatories.¹⁷ The resistance of the American judiciary and conflicts in federal legislation led to a ten year delay from the time the Convention came into force until its implementation by the United States.¹⁸ The New York Convention was adopted as a response to the Geneva Convention of September 26, 1927 on the "Execution of Foreign Arbitral Awards."¹⁹ Only by understanding the shortcomings of the Geneva Convention can the goals of the New York Convention be fully understood.

Most notably, the Geneva Convention requires that "courts in a 'host' country may only grant enforcement if it has been established that the award is 'final' in its country of origin."²⁰ Therefore, a system of "double exequator" arises in which a prevailing party needs to petition the approval of courts in the jurisdictions of origin and enforcement before an award can be enforced. "Exequator" describes the process whereby an enforcing court authorizes the execution within its jurisdiction of a foreign judgment or award."²¹ Double exequator "lead[s] to delaying tactics on the part of the respondent who could forestall the award becoming final by instituting setting aside

16. *Mitsubishi Motors Corp.*, 473 U.S. at 639.

17. See New York Convention, *supra* note 1; see also United Nations Headquarters, Treaty Section, Office of Legal Affairs, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Done at New York on 10 June 1958*, available at <http://www.un.org> (providing an up to date and authoritative status on treaties deposited with the Secretariat Unit of the United Nations).

18. See Aksen, *supra* note 6, at 4-5; see generally Cabranes, *supra* note 11.

19. 92 L.N.T.S. 302 [hereinafter Geneva Convention] (the Geneva Convention still exists and consists of 27 members, of which, the United States is not). See FOUCHARD, *supra* note 9, at para. 247. See also *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974) (affirming the district court's confirmation of a foreign award and recognizing that "[t]he 1958 Convention's basic thrust was to liberalize procedures for enforcing foreign arbitral awards . . ."). *Id.*

20. See FOUCHARD, *supra* note 9, at para. 245 (finality of an award means that it is not subject to the possibility of appeal by a court or other such authority in the country of origin).

21. Ostrowski, *supra* note 7, at n.29.

procedures in the country in which the award was made."²² The goal of the New York Convention was to eliminate a system of double exequatur.²³

Additionally, the New York Convention made several other changes "to liberalize procedures for enforcing foreign arbitral awards" such as shifting the burden of proof,²⁴ limiting the party against whom enforcement is sought to seven defenses,²⁵ and requiring that an award only be "binding" and not "final."²⁶ As a result of the changes adopted under the New

22. ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION*, 267 (1981).

23. See FOUCHARD *supra* note 9.

24. *New York Convention*, at art. IV.

25. Article V states:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or,

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or,

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or,

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or,

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, *supra* note 1.

26. *Id.* at art. V(1)(e).

York Convention, federal courts now recognize when deciding whether to deny enforcement in accordance with one of the Article V defenses that "the confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court."²⁷

C. Caveats to the Understanding of Article VI

The federal courts' failure to establish a standard guiding the stay of enforcement under the New York Convention results in a practice which contradicts the Convention's goals. To fully understand why the courts' failure is problematic, one must first recognize that parallel analyses cannot be made from other areas of law. Analysis of Article VI is separate and distinct from any inquiry into the Article V defenses, enforcement of foreign judgments or, domestic arbitral awards.

Article V provides seven specific defenses as grounds for refusing enforcement, and although every American case involving an issue of a stay under Article VI has involved at least one of these defenses,²⁸ the considerations must be separate and distinct. Not only does Article VI differ because it provides for a discretionary standard,²⁹ but it also invites a risk of inconsistent judicial interpretation not present under Article V. By definition, an enforcing court risks the possibility of an inconsistent finding of whether to enforce an award since that award is contemporaneously under review by the "competent authority" in the jurisdiction of origin, "or under law of which, that award was made."³⁰ Moreover, whereas Article VI decisions concern the likelihood of success under the guise of the law of the jurisdiction of origin, a decision to deny enforcement under Article V focuses upon an application of the laws of the

27. *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984) (denying defenses to the enforcement of an award which fall outside the parameters of the New York Convention, and in so doing, recognizing that although an "award need not actually be confirmed by a court to be valid" judicial assistance is merely sought as a "remed[y] available to enforce the judgment."). See, e.g., *Ottley v. Schwartzberg*, 819 F.2d 373 (2d Cir. 1987).

28. See Part III for a description of the federal decisions specifically addressing the merits of a claim under Article VI.

29. See discussion *infra* Part II.

30. Articles V(1)(e) and VI (note that Article V(1)(e) addresses prior decisions to suspend or set aside an award and not a pending matter as contemplated under Article VI).

jurisdiction of enforcement.³¹

Similarly, since "there is no comparable international convention dealing with the enforcement of foreign *judgments*,"³² any standards guiding the enforcement of judgments is inapplicable to the New York Convention. Contrary to the federal law of arbitration codified in the Federal Arbitration Act, "[t]he law of each state controls recognition of foreign judgments in that state,"³³ and federal courts apply state laws in all cases arising out of "diversity" and "alienage," but apply federal law in "federal-question" cases. Nevertheless, if a comparison is made between the standards for foreign judgments and an Article VI stay, "most U.S. jurisdictions recognize and enforce the judgments of other countries . . .,"³⁴ contradicting the near "absolute stay" invoked by federal courts in cases involving enforcement of foreign arbitral awards.³⁵

Lastly, staying enforcement of a foreign award under Article VI finds no domestic analog. By virtue of the U.S. Constitution's "full faith and credit clause,"³⁶ state courts must respect the judgments of other state courts. This clause applies to U.S. states only and does not apply to judgments issued by foreign countries. In the domestic context, the full faith and credit clause avoids the risk of an inconsistency evident in an international context. Furthermore, there is a lesser chance of inconsistency in judicial interpretation of domestically rendered arbitral awards because the Federal Arbitration Act codifies the federal law applicable to each state and will supersede the laws of the individual state where conflict exists.³⁷ In sum, the following proposition holds true for both

31. For example, even if a federal court denies the enforcement of an award rendered in accordance with Japanese law and affirmed by a Japanese court, the federal court is not offending the Japanese court, or its law, if such denial is based on the premise that enforcement would violate the public policy of the United States under Article V(2)(b).

32. von Mehren, *supra* note 8, at 153-154 (emphasis added).

33. Russell J. Weintraub, *How Substantial is our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get it?*, 24 BROOK. J. INT'L L. 167, 173 (No.1 1998) (citations omitted) (arguing for the need of an international judgments-recognition convention and suggesting that an enforcing state mirror the circumstances in the rendering state: "[i]f enforcement is stayed where rendered either automatically on appeal or on posting of a bond, enforcement should be suspended elsewhere." (citation omitted)). *Id.* at 206.

34. *Id.* at 168.

35. See *infra* Part III.

36. U.S. CONST. art. IV, § 1.

37. See generally 9 U.S.C. § 1 (2000). Furthermore, federal law provides for

the recognition of judgments and arbitration awards:

[w]e cannot automatically derive solutions for international practice from decisions respecting recognition of judgments of sister-states. Considerations of convenience and of doctrinal symmetry may tend toward similar results in the two areas. But in theory – and as a basis for full understanding of the implicated problems – international recognition practice should be treated separately from federal-system practice.³⁸

III. ARTICLE VI CONSIDERED UNDER U.S. CASELAW

A. *Fertilizer Corp. of India v. IDI Mgmt., Inc.*

*Fertilizer Corp. of India v. IDI Mgmt., Inc.*³⁹ represents the first instance in which an American court fully addresses the issue of whether to stay enforcement under Article VI of the New York Convention. In *Fertilizer Corp. of India*, the predecessors in interest to Fertilizer Corp. of India (“FCI”) and IDI Management, Inc. (“IDI”) entered into a contract for the construction of a nitrophosphate plant in India.⁴⁰ Dissatisfied with the results of the work done by IDI, FCI sought recourse via arbitration through the International Chamber of Commerce (“ICC”) as required under the contract.⁴¹ The arbitral panel unanimously awarded FCI a sum in excess of one million U.S. dollars (“Nitrophosphate Award”). Prior to the Nitrophosphate Award, the same arbitration panel granted IDI an award against FCI under a contract separate from FCI’s

an automatic stay of proceedings to enforce a judgment pending an appeal by a party “giving a supersedeas bond” (subject to a court’s approval). FED R. CIV. P. 62(d).

38. Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1607 (1968). Nevertheless, the federal bias towards compelling arbitration in a domestic context is extended to the enforcement of an award. “Just as ‘exceptional circumstances’ must exist in order to prevent a Court from compelling arbitration . . . a party seeking a stay to the enforcement of an arbitration award should be required to make a similarly strong showing.” *Holz-Her U.S., Inc. v. Monarch Mach., Inc.*, 47 F. Supp.2d 646 (W.D.N.C. 1999) (denying a motion to stay consideration of a motion to confirm and enter judgment on an award).

39. 517 F. Supp. 948 (S.D. Ohio 1981), *reh’g denied*, 530 F. Supp. 542 (S.D. Ohio 1982).

40. *Id.* at 950.

41. *See id.*

petition in *Fertilizer Corp. of India* ("Methanol Award").⁴² At the time FCI petitioned the U.S. District Court for enforcement of the Nitrophosphate Award, IDI and FCI had respectively commenced an action to set aside the Nitrophosphate and Methanol Awards in Indian Courts.⁴³

In *Fertilizer Corp. of India*, U.S. District Judge S. Arthur Spiegel expended a considerable amount of effort in denying each of IDI's five affirmative defenses under Article V of the New York Convention. In so doing, Judge Spiegel based his findings on a policy enforcing arbitral agreements and awards rendered therefrom.⁴⁴ For example, in the Court's consideration of IDI's Article V(1)(c) defense that the arbitrators exceeded their authority by granting consequential damages, a remedy specifically excluded under the original agreement of the parties, the Court showed complete deference to the arbitrators, opining that "(t)he Convention 'does not sanction second-guessing the arbitrator's construction of the parties' agreement,' nor would it be proper for this Court 'to usurp the arbitrator's role.'"⁴⁵ In finding that the arbitrators did not exceed their authority, Judge Spiegel cited the Supreme Court for its broad support of arbitration:

Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from the courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside from error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.⁴⁶

Initially, Judge Spiegel promoted a pro-enforcement stance in his analysis of whether to stay enforcement under Article VI

42. *Id.*

43. *See id.*

44. *See id.*

45. 517 F. Supp. 948, 959 (quoting *Parsons & Whittemore Overseas Co.*, 508 F.2d at 977).

46. *Id.* at 959-60 (quoting *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349, 15 L.Ed. 96 (1854)).

of the Nitrophosphate Award pending the determination of IDI's appeal in the Indian Court. The Ohio District Court relied on *Scherk v. Alberto-Culver Co.*⁴⁷ for the proposition that there is a need to enforce arbitral awards in order to effectuate the purposes of the Convention.⁴⁸ But, without a full explanation, the Court contradicted its pro-enforcement position by stating that "in order to avoid the possibility of an inconsistent result, this Court has determined to adjourn its decision on enforcement of the Nitrophosphate Award until the Indian courts decide with *finality* whether the award is correct under Indian law."⁴⁹ Such a reversal is particularly vexing when considering the Judge's interpretation of Article VI as "an *unfettered grant of discretion*"; the Court has been unable to discover any standard on which a decision to adjourn should be based, other than to ascertain that an application to set aside or suspend the award has been made."⁵⁰ The *Fertilizer Corp. of India* Court made no attempt to establish a standard or to discuss any presumption in favor of the agreement entered into by the parties. Instead, emphasis was placed merely upon the fact that an appeal was pending in India.⁵¹

In addition to the inconsistency between the decision to stay enforcement and the overall purpose of the Convention to encourage enforcement of arbitral awards,⁵² Judge Spiegel, without explanation, mistakenly predicated the stay on a "final" Indian court decision.⁵³ Finality of an award is not required under the Convention. To the contrary, the Convention only requires that the award be binding.⁵⁴ Contrary to Judge

47. 417 U.S. 506.

48. See *Fertilizer Corp. of India*, 517 F. Supp. at 961. "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate [the Convention's] purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." [*Scherk*] at 516-517. The same would be true of a parochial refusal to enforce an arbitral award under the Convention."

49. *Id.* at 962 (emphasis added) (also allowing FCI to seek an order for the payment of security under Article VI).

50. *Id.* at 961 (emphasis added).

51. See *id.* at 962.

52. See *id.* at 961.

53. *Id.* at 963.

54. Cf. New York Convention, *supra* note 1 (Article V(1)(e) allows a court to refuse enforcement of an award if the party against whom it is invoked proves that it is not binding.).

Spiegel's use of "finality" in his consideration of Article VI, the Court found the "Nitrophosphate Award final and binding, for purpose of the Convention."⁵⁵ The *Fertilizer Corp. of India* Court even recognized the commentary of Gerald Aksen on the issue of a "binding" award:

The award will be considered 'binding' for the purposes of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact that recourse may be had to a court of law does not prevent the award from being 'binding.' This provision should make it more difficult for an obstructive loser to postpone or prevent enforcement by bringing, or threatening to bring, proceedings to have an award set aside or suspended.⁵⁶

Fertilizer Corp. of India laid a foundation for federal review under Article VI of a court's "unfettered discretion" to stay enforcement of an arbitral award. However, despite the pro-enforcement policy articulated throughout *Fertilizer Corp. of India*, the issuance of a stay was an unexplained contradiction leaving future courts without a standard for guidance.

B. Spier v. Calzaturificio Tecnica S.p.A.

Judge Charles S. Haight's decision in *Spier v. Calzaturificio Tecnica S.p.A.*⁵⁷ also addresses the issue of whether to stay enforcement of a commercial arbitral award under Article VI. In *Spier*, Calzaturificio Tecnica, S.p.A. ("Tecnica"), an Italian corporation, contracted Martin Spier ("Spier"), a United States citizen, to supply expertise for the manufacture of ski boots.⁵⁸ Spier sought recourse in accordance with the contractual "provision providing for resolution of disputes by a panel of three arbitrators in Italy."⁵⁹ Following the panel's unanimous decision to award Spier the equivalent of nearly seven hundred thousand U.S. dollars, Tecnica

55. *Fertilizer Corp. of India*, 517 F. Supp. at 957.

56. *Id.* at 958 (quoting Gerald Aksen, *American Arbitration Accession 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, 11 (1971)).

57. 663 F. Supp. 871 (S.D.N.Y. 1987).

58. *Id.* at 872.

59. *Id.* (Judge Haight's decision omits the factual circumstances underlying the dispute).

commenced an action in an Italian court to set aside the award.⁶⁰ Subsequently, Spier filed a petition in federal court to enforce the award.⁶¹

Tecnica asserted three bases under Article V upon which Spier's petition should be dismissed, and in the alternative, Tecnica sought to have the Court stay its decision pending the determination of the challenges posed in the Italian court.⁶² Although Judge Haight clearly defines the positions under Tecnica's first defense of whether the Italian procedure of "arbitrato irrituale" can give rise to an award which is binding under V(1)(e) of the Convention no attempt is made to decide the merits of any of the Article V challenges.⁶³

The *Spier* Court appears to have relied upon the discretionary nature of a stay of enforcement under Article VI to avoid the necessity of making a determination on the merits of Tecnica's other defenses.⁶⁴ Judge Haight ordered a stay so as to defer to the findings of the Italian courts on all of the defenses placed before him even though Tecnica's assertion under V(1)(e) was not raised as a question to be settled under its Italian claims.⁶⁵ Like *Fertilizer Corp. of India*, *Spier* fails to articulate a coherent standard of whether to impose a stay for any reason other than that a court should automatically defer to the findings of the court in the jurisdiction in which the arbitral award was rendered. Judge Haight opined:

I would deny Article VI adjournment of the enforcement proceedings here only if I were satisfied that Tecnica's litigation position in Italy was transparently frivolous. I cannot reach that conclusion on the present record. That being so, it is better to permit the validity of this Italian arbitral award to be first tested under Italian law by Italian courts. That is preferable to an American court seeking to apply the law of

60. *See id.*

61. *See id.*

62. *See id.* at 873.

63. *Spier*, 663 F. Supp. at 874.

64. *Id.* at 874-75 (citing to Article VI and *Fertilizer Corp. of India* as evidence of a court's discretion).

65. *Id.* at 875. "I do not conceive the Italian courts to be presented with the question of whether this "arbitrato irrituale" falls within and is enforceable under the Convention. That question . . . would not seem to arise in Italy But clearly the Italian courts must consider under Italian law the nature of the award, and the permissible scope of the challenges Tecnica may assert against it, including the alleged invalidity of the entire contract."

the foreign country where the award was made, and entering an order enforcing an award later condemned by the courts of that foreign country.⁶⁶

Although the *Spier* Court's seemingly automatic stay seems to contradict the pro-enforcement purposes of the Convention, the Court did hold that the party against whom enforcement is sought bears the burden of proving why it should not post a security in the full amount of the award pending the disposition in the court of origin.⁶⁷ In a later Memorandum Opinion and Order, Judge Haight implies that the posting of security is a basis upon which a stay of enforcement is granted.⁶⁸

Judge Haight's decision to stay enforcement in *Spier* was correct as to its results despite its imperfect reasoning. In October 1999, Judge Haight issued a Memorandum and Order denying *Spier*'s petition for enforcement of the award because Italy's highest court had validated the findings of two lower courts granting *Tecnica*'s petition to set aside the award.⁶⁹ Although *Spier III* did not attempt to address any issues associated with an Article VI stay, it is important to note that the Italian courts set aside the arbitral award because the arbitration panel had exceeded its powers by awarding compensation outside the scope of the contract⁷⁰ and the Italian courts "demonstrated no particular interest in the distinction between an 'arbitrato rituale' and an 'arbitrato irrituale.'"⁷¹ Even on reflection, in *Spier III*, Judge Haight merely deferred to the authority of the Italian courts without even discussing the merits of *Tecnica*'s claims or the federal court's ability to resolve the dispute.

Proponents of the decisions in *Spier* and *Spier III* may argue that Judge Haight's decision to stay enforcement gave due respect to the notion of comity and as a result allowed the

66. *Id.*

67. *Id.* at 876.

68. See *Spier v. Calzaturificio Tecnica S.p.A.*, No. 86 CIV. 3447 (CSH), 1988 WL 96839, at *2 (S.D.N.Y. Sept. 12, 1988) [hereinafter *Spier II*]. "If a party such as *Tecnica* fails to post security, then it would seem that the proper remedy would be to deny its application for an adjournment of the decision." *Id.*

69. See *Spier v. Calzaturificio Tecnica S.p.A.*, 71 F. Supp.2d 279 (S.D.N.Y. 1999), *reh'g denied*, 77 F. Supp.2d 405 (S.D.N.Y. 1999) [hereinafter *Spier III*].

70. *Id.* at *2-3.

71. *Id.* at *5.

enforcing court to avoid the possibility of wrongfully enforcing a foreign arbitral award.⁷² However, the failure to even address the merits of the claims (other than those impertinent to final disposition) or to articulate a standard for a stay of enforcement only serves to undermine the purposes of the New York Convention. The “unfettered discretion” first articulated in *Fertilizer Corp. of India* is reduced to nothing more than an automatic stay, a policy, which if adopted unanimously by the federal courts, may spur all “arbitral losers” to seek review by the competent authority in the jurisdiction of origin. A policy of an automatic stay is not endorsed by the language and purpose of the New York Convention. If it was, then a stay would be contingent merely upon the posting of security.⁷³

C. Caribbean Trading and Fidelity Corp. v. Nigerian Nat'l Petroleum Corp.

Judge John F. Keenan's stay of an award under Article VI in *Caribbean Trading and Fidelity Corp. v. Nigerian Nat'l Petroleum Corp.*⁷⁴ represents nothing more than a verbatim application of the reasoning used in *Spier*. In *Caribbean Trading and Fidelity Corp.*, no mention was made as to the purpose of the New York Convention or to the general federal bias in favor of arbitration and its enforcement.⁷⁵

Caribbean Trading and Fidelity Corp. involved a dispute over a contract entered into between Caribbean Trading & Fidelity Corp. (“CTFC”)⁷⁶, an Anguillan, British West Indies

72. *Spier* is an exception in that “[i]t rarely occurs that an action for setting aside the award existent in the country of origin is successful. In fact, out of the 288 reported court decisions, in only one case did a court set aside an award in the country of its origin.” Michael Tupman, *Staying Enforcement of Arbitral Awards under the New York Convention*, 3 ARB. INT'L 209, 222 (1987) (citing Jan van den Berg, 11 Y.B. Comm. Arb. 399, 458 (1986)).

73. See Tupman, *supra* note 72, at 221. The posting of security alone, also does not resolve the problems of an automatic stay because “a statutory or other fixed rate [of interest] might be applied which is well below the actual loss to the claimant. Furthermore, from a business perspective it might be more important for the claimant to have the money now . . . than years later with interest.” *Id.* at 222 (citation omitted).

74. No. 90 CIV. 4169 (JFK), 1990 WL 213030 (S.D.N.Y. Dec. 18, 1990), *reh'g denied*, No. 90 CIV. 4169 (JFK), 1991 WL 64181 (S.D.N.Y. Apr. 17, 1991), *appeal dismissed*, 948 F.2d 111 (2nd Cir. 1991), *cert. denied*, 504 U.S. 910 (1992).

75. See generally *Scherk*, 417 U.S. 506.

76. CTFC acted as an agent for and on behalf of the Government of St.

corporation, and Nigerian National Petroleum Corp. ("NNPC"), a Nigerian corporation and governmental entity.⁷⁷ CTFC presented the dispute before an arbitral panel selected by the parties under the Nigerian Arbitration Act as provided for by the contract.⁷⁸ Following the issuance of an award in favor of CTFC, NNPC originated an action in the High Court of Lagos State in Lagos, Nigeria. NNPC sought to have the award set aside on various grounds, including, but not limited to, the notion that the contract was made between two governments.⁷⁹ As of the time Judge Keenan rendered his decision in *Caribbean Trading and Fidelity Corp.*, litigation was still pending in the High Court regarding NNPC's application to have the original award set aside and CTFC's appeal of a denial of its motion to have NNPC's application set aside.

In *Caribbean Trading and Fidelity Corp.*, the Court discussed, but made no decision upon, the issue of NNPC's jurisdictional immunity under the rubric of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330.⁸⁰ Due to the Court's grant of NNPC's request for a stay pending the disposition of the action before the High Court in Nigeria, no judicial determination was made as to the findings of the arbitrators.⁸¹ Judge Keenan merely reiterated Judge Haight's decision in *Spier*⁸² deferring to the High Court of Lagos and stating that "(t)he same logic applies in this case, especially where the evidence indicates that the arbitrators may not have considered all of the evidence before them."⁸³ Although the Court made a summary statement that the Nigerian action was not frivolous, it made no effort to articulate how all of the evidence may not have been considered by the arbitrators.⁸⁴ In light of the issuance of a stay under Article VI, the *Caribbean Trading and*

Christopher and Nevis (St. Kitts). See *Caribbean Trading and Fidelity Corp.*, No. 90 CIV. 4169, 1990 WL 213030, at *1.

77. *Id.*

78. See *id.*

79. See *id.* at *3.

80. *Id.* at *4-6 (NNPC asserts that because CTFC acted on behalf of the government of St. Kitts that the contract was made between two governments and is therefore not a private contract).

81. See *id.* at *7-8.

82. *Caribbean Trading and Fidelity Corp.*, 1990 WL 213030, at *7; see also *infra* Part III.

83. *Id.* at *7.

84. See *id.* at *7-8.

Fidelity Corp. Court ordered NNPC to post security in the amount set forth in the original award.⁸⁵

Although NNPC and CTFC eventually settled their dispute prior to judicial resolution in the United States or Nigeria,⁸⁶ *Caribbean Trading and Fidelity Corp.* remains as an example of the federal courts' failure to articulate a standard for staying enforcement under Article VI of the New York Convention. *Caribbean Trading and Fidelity Corp.* goes even further than *Spier* in exhibiting an "unfettered discretion" to automatically stay enforcement and the ability of a court to divorce itself from the purposes of the Convention as implemented in the Federal Arbitration Act.

D. Ukrvneshprom State Foreign Econ. Enter. v. Tradeway, Inc.

*Ukrvneshprom State Foreign Econ. Enter. v. Tradeway, Inc.*⁸⁷ represents an exception from the federal courts' seemingly "automatic" stay of enforcement under Article VI of the New York Convention. *Ukrvneshprom* stemmed from two contractual agreements made by Tradeway, Inc. ("Tradeway"), a New York corporation, and Ukrvneshprom State Foreign Economic Enterprise ("USFEE"), a Ukrainian corporation, providing for the purchase of steel and iron products by Tradeway from USFEE.⁸⁸ Both contracts entered into by Tradeway and USFEE provided for the resolution "of disputes by the Court of Arbitration at the Chamber of Commerce and Industry of Ukraine, Kiev."⁸⁹ In 1995, USFEE initiated an action before the Arbitral Authority for which USFEE was awarded in excess of six million U.S. dollars for Tradeway's breach of the two contracts.⁹⁰ Tradeway responded to the award by petitioning the City Court of Kiev, Ukraine to set aside the award and by commencing a "counterclaim arbitration" against USFEE with the Arbitral Authority⁹¹ At the time of Judge Robert P.

85. *Id.* at *8.

86. See *Caribbean Trading and Fidelity Corp. v. Nigerian Nat'l Petroleum Co.*, No. 90 CIV. 4169 (JFK), 1993 WL 541236, at *1 (S.D.N.Y. Dec. 28, 1993).

87. No. 95 CIV. 10278 (RPP), 1996 U.S. Dist. LEXIS 2827, at *1 (S.D.N.Y. Mar. 11, 1996) [hereinafter *Ukrvneshprom*].

88. *Id.* at *2.

89. *Id.* at *2-3 ("Arbitral Authority").

90. See *id.* at *4.

91. *Id.*

Patterson's decision in *Ukrneshprom*, Tradeway's petition to have the award set aside by the Kiev City Court had been denied and was under review by the Supreme Court of the Ukraine.⁹²

In *Ukrneshprom*, Tradeway asserted three Article V defenses on the basis of which the Court should deny enforcement of the original award. Relying on *Fertilizer Corp. of India* and the contractual provision that provided for the finality of an award issued by the Arbitral Authority, the *Ukrneshprom* Court found against Tradeway's first assertion under Article V(1)(e) that the award was not binding.⁹³ Second, Judge Patterson found that Tradeway's own failure to invoke procedures of the Arbitral Authority for the presentation of evidence precluded the application of an Article V(1)(b) defense that it was unable to present its case.⁹⁴ Finally, Judge Patterson concluded that based upon Tradeway's inability to assert any factors supporting its proposition under Article V(2)(b), the public policy of the United States is not violated by the enforcement of the award.⁹⁵

Following the denial of Tradeway's Article V defenses and based upon a court's "unfettered discretion" to stay enforcement under Article VI, as articulated in *Fertilizer Corp. of India*,⁹⁶ Judge Patterson enforced the arbitral award issued by the Arbitral Authority despite pending judicial review in the Ukraine.⁹⁷ Judge Patterson carefully balanced the goal of the Convention to promote the enforcement of awards⁹⁸ against "the risk that the power to stay could be abused by disgruntled litigants . . . [which] argues more for a cautious and prudent exercise of the power than for its elimination."⁹⁹ Judge Patterson appears to implement *Spier's* "frivolous" exception to staying enforcement¹⁰⁰ in finding that ". . . Tradeway is en-

92. *Id.* at *5.

93. *Ukrneshprom*, 1996 U.S. Dist. LEXIS 2827, at *9-13.

94. *See id.* at *13-16.

95. *See id.* at *18.

96. *See id.* *See also supra* Part III.A.

97. *See Ukrneshprom*, 1996 U.S. Dist. LEXIS 2827, at *1.

98. *See id.* at *19; *see also Fertilizer Corp. of India*, 517 F. Supp. 948.

99. *Ukrneshprom*, 1996 U.S. Dist. LEXIS 2827, at *19-20 (quoting *Hewlett-Packard Co., Inc. v. Berg*, 61 F.3d 101, 106 (1st Cir. 1995) (finding that although Article VI of the New York Convention did not apply, the district court may stay an action to enforce an arbitral award for other reasons)).

100. *See Spier*, 663 F. Supp. 871.

gaged in obstructive litigation while it conducts transactions intended to avoid the effect of the [a]ward."¹⁰¹ Judge Patterson's decision was based upon the following findings: (i) the claims of Tradeway remain unsubstantiated other than by representations of its lawyers; (ii) the exclusion of a 'critical' phrase in a translation of Ukrainian law provided by Tradeway; (iii) the indeterminacy of Tradeway's claims; and (iv) the liquidation of Tradeway's assets by sale of all assets and liabilities to Tradeway West, Inc., a New York corporation, whose sole shareholder was an employee of Tradeway, two days prior to the issuance of the arbitral award.¹⁰²

Although the courts in *Spier* and *Caribbean Trading and Fidelity Corp.* noted the existence of the "frivolous" exception to staying enforcement,¹⁰³ neither contained more than a cursory conclusion as to the inapplicability of the exception. Despite *Ukrvneshprom's* failure to establish a standard for a stay under Article VI, it does represent an initial attempt by a federal Court to address the factors to be considered in deciding whether to stay enforcement.

E. Europcar Italia, S.p.A. v. Maiellano Tours, Inc.

*Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*¹⁰⁴ represents the only instance in which a U.S. Court of Appeals has attempted to articulate the factors that are to be considered in granting a stay under the New York Convention.¹⁰⁵ Although the Second Circuit admittedly made no attempt to define a standard for staying an award under Article VI, its review of the District Court's denial of a stay for an abuse of discretion did at least establish a framework from which a standard may arise.¹⁰⁶

101. *Ukrvneshprom*, 1996 U.S. Dist. LEXIS 2827, at *24.

102. See *id.* at *20-23.

103. See *Spier*, 663 F. Supp. 871; *Caribbean Trading and Fidelity Corp.*, No. 90 CIV. 4169, 1990 WL 213030.

104. *Europcar Italia, S.p.A.*, 156 F.3d 310.

105. See *Consortio Rive, S.A. de C.V. v. Briggs of Cancun, Inc.*, No. CIV.A. 99-2204 (CS), slip op., 1999 WL 1009806, at *2 (E.D. La. Nov. 5, 1999).

106. "We agree with [*Hewlett-Packard Co., Inc. v. Berg*, 61 F.3d 101, 106 (1st Cir. 1995)], that adjournment should be decided by the district court in the first instance. We also conclude that in light of the permissive language of Article VI of the Convention and a district court's general discretion in managing its own case-load and suspense docket, . . . the proper standard for reviewing a court's decision

Europcar Italia, S.p.A. arises out of a contractual agreement between Maiellano Tours, Inc. ("Maiellano"), an American corporation, and Europcar Italia, S.p.A. ("Europcar"), an Italian corporation, which was to rent cars to customers referred by Maiellano.¹⁰⁷ The original agreement provided that all disputes will be "finally resolved" by a sole arbitrator under Italian legal rules known as "arbitrato irrituale in equita" or "informal proceedings."¹⁰⁸ Subsequent to a dispute that arose between the parties regarding the remittance of value-added-tax refunds and their inability to agree upon a sole arbitrator, the parties entered into a supplemental arbitration agreement.¹⁰⁹ The supplemental agreement provided for a panel of three arbitrators. In accord with the original agreement, the award was to be final and determined in accordance with the procedure of "arbitrato irrituale."¹¹⁰ Europcar then sought to have the award rendered by the arbitral panel enforced by the Tribunal of Rome and Maiellano initiated an action to have the award set aside by the same Italian court of first instance.¹¹¹ Prior to the disposition of the Italian actions, Europcar sought and was granted enforcement of its award by Judge Carol Bagley Amon in the Eastern District of New York.¹¹²

Presented with Maiellano's four claims on appeal, the *Europcar Italia, S.p.A.* Court ultimately narrowed its decision to the issue of whether to stay enforcement under Article VI in remanding the action for further consideration by Judge Amon. Maiellano's first contention that an award reached under arbitramento irrituale is not binding and enforceable was also at issue in *Spier*.¹¹³ Although the *Europcar Italia, S.p.A.* Court illustrated the arguments involved with the enforceability of an arbitramento irrituale proceeding, the Court found that resolution of the issue was not necessary for disposition of the case

whether to adjourn is for abuse of discretion." *Europcar Italia, S.p.A.*, 156 F.3d at 316-17.

107. *Id.* at 312.

108. *Id.*

109. *See id.*

110. *See id.*

111. *See Europcar Italia, S.p.A.*, 156 F.3d at 312.

112. *See Id.* at 312-13 (Judge Amon's decision reflected the partial adoption of a Report and Recommendation prepared by Magistrate Judge Steven R. Gold, granting Europcar's motion for summary judgment).

113. *See supra* Part III.(B).

and therefore made no final determination.¹¹⁴ However, the *Europcar Italia, S.p.A.* Court did find under Maiellano's second contention that the District Court was correct in determining that the parties intended to be bound by the arbitration award.¹¹⁵ Furthermore, Judge Amon's decision that enforcement of the arbitration award does not violate United States' public policy under Article V(2)(B) of the New York Convention was affirmed in *Europcar Italia, S.p.A.* because the issue of whether the agreement, upon which the award was based, was a forgery was for the arbitrators to decide.¹¹⁶

Based upon Maiellano's final argument that a stay of enforcement was proper pending the resolution of the Italian actions, the Court of Appeals vacated and remanded Judge Amon's decision for further consideration.¹¹⁷ The *Europcar Italia, S.p.A.* Court based its decision on the perception that the District Court did not consider the competing concerns associated to granting a stay.¹¹⁸ The concerns of staying enforcement outlined in *Europcar Italia, S.p.A.*, such as the purposes of arbitration and comity, were addressed more fully by balancing the following non-exhaustive list of factors:

- (1) the general objectives of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation;
- (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved;
- (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;
- (4) the characteristics of the foreign proceedings including (i) whether they were brought to enforce an award (which would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of enforcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to

114. See *Europcar Italia, S.p.A.*, 156 F.3d at 314.

115. *Id.* at 315.

116. *Id.* at 315-16.

117. *Id.*

118. *Id.* at 317.

hinder or delay resolution of the dispute;

(5) a balance of the possible hardships to each of the parties, keeping in mind that if enforcement is postponed under Article VI . . . , the party seeking enforcement may receive 'suitable security' and that under Article V . . . an award should not be enforced if it is set aside or suspended in the originating country . . . ; and

(6) any other circumstances that could tend to shift the balance in favor of or against adjournment.¹¹⁹

Although the Second Circuit provided some guidance by articulating a list of factors for Judge Amon to consider on remand, the usefulness of *Europcar Italia, S.p.A.* is limited by its failure to establish the weight to be given to each of the factors and by the unlimited breadth afforded under the sixth consideration. In light of the goal of the New York Convention, the Second Circuit did place greater emphasis on the first two factors.¹²⁰ However, the Second Circuit made no effort at providing a formula for weighing the factors and did not articulate whether there is even a presumption in favor of enforcement that must be overcome before a stay is granted by a federal district court. The instructiveness of *Europcar Italia, S.p.A.* is further limited because the Italian actions were disposed of in favor of Europcar prior to a ruling by Judge Amon of the issue on remand.¹²¹

Moreover, *Europcar Italia, S.p.A.* is inherently flawed since, although the Court of Appeals acknowledged the authority and discretion of a district court in deciding whether to stay enforcement, the Court did not make reference to Judge Amon's failure to consider arguments elicited by Maiellano. Instead, the Second Circuit usurped Judge Amon's authority by delineating its own list of factors she should have considered without acknowledging her use of discretion when originally ordering enforcement. As instructive as the concerns articulated in *Europcar Italia, S.p.A.* are, the decision to remand serves as an additional obstacle to enforcement and therefore, contradicts the goals of the New York Convention

119. *Id.* at 317-18.

120. See *Europcar Italia, S.p.A.*, 156 F.3d at 318.

121. This information may be found from docket sheets attainable at the District Courthouse for the Eastern District of New York under the identifying docket number "94-CV-3658" (Documents nos. 45-48).

and the parties' agreement providing for a final resolution.

Although *Europcar Italia, S.p.A.* did not promote the goals of the New York Convention by remanding Judge Amon's decision to enforce the arbitral award, the balancing factors presented by the Second Circuit serve as an important step forward in defining a federal standard under Article VI.

Yet the potential legacy of *Europcar Italia, S.p.A.* may actually be that of a hinderance to the development of a standard for staying enforcement in compliance with the purposes of the New York Convention. *Consortio Rive, S.A. de C.V. v. Briggs of Cancun, Inc.*¹²² serves as the first, yet incomplete, application of the factors set forth in *Europcar Italia, S.p.A.* *Consortio Rive, S.A. de C.V.* involves a situation in which an arbitral award was rendered in Mexico under Mexican law as provided for by a lease agreement between the parties.¹²³ Prior to *Consortio Rive, S.A. de C.V.*'s. (Rive) action to enforce the award in the Eastern District of Louisiana, Briggs of Cancun, Inc. (Briggs) sought to have the award set aside by a "nullity action" brought against the arbitration panel in a Mexican court for violations of Mexican procedural law.¹²⁴ Prior to Briggs's application for a stay of enforcement, "the Mexican court sua sponte dismissed the nullity action" and Briggs appealed such dismissal.¹²⁵ In preliminarily denying Briggs's motion to stay the enforcement of the arbitral award, Judge Charles Schwartz, Jr. evaluated how each factor articulated in *Europcar Italia, S.p.A.* applied to the action at hand.¹²⁶ Nevertheless, Judge Schwartz granted the parties an additional opportunity to research Mexican law to determine if the appeal was devolutive, the anticipated duration of the proceedings, and the security necessary if the stay was granted.¹²⁷

Based upon further submissions, Judge Schwartz found that "the effect of the dismissal of the nullity action [had] been suspended by the appeal, so that action 'for the setting aside or

122. *Consortio Rive, S.A. de C.V.*, 1999 WL 1009806, at *1 (a final disposition of this action has not been rendered as of the completion of this Note).

123. *Id.* at *1.

124. See *Consortio Rive, S.A. de C.V.*, No. CIV.A. 99-2204 (CS), 2000 WL 98127 (Jan. 26, 2000 E.D. La.) (Rive is not a party to the nullity action).

125. *Consortio Rive, S.A. de C.V.*, 1999 WL 1009806, at * 1.

126. See *id.* at *2.

127. See *id.*

suspension of the award' is unresolved."¹²⁸ As a result, the enforcement proceedings were stayed pending the defendants' posting of a bond in the sum of the original award.¹²⁹ In granting a stay, Judge Schwartz ultimately relied upon the notion that "a foreign court well-versed in its own law is better suited to determine the validity of the award."¹³⁰ *Consortio Rive, S.A. de C.V.* represents a conscious effort by the court not to address the merits of the nullity action, the dismissal of which does not affect the binding nature of the award, but instead suspends the effect of dismissal. Regardless of the eventual disposition of *Consortio Rive, S.A. de C.V.* and the future application of *Europcar Italia, S.p.A.*, these cases illustrate that a blind adherence to the notion of comity merely reaffirms the federal practice of an absolute stay while violating the goal of the New York Convention to eliminate the need for double exequator.

IV. CONCLUSION

As *Fertilizer Corp. of India* and its progeny illustrate, the failure of the federal courts to articulate a definitive standard for staying the enforcement of foreign commercial arbitral awards under Article VI of the New York Convention has led to an *ad hoc* determination usually resulting in an automatic stay. This general practice is repugnant to the goals of the Convention because it contradicts the notion that "[i]n order to obtain the benefit of the New York Convention, a party applying for recognition or enforcement of an award is not required to initiate proceedings in the country of origin of the award."¹³¹ Even though the party seeking enforcement does not have to "initiate" a proceeding in the country of origin, an automatic stay nevertheless requires the enforcing party to submit to a system of double exequator.

Even though *Ukrvneshprom* stands apart from federal case law, and seems to support the goals of the Convention by its denial of a stay of enforcement of a foreign arbitral award, it still fails to define a proper standard encompassing the need to

128. *Consortio Rive, S.A. de C.V.*, 2000 WL 98127, at *3.

129. *See id.* at *4.

130. *Id.* at *3 (quoting *Europcar Italia, S.p.A.*, 156 F.3d at 317).

131. *See* FOUCHARD, *supra* note 9, at para. 1677.

avoid double exequatur and the promotion of party autonomy. One commentator promotes a standard analogous to that used by federal courts in exercising their discretion to stay an injunctive order from enforcing a final judgment pending an appeal under FED.R.CIV.P. 62(c).¹³² Similarly, another approach only allows a stay to be granted if "the opposing party can demonstrate that the balance of potential harms to each of the parties weighs in favor of a stay."¹³³ Despite any merit contained in these theories or the result attained in *Ukrvneshprom*, the elimination of a need for double exequatur must retain its paramount importance when considering enforcement under the New York Convention.

Underlying the system of double exequatur lies the principle of party autonomy. The risk of an incorrect award is real and is in the minds of the parties when initially contracting for the resolution of disputes by an arbitral forum. An enforcing party merely seeks enforcement from a decision resulting from its original bargain. In light of the rare instance when review is necessary, the parties may contract for a method of review as a predicate to the award's achievement of a binding nature. This form of review allows the parties to assert their own needs in achieving a final resolution which limits the time and expense associated with a protracted litigation.

Europcar Italia, S.p.A. represents a significant step by the federal courts in defining a standard to stay enforcement under Article VI. However, the factors proposed by the Second Circuit illustrate the tension experienced by federal courts in escaping the inherent resistance to arbitration as a means of dispute resolution. The *Europcar Italia, S.p.A.* Court limited any presumption in favor of enforcement to "the general objectives of arbitration,"¹³⁴ but fails to recognize "party autonomy" as the preeminent concern to be advanced by enforcement. Furthermore, *Consortio Rive, S.A. de C.V.* illustrates that mere contemplation of the factors articulated by the Second Circuit

132. See Strub, *supra* note 4 (this standard requires a balancing of "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.") (citations omitted). *Id.* at 1064.

133. See Tupman, *supra* note 72.

134. *Europcar Italia, S.p.A.*, 156 F.3d 310.

without a true prioritization in favor of enforcement will yield a practice contravening the purposes of the New York Convention.

Decisions such as *Mitsubishi Motors Corp.* and *Scherk* reflect the federal judiciary's growing acceptance of arbitration. Nevertheless, the courts' failure to create a definitive standard guiding the stay of enforcement of a foreign commercial arbitral award under Article VI reflects a changing policy which is not complete. The lack of a definitive standard has led to a practice contravening the goals of both the Convention and the parties who agreed to arbitrate their disputes.

*Brian Sampson**

* The author would like to dedicate this Note to the memory of his father and to all of the author's teachers who believe in untapped potential.