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# COMMENTS

## ***IRAN AIRCRAFT INDUSTRIES v. AVCO CORPORATION: WAS A VIOLATION OF DUE PROCESS DUE?***

### I. INTRODUCTION

Arbitration as a mechanism for resolving commercial disputes has become increasingly popular in the last several decades. It is generally faster, less expensive, and more efficient than litigation.<sup>1</sup> Litigation is especially complex when the dispute involves international parties. "The foreign court can be an alien environment for a businessman because of his unfamiliarity with the procedure which may be followed, the laws to be applied, and even the mentality of foreign judges."<sup>2</sup> On the other hand, in international commercial arbitration, the parties can decide where the claims should be disputed, and which law should be applied.<sup>3</sup>

Once arbitration awards are rendered, the parties often seek to have the decision enforced in other countries. Arbitral awards are recognized and enforced more readily in United States courts than are judgments rendered by foreign courts.<sup>4</sup> The mechanism that provides for the enforcement of foreign arbitration awards is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

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1. Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards Under the New York Convention - Practice in the U.S. Courts*, 3 INT'L TAX & BUS. LAW. 249, 250 (1986). But see Bryan J. Holzberg, *Panel Critical of Arbitration Cases*, 19 LITIG. NEWS 10 (1993). There are those who believe that the strengths of arbitration—its swiftness and its inexpensiveness—have been weakened by the existence of lengthy, detailed appellate review of arbitration awards. *Id.*

2. ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* 1 (1981).

3. *Id.*

4. McLaughlin & Genevro, *supra* note 1, at 250.

commonly referred to as the New York Convention.<sup>5</sup> The Convention was ratified by many countries, including the United States, and affirms that foreign arbitration awards are recognizable and enforceable in international courts;<sup>6</sup> but it also defines some exceptions to the general rule of enforceability.<sup>7</sup> Article V(1)(b) provides that where there has been a violation of due process, the arbitral award is not enforceable.<sup>8</sup>

Disputes between nationals of the United States and Iran are arbitrated by the United States-Iran Claims Tribunal, which was established by the Algiers Accords<sup>9</sup> as a consequence of the resolution of the Iranian hostage crisis.<sup>10</sup> In 1988, in a dispute between Iran Aircraft Industries and Avco Corporation, an American company, the Tribunal returned an award in favor of the Iranian party.<sup>11</sup> Thereafter, Iran Aircraft Industries sought to have the award enforced in the United States, per the New York Convention.<sup>12</sup> This attempt was denied both by the District Court of Connecticut,<sup>13</sup> and the Court of Appeals for the Second Circuit.<sup>14</sup> The Second Circuit held that the American party, Avco Corporation, was denied due process and consequently the award was unenforceable.<sup>15</sup> This Comment is concerned with the Second Circuit decision,<sup>16</sup> in which enforcement of a foreign arbitration award rendered by the United States-Iran Claim Tribunal was denied

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5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

6. *Id.* art. III.

7. *Id.* art. V; see also *infra* note 95 and part I.E.

8. New York Convention, *supra* note 5, art. V(1)(b).

9. The Algiers Accords include: (1) the Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 1 Iran-U.S. Cl. Trib. Rep. 3 (1983), 20 I.L.M. 224 (1981) [hereinafter General Declaration]; and, (2) the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, 1 Iran-U.S. Cl. Trib. Rep. 9 (1983), 20 I.L.M. 230 (1981) [hereinafter Claims Settlement Declaration].

10. See *infra* notes 18-33 and accompanying text.

11. Avco Corp. v. Iran Aircraft Indus., 19 Iran-U.S. Cl. Trib. Rep. 200 (1988).

12. New York Convention, *supra* note 5.

13. Iran Aircraft Indus. v. Avco Corp., No. 5:91 Civ. 286 (D. Conn. Dec. 10, 1991).

14. Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141 (2d Cir. 1992).

15. *Id.*

16. *Id.*

enforcement in the United States. Until this case, "no federal or foreign case appears to have used Article V(1)(b)'s narrow exception as a reason to refuse to enforce an arbitral award . . . ."<sup>17</sup>

The Comment begins by providing the historical and factual background of the arbitration mechanism set up between the United States and Iran and the enforcement of arbitration awards in international law. It will describe the Algiers Accords, which created the United States-Iran Claims Tribunal, the New York Convention, and its operation on decisions rendered by the Tribunal. The Comment will trace the courts' application of the "due process" defense as a mechanism to challenge enforcement of arbitration decisions. The next section of the Comment will provide the relevant facts and the procedural history of *Iran Aircraft Industries*, followed by an analysis of the Second Circuit's opinion. The case is analyzed from four perspectives: whether the facts are compatible with a denial of due process, whether the decision of denial of due process is consistent with other decisions, whether or not denial of due process should be relevant here, and whether this case was subject to a stricter scrutiny.

Based on a review of the court's opinion and an analysis of other cases in which the due process defense was raised, this Comment concludes that there was no violation of due process in this case. The Second Circuit, perhaps because of the emotional background of this issue, subjected this case to a higher level of scrutiny than other cases presenting the same issue of due process.

## II. BACKGROUND: THE UNITED STATES-IRAN CLAIMS TRIBUNAL AND ENFORCEMENT OF INTERNATIONAL ARBITRATION

### A. *The Algiers Accords and the Creation of the United States-Iran Claims Tribunal*

The United States Claims Tribunal was created by the Algiers Accords,<sup>18</sup> which were a consequence of the resolution of the Iranian hostage crisis. On November 14, 1979, the American Embassy in Tehran was seized, and United States

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17. *Id.* at 147 (Cardamone, J., dissenting).

18. Algiers Accords, *supra* note 9.

diplomatic personnel were captured and held hostage. President Carter, acting pursuant to the International Emergency Economic Powers Act,<sup>19</sup> declared a national emergency and blocked the transfer of Iranian property, and interests in property, subject to the jurisdiction of the United States, and authorized the Secretary of the Treasury to carry out this process.<sup>20</sup> On November 15, 1979, the Treasury Department issued the Iranian Asset Control Regulations which provided that "unless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979] there existed an interest of Iran."<sup>21</sup>

In January of 1981 the governments of the United States and Iran entered into an agreement calling for the release of the American hostages and the settlement of any claims that may have arisen out of the crisis. The agreement was embodied in two declarations of the Democratic and Popular Republic of Algeria: The Declaration of the Government of the Democratic and Popular Republic of Algeria, and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran.<sup>22</sup> Collectively, these two documents are referred to as the Algiers Accords.<sup>23</sup> On January 19, 1981, President Carter issued a series of Executive Orders implementing the terms of the agreement.<sup>24</sup> Subsequently, on January 20, 1981, the American hostages were released.

The agreement stated that:

It is the purpose of both parties . . . to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration . . . . [T]he United States agrees to terminate all legal proceedings in United States courts involving claims of United States per-

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19. 50 U.S.C. §§ 1701-1706 (Supp. III 1976).

20. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981); see also *E. Systems, Inc. v. United States*, 2 Cl. Ct. 271 (1983).

21. 273 C.F.R. § 535.203(e) (1980).

22. Algiers Accords, *supra* note 9.

23. Algiers Accords, *supra* note 9.

24. Exec. Order Nos. 12,276-12,285, 46 Fed. Reg. 7,913-7,931 (1982).

sons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.<sup>25</sup>

The Accords called for the establishment of the United States-Iran Claims Tribunal to hear disputes,<sup>26</sup> and declared that the Tribunal would have jurisdiction over claims arising out of contractual arrangements between the two countries, or nationals of the two countries, for the purchase and the sale of goods and services.<sup>27</sup> Furthermore, the Accords provided that the Tribunal would consist of nine members—three from the United States, three from Iran, and three to be picked by those other six.<sup>28</sup> Claims could be decided by the full Tribunal or by a panel of three.<sup>29</sup> One billion dollars would be held in the Bank of England, in the account of the Algerian Central Bank, and would be used to satisfy awards rendered against Iran by the Claims Tribunal.<sup>30</sup> Finally, Article IV of the Claims Settlement Declaration of the Accords provided that “[a]ll decisions and awards of the Tribunal shall be final and binding.”<sup>31</sup>

On February 24, 1981, President Reagan issued an executive order which ratified the January 19 executive orders of President Carter.<sup>32</sup> In Reagan’s executive order, he suspended all claims pending in the United States that could be presented to the Tribunal, holding that such claims would cease to have legal effect.<sup>33</sup>

Suspension of all pending claims in the United States was

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25. General Declaration, *supra* note 9, 1 Iran-U.S. Cl. Trib. Rep. at 3, 20 I.L.M. at 224.

26. Claims Settlement Declaration, *supra* note 9, 1 Iran-U.S. Cl. Trib. Rep. at 9, 20 I.L.M. at 230.

27. Claims Settlement Declaration, *supra* note 9, 1 Iran-U.S. Cl. Trib. Rep. at 9-10, 20 I.L.M. at 230-31.

28. Claims Settlement Declaration, *supra* note 9, 1 Iran-U.S. Cl. Trib. Rep. at 10, 20 I.L.M. at 231-32.

29. Claims Settlement Declaration, *supra* note 9, 1 Iran-U.S. Cl. Trib. Rep. at 10, 20 I.L.M. at 231-32.

30. General Declaration, *supra* note 9, 1 Iran-U.S. Cl. Trib. Rep. at 5-6, 20 I.L.M. at 226.

31. Claims Settlement Declaration, *supra* note 9, 1 Iran-U.S. Cl. Trib. Rep. at 10, 20 I.L.M. at 232.

32. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

33. *Id.*

met with hostility by companies who had actions pending in United States courts against Iran. Questions arose regarding the various executive orders and actions undertaken by President Carter, the Secretary of the Treasury, and President Reagan. In *Dames & Moore v. Regan*,<sup>34</sup> the corporation petitioner had filed suit in the District Court for the Southern District of California against the Government of Iran, the Atomic Energy Organization of Iran, and a number of Iranian banks alleging that it was owed a certain amount of money for services performed under contract.<sup>35</sup> The district court issued orders of attachment against the defendant's property, and property of certain Iranian banks was attached to secure any judgment that might be entered against them.<sup>36</sup> As a result of the Executive Orders of President Carter, and the subsequent Executive Order of President Reagan, the district court ordered that all attachments against the defendant be vacated.<sup>37</sup>

The petitioner then filed an action in a California District Court claiming that the President, in his executive order, exceeded his constitutional powers by terminating all legal proceedings involving Iran. The petitioner further argued that the President's actions were unconstitutional to the extent they adversely affected petitioner's final judgment, the execution of that judgment, and its prejudgment attachments.<sup>38</sup> The district court dismissed the complaint for failure to state a claim upon which relief can be granted, but entered an injunction pending appeal prohibiting the United States from requiring the transfer of Iranian property that is subject to any writ of attachment issued by any court in petitioner's favor.<sup>39</sup> The Supreme Court granted *certiorari* before judgment could be reached by the Ninth Circuit.<sup>40</sup>

Justice Rehnquist held that the President's actions suspending claims against Iran was authorized where such "settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between

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34. 453 U.S. 654 (1981).

35. *Id.* at 663-64.

36. *Id.* at 664.

37. *Id.* at 666.

38. *Id.* at 666-67.

39. *Id.* at 667.

40. *Dames & Moore v. Regan*, 452 U.S. 932 (1981).

our country and another . . . .”<sup>41</sup> Since the creation of the Iran Claims Tribunal stemmed from a major foreign policy dispute between the United States and Iran, it was legal.<sup>42</sup> All disputes between United States nationals and Iranian nationals would now be heard at the newly formed United States-Iran Claims Tribunal.

Although awards of the Tribunal were held to be final and binding, the Algiers Accords did not provide any enforcement mechanism. In *Islamic Republic of Iran v. United States*,<sup>43</sup> the Tribunal considered whether the Accords obligated the United States to satisfy awards issued in favor of Iran or its nationals upon the default of American nationals. The Tribunal ruled that although the United States had no such enforcement obligation under the Accords themselves, it nevertheless had assumed a “treaty obligation”<sup>44</sup> to provide an enforcement mechanism for the Tribunal’s awards in its domestic courts:

It is therefore incumbent on each State Party to provide some procedure or mechanism whereby enforcement may be obtained within its national jurisdiction, and to ensure that the Party has access thereto. If procedures did not already exist as part of the State’s legal system they would have to be established . . . .<sup>45</sup>

The United States has established a uniform means of enforcement through the New York Convention.<sup>46</sup>

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41. *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981).

42. *Id.*

43. 14 Iran-U.S. Cl. Trib. Rep. 324 (1987).

44. Although the United States does not have to satisfy awards issued in favor of Iran or its nationals upon the default of American nationals, an obligation to enforce these awards does exist in Article IV of the Claims Settlement Declaration, which states: “Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.” Claims Settlement Declaration, *supra* note 9, 1 Iran-U.S. Cl. Trib. Rep. at 10, 20 I.L.M. at 232. Therefore, the Accords do provide that the awards should be enforced, yet does not provide the means for such enforcement.

45. *Islamic Republic of Iran*, 14 Iran-U.S. Cl. Trib. Rep. at 331.

46. New York Convention, *supra* note 5.



*B. The Enforcement of Foreign Arbitration Awards and the New York Convention*

The recognition and enforcement of arbitration awards began at the end of World War I as a result of increased international commerce.<sup>47</sup> After the war, the International Chamber of Commerce promoted a convention to confirm enforceability of the arbitration clause.<sup>48</sup> The League of Nations followed the Chamber's initiative, and the result was the Geneva Protocol on Arbitration Clauses of 1923.<sup>49</sup> The Protocol recognized the validity of arbitration agreements "whether relating to existing or future differences"<sup>50</sup> between parties in contracts dealing with commercial matters.<sup>51</sup> Furthermore, the Protocol provided that the courts of the contracting states should refer the parties to arbitration if presented with a disagreement which the disputants had agreed was arbitrable. Enforcement of arbitration awards that arose from the arbitration agreements covered in the 1923 Protocol<sup>52</sup> was provided for in 1927 under the direction of the League of Nations in the Geneva Convention on the Execution of Foreign Arbitral Awards.<sup>53</sup>

Although the Geneva Protocol in 1923 and Convention in 1927 enhanced the legitimacy of arbitration, the latter was nevertheless still wanting.<sup>54</sup> One limitation was that in seeking enforcement, the 1927 Convention placed a heavy burden on the winning party to provide the conditions necessary for enforcement.<sup>55</sup> Second, the Convention required that parties to an arbitration hearing must be citizens of the contracting states.<sup>56</sup> The only way arbitration awards could be enforced

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47. Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1054 (1961).

48. VAN DEN BERG, *supra* note 2, at 6.

49. Geneva Protocol on Arbitration Clauses of 1923, Sept. 24, 1923, 27 L.N.T.S. 158.

50. *Id.* § 1.

51. *Id.*

52. *Id.*

53. Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302.

54. VAN DEN BERG, *supra* note 2, at 7.

55. VAN DEN BERG, *supra* note 2, at 7; *see also* Quigley, *supra* note 47, at 1055.

56. Contracting states refers to those states which had participated in the

was if both disputants were citizens of contracting states, and the arbitral award was made in a contracting state. This was called the diversity of citizenship clause.<sup>57</sup> A decision rendered in a state that was not one of the contracting states could not be enforced under the Convention of 1927. Additionally, "the constitution of the arbitral tribunal, and the arbitral procedure should have taken place in conformity with the laws governing the arbitral procedure; this has almost always been the law of the country where the arbitration took place."<sup>58</sup> In other words, any action to seek enforcement of the award was subject to the laws of the state where the decision was rendered. International arbitration then could be governed by national law.

This sensitive situation eventually caused the International Chamber of Commerce (ICC) to initiate a new international convention on the issue of arbitration awards. The ICC proposed a new draft convention in 1953<sup>59</sup> which aimed essentially at an arbitration which would not be governed by national law.<sup>60</sup> But most states found the idea of international commercial arbitration based solely on an international convention unappealing.<sup>61</sup> As a result, the draft convention of the ICC<sup>62</sup> did not enjoy much support, and never proceeded beyond the draft stage.

Consequently, the United Nations Economic and Social Council (ECOSOC) drafted a different convention in 1955.<sup>63</sup>

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Convention and which had signed and ratified the Protocols.

57. VAN DEN BERG, *supra* note 2, at 7; see also Quigley, *supra* note 47, at 1055.

58. VAN DEN BERG, *supra* note 2, at 7.

59. VAN DEN BERG, *supra* note 2, at 7 (citing INTERNATIONAL CHAMBER OF COMMERCE, ICC BROCHURE NO. 174, ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS, REPORT AND PRELIMINARY DRAFT CONVENTION (1953), U.N. Doc. E/C.2/373 (1953)).

60. VAN DEN BERG, *supra* note 2, at 7.

61. VAN DEN BERG, *supra* note 2, at 7.

62. VAN DEN BERG, *supra* note 2, at 7.

63. VAN DEN BERG, *supra* note 2, (citing U.N. Doc. E/2704 (1955)). The difference between this convention and the ICC convention could be found in the titles of the conventions themselves: the ICC draft convention referred to *International* Arbitral Awards and the ECOSOC's referred to *Foreign* Arbitral Awards. VAN DEN BERG, *supra* note 2, at 7-8. The difference in names emphasized the different approaches. The ICC was concerned that arbitration awards would not be governed by any national law, only international law. Conversely, the ECOSOC draft recognized that most countries found the idea of truly international arbitra-

Pursuant to this draft convention, the Conference on International Commercial Arbitration convened in New York from May 20 to June 10, 1958. There, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards, commonly called the New York Convention, was adopted.<sup>64</sup>

The New York Convention sought to "liberalize procedures for enforcing foreign arbitral awards."<sup>65</sup> Its goals were to "encourage recognition and enforcement of commercial arbitration agreements in international contracts and unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries."<sup>66</sup> The Convention applied to:

arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, [and to] . . . arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.<sup>67</sup>

The Convention was open for signature until December 31, 1958, at which time twenty-five states had signed it.<sup>68</sup>

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tion based solely on an international convention unappealing. VAN DEN BERG, *supra* note 2, at 7. As such, they recognized that arbitration procedures can be governed by foreign countries' law, and provided that both parties consent to the law applicable.

64. New York Convention, *supra* note 5.

65. *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974); *see also* *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133, 136 (D.N.J. 1976).

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

67. New York Convention, *supra* note 5, art. I.

68. The twenty five states were: Argentina, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Ceylon, Costa Rica, Czechoslovakia, Ecuador, El Salvador, Federal Republic of Germany, Finland, France, Hashemite Kingdom of Jordan, India, Israel, Luxembourg, Monaco, Netherlands, Pakistan, Philippines, Poland, Sweden, Switzerland, Ukrainian Soviet Socialist Republic, and Union of Soviet Socialist Republics. Paoli Contini, *International Commercial Arbitration—The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283, 291 n.38 (1959). Iran is not a contracting state. One would think then that an Iranian party could not seek enforcement of an arbitration award under the New York Convention. Had the Geneva Protocols still been applicable, this would have been the case. However, under the New York Convention, the diversity of citizenship requirement no longer exists. The Convention provides for enforcement of awards even when rendered in a non-contracting

The United States did not ratify the New York Convention until 1970 through its accession in the Foreign Arbitration Act.<sup>69</sup> Section 202 of the Act provides that "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial . . . falls under the Convention."<sup>70</sup> Furthermore, in section 203, Congress vested federal district courts with original jurisdiction over any action or proceeding "falling under the Convention,"<sup>71</sup> as such an action is "deemed to arise under the laws and treaties of the United States."<sup>72</sup>

### *C. Application of the New York Convention*

The New York Convention eliminated the perceived limitations of the Geneva Convention of 1927.<sup>73</sup> First, whereas the Geneva Conventions applied only to commercial claims, the New York Convention applies to non-domestic awards in the state where their recognition is being sought,<sup>74</sup> whether or not

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state and even where a party to the proceeding is not subject to the jurisdiction of a contracting state. See *infra* note 79 and accompanying text. Additionally, in the case of *Iran Aircraft Indus. v. Avco Corp.*, the arbitration award was rendered by the Tribunal which is seated in the Hague, Netherlands. Netherlands is a contracting state. Consequently, even had diversity of citizenship still been a factor, Iran could have sought enforcement of the award.

69. 9 U.S.C. §§ 201-208 (1982).

70. 9 U.S.C. § 202 (1982).

71. 9 U.S.C. § 203 (1982).

72. *Id.*

73. See Quigley, *supra* note 47, at 1060-61. The president of the Conference summarized the advantages:

It was already apparent that the document represented an improvement on the Geneva Convention of 1927. It gave a wider definition of the awards to which the Convention applied; it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked; it gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedure; it gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security.

Quigley, *supra* note 47, at 1060 (quoting U.N. Doc. E/Conf.26/SR.25, at 2 (1958)).

74. An award rendered in the country where enforcement is being sought is enforceable if the enforcing state does not consider the award as domestic. Quigley, *supra* note 47, at 1061. For instance, an award made in France under foreign law is regarded as a non-domestic award. Consequently, such an award can be enforced within France. Quigley, *supra* note 47, at 1061. This means that the New York Convention does not only apply to awards rendered outside of the

those awards regard commercial matters.<sup>75</sup> Second, it removed the burden of proof from the successful party and placed it on the party opposing enforcement.<sup>76</sup> Once the party seeking enforcement presents the arbitration agreement and the award granted,<sup>77</sup> the other party has the burden of demonstrating the grounds for refusal to enforce the award.<sup>78</sup> Finally, it removed the diversity of citizenship requirement.

The limitations of the Geneva Convention, that in order for the award to be enforced the award must have been made in a contracting state, and that the parties had to be subject to the jurisdiction of contracting states, were eliminated. The New York Convention confers legitimacy upon awards granted in any state, whether or not a contracting state, and whether or not the parties are subject to the jurisdiction of different contracting states.<sup>79</sup> Regarding enforcement, if the parties have agreed to the composition of the arbitral tribunal or the arbitration procedure, the decision is binding even if it does not coincide with the arbitration laws of the country where the arbitration took place.<sup>80</sup> The New York Convention requires an arbitration agreement in writing in order to enforce any future award.<sup>81</sup> Existence of a valid arbitration agreement implies that the agreement has been voluntarily entered into by both parties. Once such an agreement exists, the obligation for recognition and enforcement of the award is found in Article III which states: "Each 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

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enforcing country.

75. Quigley, *supra* note 47, at 1061.

76. VAN DEN BERG, *supra* note 2, at 9.

77. New York Convention, *supra* note 5, art. IV; *see also infra* notes 83-84 and accompanying text.

78. New York Convention, *supra* note 5, art. V.

79. Quigley, *supra* note 47, at 1061; *see also* VAN DEN BERG, *supra* note 2, at 8. Notwithstanding the breadth of its provisions, the Convention does provide that any nation may "on the basis of reciprocity" declare that it will apply the Convention to awards made only in the territory of other contracting states, or that it will apply only to awards rendered in decisions arising out of what would be considered commercial disputes under the laws of the state making the declaration. These two provisions, in Article I(3) of the Convention, are commonly referred to as the "reciprocity" and "commercial" reservations. Quigley, *supra* note 47, at 1061; *see also* VAN DEN BERG, *supra* note 2, at 12.

80. VAN DEN BERG, *supra* note 2, at 8.

81. New York Convention, *supra* note 5, art. II.

relied upon, under the conditions laid down in the following articles . . . ."<sup>82</sup> In seeking enforcement of the award in a contracting state, the party seeking enforcement must merely supply the "original agreement referred to in Article II or a duly certified copy thereof[.]"<sup>83</sup> and "[t]he duly authenticated original award or a duly certified copy thereof."<sup>84</sup>

#### *D. The Algiers Accord Is a Valid Arbitration Agreement*

According to the New York Convention, awards rendered by the United States-Iran Claims Tribunal would be enforceable in other states if the arbitration agreement is valid, and if there is a copy of the award rendered by the arbitration body.<sup>85</sup> As a consequence of the signing of the Algiers Accords,<sup>86</sup> claims arising between nationals of the United States and nationals of Iran are to be submitted to the United States-Iran Claims Tribunal; thus, the validity of the Accords as an arbitration agreement is critical.

The issue of the validity of the Accords was presented to the Ninth Circuit in *Iran v. Gould*,<sup>87</sup> concerning a contract entered into between the Ministry of War of the Imperial Government of Iran and Hoffman Electric Corporation (HEC),<sup>88</sup> whereby the latter agreed to provide and install certain military equipment.<sup>89</sup> The Iranian hostage crisis brought progress under the contract to an end, however, and HEC filed an action against Iran in the District Court for the Central District of California for breach of contract. HEC received a writ of attachment on Iranian assets to satisfy its claim.<sup>90</sup> However, after President Reagan ratified the executive orders of President Carter, and further declared all existing claims within the United States to be terminated, the district court vacated the judgment.<sup>91</sup> HEC then filed a claim with the Tribunal which

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82. New York Convention, *supra* note 5, art. III.

83. New York Convention, *supra* note 5, art. IV.

84. New York Convention, *supra* note 5, art. IV.

85. See *supra* notes 82-83.

86. Algiers Accords, *supra* note 9.

87. 887 F.2d 1357 (9th Cir. 1989).

88. In the course of the litigation, Hoffman Electric Corporation merged with Gould Marketing, Inc. *Id.* at 1360.

89. *Id.*

90. *Id.*

91. *Security Pac. Nat'l Bank v. Iran*, 513 F. Supp. 864, 884 (C.D. Cal. 1981).

ultimately found that HEC owed money to Iran.<sup>92</sup> Iran then sought confirmation and enforcement of this award in the Ninth Circuit.

HEC argued that the award was not enforceable because the Algiers Accord did not constitute a valid arbitration agreement; consequently, the terms of the New York Convention were not met. The Ninth Circuit rejected this argument, stating "We construe the Accords themselves as representing the written agreement so required, on the strength of the President's authority to settle claims on behalf of United States nationals through international agreements."<sup>93</sup> The court affirmed the president's power to enter into such an agreement on behalf of United States nationals.<sup>94</sup> *Iran v. Gould* established the validity of the Algiers Accords as an arbitration agreement. Consequently, awards rendered by the United States-Iran Claims Tribunal are enforceable in the United States under the Federal Arbitration Act through which the United States acceded to the New York Convention.

### *E. The Due Process Defense*

The New York Convention provides defenses which may be raised by the party against whom enforcement is being sought.<sup>95</sup> Article V(1)(b) of the New York Convention states

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92. *Iran v. Gould*, 887 F.2d 1357, 1359 (9th Cir. 1989).

93. *Id.* at 1363.

94. *Id.*

95. Article V of the New York Convention provides for two kinds of defenses: those raised by the party opposing enforcement, New York Convention, *supra* note 5, art. V(1), and those which may be raised by the court itself, New York Convention, *supra* note 5, art. V(2). There are five types of defenses in article V(1):

(a) The parties to the agreement . . . 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 . . . ; 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

that enforcement may be challenged if "[t]he 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."<sup>96</sup> This clause incorporates the basic due process defense into the Convention.<sup>97</sup> "The fundamental requirement of due process is the opportunity [for the party] to be heard 'at a meaningful time and in a meaningful manner.'"<sup>98</sup>

Article V(1)(b) provides that a defense to enforcement exists when "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings . . . ."<sup>99</sup> The requirement that notice be proper is satisfied when the notice of appoint-

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set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

New York Convention, *supra* note 5, art. V(1).

Article V(2) is also of two types: the "public policy" defense, which states that enforcement of the award would be against the public policy of the state, and the "subject matter" defense, where the subject matter of the defense is not capable of settlement by arbitration under the laws in the state. Whether the dispute is arbitrable is to be determined according to the laws of the enforcing state. VAN DEN BERG, *supra* note 2, at 369.

96. New York Convention, *supra* note 5, art. V(1)(b). Since the Second Circuit denied enforcement of the arbitration award because of the Tribunal's violation of Avco's due process rights under the New York Convention, this Comment will only analyze Article V(1)(b).

97. McLaughlin & Geneviro, *supra* note 1, at 266; *see also* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie Du Papier (RAKTA), 508 F.2d 969, 975 (2d Cir. 1974); Quigley, *supra* note 47, at 1067; VAN DEN BERG, *supra* note 2, at 297.

98. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Due process safeguards are implicit in the public policy defense. New York Convention art. V(2)(b). In addition:

if due process were only covered by Article V(1)(b), a court would not be allowed to refuse enforcement of the award on its own motion if it finds that an award is tainted by a serious violation of due process; it could refuse enforcement only if the respondent asserts it.

VAN DEN BERG, *supra* note 2, at 299. Article V(1) contains defenses that may only be raised by the party opposing enforcement. Consequently, the due process defense in Article V(1)(b) could only be brought up at the insistence of the respondent. The court has no grounds to raise a due process defense on its own under article V(1)(2). However, Article V(2)(b) addresses this situation. Article V(2) contains defenses that can be brought up at the court's insistence. Article V(2)(b), the public policy defense, has been held to imply a due process defense. Consequently, even should the respondent not bring due process up on his own, the court may do so. Therefore, a violation of due process may fall either under Article V(1)(b) or Article V(2)(b). VAN DEN BERG, *supra* note 2, at 300.

99. New York Convention, *supra* note 5, art. V(1)(b).



ment of the arbitrator and the arbitral proceedings is adequate. Frequently, however, when notice can be considered adequate is merely a question of fact.<sup>100</sup> Moreover, proper notice requires that the names of the arbitrators be provided to the parties of the action;<sup>101</sup> and that it be timely. "Proper" is also invoked in a situation where the respondent, being under a legal incapacity, was not properly represented in the arbitral proceedings.<sup>102</sup>

The additional defense of "or was otherwise unable to present his case"<sup>103</sup> refers to situations where, although notice has been timely given, the party may have been unable to present himself before the court for causes of force majeure,<sup>104</sup> or where the party may not have had sufficient opportunity to present his case before the arbitrator.<sup>105</sup>

The due process defense has rarely been successful.<sup>106</sup> "Despite the broad wording of Article V(1)(b), the courts appear to accept a violation of due process in very serious cases only, thereby applying the general rule of interpretation of Article V that the grounds for refusal of enforcement are to be construed narrowly."<sup>107</sup> If after being notified of the hearing, the defendant refuses to appear or remains inactive at the hearing, the defendant has forfeited his opportunity and cannot later raise the due process defense.<sup>108</sup> Two cases illustrate this point. In

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100. VAN DEN BERG, *supra* note 2, at 303.

101. VAN DEN BERG, *supra* note 2, at 305.

102. VAN DEN BERG, *supra* note 2, at 305; *see also* Quigley, *supra* note 47, at 1067.

103. New York Convention, *supra* note 5, art. V(1)(b).

104. VAN DEN BERG, *supra* note 2, at 306; *see also* Quigley, *supra* note 47, at 1067. Causes of force majeure are grounds which prevent the completion of an act because of causes outside the control of the parties that could not have been avoided by the exercise of due care. BLACK'S LAW DICTIONARY 645 (6th ed. 1990).

105. VAN DEN BERG, *supra* note 2, at 306; *see also* Quigley, *supra* note 47, at 1067.

106. VAN DEN BERG, *supra* note 2, at 297; *see* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie Du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974) (due process defense was denied where appellant's witness was not able to testify at the hearing); *see also* Geotech Lizenz AG v. Evergreen Sys., Inc., 697 F. Supp. 1248 (E.D.N.Y. 1988) (due process defense was denied where appellant did not attend arbitration despite having had notice as to its commencement); Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co., 415 F. Supp. 133 (D.N.J. 1976) (due process defense was denied where appellant contended that it was "unable to present its case" because its rights and liabilities had not matured and could not be calculated).

107. VAN DEN BERG, *supra* note 2, at 297.

108. VAN DEN BERG, *supra* note 2, at 306; *see also* Geotech Lizenz AG, 697 F.

*Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Company*,<sup>109</sup> the American respondent had received notice of the arbitration to take place in Switzerland, but did not appear at the arbitration. Medford contended that it did not appear before the arbitration because it was "unable to present its case" within the meaning of Article V(1)(b). Under one of the agreements that existed between the parties, Medford contended its "rights and liabilities did not mature, and could not be calculated."<sup>110</sup> until the agreement had expired. The district court, in narrowly construing the due process defense, held that:

The primary elements of due process are notice of the proceedings and the opportunity to be heard . . . Medford's due process rights under American Law were not infringed under the facts of this case. It [Medford] received notice of the proceedings; it offers no explanation of its failure to participate.<sup>111</sup>

Medford could have made its argument before the arbitration panel; however, because it elected not to appear after receiving due notice, it cannot invoke the due process defense.

In *Geotech Lizenz AG v. Evergreen Sys. Inc.*,<sup>112</sup> Geotech, a Swiss company, and Evergreen entered into a partnership agreement. The agreement provided for arbitration. As a result of a dispute, an arbitration proceeding was commenced by Geotech in Switzerland. Evergreen did not participate despite notice that arbitration would proceed without him. When the arbitrator found for Geotech, Evergreen sought to bar enforcement alleging that its rights of due process had been violated because they did not have the opportunity to present their case, and that enforcement should be denied according to Article V(1)(b) of the New York Convention. The court held there was no violation of due process because Evergreen received notice of the proceedings, yet refused to appear. "Evergreen's failure to participate was a decision that was reached only after the Company had full knowledge of the peril at which it

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Supp. at 1248.

109. 415 F. Supp. at 133.

110. *Id.* at 140.

111. *Id.*

112. 697 F. Supp. at 1248.

acted. Accordingly . . . recognition and enforcement of the award will not violate . . . Article V."<sup>113</sup>

Another case where the due process exception was construed narrowly was *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*,<sup>114</sup> heard before the Second Circuit. Parsons appealed a decision of the district court confirming a foreign arbitration award holding them liable to the Egyptian corporation RAKTA for breach of contract. In November 1962, Parsons entered into an agreement with RAKTA to construct, start up, and for one year, manage and supervise a paperboard mill in Alexandria, Egypt. The contract contained an arbitration clause to provide a means for settlement of differences arising in the course of performance. The contract also contained a force majeure clause<sup>115</sup> which excused delays due to causes beyond Parsons' ability to control.

In May 1967, with Arab-Israeli war imminent, amidst escalating public expressions of hostility against Americans, the majority of the American work staff left Egypt. The Egyptian government eventually broke off all ties with the United States, and ordered all Americans to leave Egypt. Parsons notified RAKTA that they considered their abandonment excused by the force majeure clause; RAKTA disagreed and sought damages for breach of contract. The claim was submitted to arbitration and a final award was rendered for RAKTA. Parsons presented five defenses to the district court to preclude enforcement.<sup>116</sup> One of the defenses was that Parsons was unable to present its case because the arbitrator had refused to delay the arbitral proceedings to accommodate the schedule of a Parsons's witness who could not attend at the time requested. The district court denied the defenses raised by Parsons. The Court of Appeals for the Second Circuit af-

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113. *Id.* at 1253.

114. 508 F.2d 969 (2d Cir. 1974).

115. For a definition of force majeure see *supra* note 104.

116. The five defenses presented were: (1) enforcement of the award would violate the public policy of the United States; (2) the award represents an arbitration of matters not appropriately decided by arbitration; (3) the Tribunal denied Overseas an adequate opportunity to present their case; (4) the award is predicated upon a resolution of issues outside the scope of contractual agreement to submit to arbitration; and (5) the award is in manifest disregard of the law. 508 F.2d at 972-73.

firmed the district court's ruling, stating that an "inability to produce one's witnesses before an arbitral tribunal is a risk inherent in an . . . agreement to submit to arbitration."<sup>117</sup> Consequently, "[Parsons'] due process rights under American law, rights entitled to full force under the Convention as a defense to enforcement, were in no way infringed by the tribunal's decision."<sup>118</sup>

In a case decided by the court of appeals of Hamburg, the German respondent alleged he did not have the opportunity to present his case because certain documents of the English claimant did not reach him until the night before the oral hearing in London and he had no time to read them. The court rejected this argument, holding that due process was not violated. The court further opined that the respondent had willfully not taken notice of the document by not reading it.<sup>119</sup>

These cases illustrate the narrow construction of the due process defense rendered by the courts. Such an interpretation is consistent with the overall purpose of the Convention which is to simplify the enforcement process. As the district court in *Biotronik* noted, "[i]t goes without saying that there should be great hesitation in upsetting an arbitration award."<sup>120</sup>

### III. FACTS OF *IRAN AIRCRAFT INDUSTRIES v. AVCO CORPORATION*

In 1976, Avco Corporation entered into a series of contracts whereby it agreed to repair and supply helicopter engines to Iran Aircraft Industries. After the revolution in 1978-79, disputes arose concerning Avco's performance under the contracts and Iranian Aircraft Industries' payments under the contracts. The parties met in Paris in 1980 where Iran Aircraft agreed that approximately eleven million dollars was due to Avco for work performed, but denied an additional claim by Avco for approximately one million dollars. Iran Aircraft In-

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117. *Id.* at 975.

118. *Id.* at 976.

119. VAN DEN BERG, *supra* note 2, at 307 (citing Judgment of July 27, 1978, Oberlandesgericht [OLG] of Hamburg, No. 18 (F.R.G.)). Although decisions rendered in a foreign country are not binding in United States courts, they can serve as persuasive authority.

120. *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133, 139 (D.N.J. 1976)

dustries refused to confirm the invoices representing the one million dollars.<sup>121</sup> Iran Aircraft did not pay either the agreed upon eleven million, or the disputed one million to Avco corporation. Consequently, on January 14, 1982, the dispute concerning the money owed was submitted to the Tribunal for binding arbitration. Iran Aircraft counterclaimed against Avco asserting that Avco owed them money for damage due to delay in the return of certain aircraft parts, and for breach of contract.<sup>122</sup>

On May 17, 1985, the Tribunal held a pre-hearing conference to consider, among other things, "whether voluminous and complicated data [the many invoices] should be presented through summaries, tabulations, charts, graphs or extracts in order to save time and costs."<sup>123</sup> Present at the pre-hearing conference was the chairman of the Tribunal, Judge Nils Mangard of Sweden, as well as Judge Charles Brower and representatives for Avco. Counsel for Avco stated that "[i]n the interest of keeping down some of the documentation for the Tribunal, we have not placed in evidence as of yet the actual supporting invoices. But we have those invoices and they are available . . . ."<sup>124</sup> The chairman of the Tribunal, Judge Mangard, stated "I don't think we will be very, very much enthusiastic getting kilos and kilos of invoices" and suggested that Avco "[g]et an account made."<sup>125</sup> In response to this suggestion, Avco's counsel retained Arthur Young & Co., an internationally recognized public accounting firm, to prepare the invoice summary.<sup>126</sup>

The Tribunal held its hearings on the merits of the case on September 16-17, 1986. Judge Mangard, by then, was replaced by Judge Virally of France. Only the American judge, Judge Brower, was on the panel at the prehearing conference. Judge Ansari, the Iranian arbitrator, questioned the absence of the invoices stating that this case "was one of the first, or one of the few cases that I have seen that the invoices have not been submitted."<sup>127</sup> Avco's counsel responded by recounting the

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121. *Avco Corp. v. Iran Aircraft Indus.*, 19 Iran-U.S. Cl. Trib. Rep. 200 (1988).

122. *Id.* at 216.

123. *Id.* at 235.

124. *Id.* at 235-36.

125. *Id.* at 236.

126. *Id.* at 236.

127. Transcript of Trial Hearing before the Tribunal at 107-08, *Avco Corp. v.*

events of the pre-hearing conference and reiterated Judge Mangard's statement to them. Judge Ansari was not satisfied by this reply and did not respond affirmatively.

On July 18, 1988, the Tribunal found that as per the Paris agreement, Iran Aircraft owed Avco eleven million dollars. However, the Tribunal disallowed Avco's claims for the disputed million dollars which were documented by the audited summaries of the invoices. The Tribunal stated that they "cannot grant Avco's claim solely on the basis of an affidavit and a list of invoices, even if the existence of the invoices was certified by an independent audit."<sup>128</sup> The Tribunal found for Iran Aircraft Industries on some of their counterclaims, and after offsetting the amount Iran Aircraft owed to Avco, and the amount Avco owed to Iran Aircraft, a net amount of \$1,383,263.21 was owed to Iran Aircraft Industries.<sup>129</sup> Judge Brower concurred in part,<sup>130</sup> and dissented in part,<sup>131</sup> on the grounds that since Avco did what it was told at the pre-hearing conference, by refusing to accept the sufficiency of the summaries the Tribunal was not permitting Avco to present its case.

The Iranian parties sought enforcement of their one million dollar award in the United States under the New York Convention. On December 10, 1991, the District Court for the District of Connecticut refused enforcement of the award and granted defendant Avco a motion for summary judgment.<sup>132</sup> On appeal, Iran argued that the Tribunal's award was directly enforceable in the United States under the Algerian Accords, and alternatively, that the award was enforceable under the New York Convention. The Court of Appeals for the Second Circuit disagreed, and affirmed the district court's decision that Avco's due process rights had been violated,<sup>133</sup> and that

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Iran Aircraft Indus., 19 Iran-U.S. Cl. Trib. Rep. 200 (1988) (No. 261).

128. *Avco Corp.*, 19 Iran-U.S. Cl. Trib. Rep. at 214.

129. *Id.* at 218.

130. Judge Brower concurred with the majority decision regarding the dismissal of an additional claim that was set forth by Avco on the basis of lack of jurisdiction. *Id.* at 239 (Brower, J., concurring and dissenting).

131. Judge Brower dissented on the finding for Iran Aircraft regarding the monetary claim asserted by Avco, believing that Avco was misled regarding the evidence it was required to submit regarding the invoices. *Id.* at 231 (Brower, J., concurring and dissenting).

132. *Iran Aircraft Indus. v. Avco Corp.*, No. 5:91 Civ. 286 (D. Conn. Dec. 10, 1991).

133. *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992).

in conformity with Article V(1)(b) of the New York Convention, the award was not enforceable.<sup>134</sup>

The Second Circuit reasoned that a violation of due process had occurred when the Tribunal held that the summary invoices submitted by Avco were not sufficient.<sup>135</sup> Avco had been following Judge Mangard's "suggestion."<sup>136</sup> Avco had been misled into thinking that the summaries were adequate and was therefore denied the opportunity to present its claim meaningfully.

In his dissenting opinion, Judge Cardamone asserted that the exchange during the prehearing conference was not a binding rule, and did not preclude the submission of the actual invoices.<sup>137</sup> Additionally, the dissent argued that Judge Ansari's questioning, and dissatisfaction with Avco's reply, had put Avco on notice of the possibility that the panel would choose not to rely on the invoice summaries alone.<sup>138</sup>

#### IV. ANALYSIS:

##### *A. A Due Process Violation is Incompatible with the Circumstances Surrounding Iran Aircraft Industries v. Avco Corporation*

Avco claims a violation of its due process rights, maintaining that the award rendered in favor of Iran Aircraft Industries by the United States-Iran Claims Tribunal should not be enforced. Avco steadfastly asserts that Judge Mangard's remarks at the pre-hearing conference constituted a binding ruling, and consequently they cannot be held liable for having failed to produce the actual invoices in question. As has already been stated, due process essentially guarantees the "opportunity to be heard 'at a meaningful time and in a meaningful manner.'"<sup>139</sup> However, being unable to present all of one's evidence is not the same as being denied the opportunity to be meaningfully heard and is not synonymous with being unable to present his case.

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134. New York Convention, *supra* note 5, art. V(1)(b).

135. *Iran Aircraft Indus.*, 980 F.2d at 146.

136. Judge Mangard's remarks are characterized as a "suggestion" by the Second Circuit itself in its opinion in *Iran Aircraft Indus.* . *Id.* at 144.

137. *Id.* at 148 (Cardamone, J., dissenting).

138. *Id.* at 147 (Cardamone, J., dissenting).

139. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

As seen above, in *Parsons & Whittemore*, the respondent was unable to assert a due process defense where its witness was unable to be produced.<sup>140</sup> The respondent's inability to present evidence was not held to constitute a violation of due process.<sup>141</sup> When a party may be expected to anticipate a problem but fails to do so it is no more a denial of due process than when a party receives notice of a proceeding but fails to attend. The former scenario existed in a case where the respondent alleged a due process violation when he did not have the opportunity to read documents sent to him by his opposing counsel.<sup>142</sup> The latter situation existed where the respondent had received notice of the arbitration proceeding yet failed to respond.<sup>143</sup> In neither instance is the party being denied the opportunity to present its case; it has simply not availed itself of the opportunity presented. That was the case in *Iran Aircraft Industries v. Avco Corporation*.<sup>144</sup> Avco asserted that because it was following Judge Mangard's recommendation in retaining Arthur Young & Co. and receiving a summary of the invoices,<sup>145</sup> when the Tribunal rejected the summaries, it was "unable to present its case." In the appellate brief submitted by Avco's counsel before the Second Circuit, Avco contended that Judge Mangard's remarks were not a suggestion but constituted a "decision,"<sup>146</sup> a "binding ruling,"<sup>147</sup> and that the Judge "directed"<sup>148</sup> Avco's counsel not to produce any invoices. The brief further asserted that "Avco, having offered to put the invoice documents into evidence, was *instructed by the Tribunal not to do that*,"<sup>149</sup> and furthermore, that "it was affirmatively told by the Tribunal that this evidence would be acceptable and, indeed, was the Tribunal's preferred form of evidence."<sup>150</sup> Therefore, claims Avco, its due process rights were violated through no fault or action of their own when those

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140. See *supra* notes 114-18 and accompanying text.

141. See *supra* note 117 and accompanying text.

142. See *supra* note 119 and accompanying text.

143. See *supra* notes 109-13 and accompanying text.

144. 980 F.2d 141 (2d Cir. 1992).

145. See *supra* text accompanying notes 124-26.

146. Brief for Appellee at 2, *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992) (No. 92-7217).

147. *Id.* at 20.

148. *Id.* at 15.

149. *Id.* at 18 (emphasis added).

150. *Id.* at 33.



very same summaries were rejected by the Tribunal.

These assertions are quite different than Avco's position years earlier at the Tribunal itself. "[T]he plain and common sense import of [Judge] Mangard's guarded words was not lost on Avco's trial counsel in the Tribunal in 1985. He well understood that Chairman Mangard had not 'instructed' or 'directed' him to retain an independent accountant to review Avco's accounts receivable ledger . . . ."<sup>151</sup> Two months after the conference, on July 22, 1985, Avco's counsel filed a supplemental Memorial with the Tribunal stating: "In response to the Tribunal's *suggestion* at the Prehearing Conference, Avco's counsel has retained Avco's independent auditor, Arthur Young & Co . . . ."<sup>152</sup> As a "suggestion" Judge Mangard's remarks do not carry the weight of an order. A suggestion is merely a recommendation, which may, or may not, be followed. The Court of Appeals for the Second Circuit recognized this as well, when they said in their opinion, "in response to the Tribunal's *suggestion* . . . counsel has retained Arthur Young & Co . . . ."<sup>153</sup> By all accounts, therefore, Mangard's statement does not appear to have been an order or a directive, but merely a suggestion.

Mangard himself, moreover, was hesitant in suggesting this course of action. He said, "[o]n the other hand, I don't know if . . . there are any objections to any specific invoices so far made by the Respondents. But anyhow *as a precaution* maybe you could . . . [g]et an account made . . . ."<sup>154</sup> Judge Mangard never summarily declared that summaries of the invoices would be sufficient, and did in fact characterize having an account made as only a *precaution*. This is hardly a "ruling" that could be expected to carry great weight. A "precaution" can also be defined as "in addition." That is, in addition to the invoices, bring a summary, in case we decide to only look at the summaries.

According to Bruno Ristau, counsel for Iran Aircraft Industries, Iran vigorously objected to Judge Mangard's sugges-

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151. Reply Brief for Appellants at 7, *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992) (No. 92-7217).

152. Brief for Appellee at 3 (emphasis added).

153. *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 144 (2d Cir. 1992) (emphasis added).

154. *Id.* at 143-44 (emphasis added).

tion.<sup>155</sup> Brice M. Clagett, counsel for Avco Corporation, acknowledged that the Iranian parties had objected to Mangard's suggestion, and that Avco knew of this opposition prior to the hearing.<sup>156</sup> Clagett explained that Avco did nothing in response to Iran Aircraft's expressed opposition probably because Avco was relying on Judge Mangard's "ruling." Avco asserts that, had the "ruling" changed, they should have been notified by the panel. However, since Judge Mangard's recommendation was clearly to have the accounts made more as a "precaution,"<sup>157</sup> and not a "ruling," there was no need for the Tribunal to supply notice.

Furthermore, the facts of the case are such that there was an amount of approximately one million dollars, *represented in actual invoices*, that would not be confirmed by Iran Aircraft Industries.<sup>158</sup> If there was opposition regarding the presentation of the actual invoices, it is logical to assume there would be opposition regarding something less than the original invoices. Certainly, Avco should have been wary.

Arguendo, even if Judge Mangard's statement was authoritative, Iran's objections should nevertheless have suggested to Avco that complications may ensue should it attempt to present its case based on summaries alone. There was always the risk that the Tribunal would pay heed to Iran Aircraft's objections. What the Second Circuit has done here is sanction indifference and inaction on the part of a party who was made aware of potential weaknesses in its case. Rather than hold the party responsible for its failure to take all precautions to ameliorate the potential request for invoices, the court has rewarded the party for its inaction.

The time frame of the arbitration is relevant, too.<sup>159</sup> Almost one and a half years elapsed between the pretrial hearing and the actual hearing. Within such a span of time it is not surprising for changes to occur that affect the pretrial "ruling." In fact, a major change did occur: a new judge was appointed.

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155. Telephone Interview with Bruno A. Ristau, Attorney, Ristau & Abbell (Oct. 12, 1993).

156. Telephone Interview with Brice M. Clagett, Attorney, Covington & Burling (Oct. 26, 1993).

157. See *supra* note 154 and accompanying text.

158. See *supra* note 121 and accompanying text.

159. The pretrial hearing took place on May 17, 1985. Brief for Appellee at 1. The actual hearing took place on Sept. 16-17, 1986. Reply Brief for Appellant at 5.

Judge Mangard left the panel. In his place, Judge Virally of France joined the panel. As such, the judge upon whose tentative recommendation Avco presented its evidence would not preside at the actual hearing. This should have made Avco all the more cautious; instead, Avco proceeded as if nothing had changed. Avco did not claim that it did not receive notice of the assignment of a new arbitrator. If that was the case, they could justifiably have argued denial of due process. Avco's lack of such a claim is persuasive authority that it was aware of the change in the Tribunal's arbitrators. They therefore should have anticipated the possible problems as a result of the reassembling of the panel.

Avco's inaction is especially questionable in light of the structure of the arbitration panel. The panel was a panel of three: one arbitrator chosen by Iran, one chosen by the United States, and one selected by the two other arbitrators. An attorney has noted that in a three panel proceeding, the Iranian judge is likely to side with the Iranian nationals, the United States arbitrator with the party from the United States, and the neutral third arbitrator would be the swing vote.<sup>160</sup> Judge Mangard was the swing vote. With the departure of the judge who suggested the format of the evidence, and in light of Iran's expressed opposition to the sufficiency of Arthur Young & Company's summaries, there was a good possibility that the new judge would also hold that the summaries alone were insufficient. That is in fact what happened. Judge Ansari and the new judge, Judge Virally, voted against the sufficiency of the summaries alone.<sup>161</sup> Without Judge Mangard, Avco could not have been sure that the new "neutral" judge would concur that summaries alone were sufficient; Avco therefore should have taken the precaution to be prepared to show all the invoices.

The hearing lasted two days.<sup>162</sup> At the hearing, the following exchange took place between counsel for Avco and Judge Ansari: Judge Ansari commented, "May I ask a ques-

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160. The attorney who has made this allegation has requested anonymity. A second attorney, however, who also requested anonymity, disagreed with his colleague's assessment, and felt that, for the most part, the arbitrators approach each case without bias.

161. See *supra* note 127 and accompanying text.

162. *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 143 (2d Cir. 1992).

tion? It is about the evidence. It was one of the first or one of the few cases that I have seen that the invoices have not been submitted."<sup>163</sup> Once Ansari questioned the absence of the invoices, Avco had effectively been put on notice that the panel was not receptive to the submission of summaries alone. No one on the panel declared during the hearing that the summaries were sufficient. It is arguably true that Avco would find it difficult to produce all the invoices overnight. But since there clearly were disparate viewpoints regarding sufficiency of the evidence, and that these documents were crucial to Avco's claims, Avco should have had the invoices available in case they were needed.

After the Tribunal's decision, Avco still had a further recourse. A party to an arbitration action may make a motion subsequent to the hearing for an additional reward.<sup>164</sup> Avco filed no motion for reconsideration, no petition addressed to the full tribunal, and no letter of complaint addressed to the president of the Tribunal.<sup>165</sup> Presumably, Avco did not do so because they believed that the rules of the Tribunal did not allow any post partial award petition or motion for reconsideration of new evidence.<sup>166</sup> However, Article 37 of the Tribunal Rules does permit such reconsideration.<sup>167</sup> Nevertheless, Avco made no attempt to supplement the summaries presented at the hearing with the actual invoices. Being "unable to present

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163. *Id.*

164. Reply Brief for Appellants at 12-13 nn.8, 9.

165. Reply Brief for Appellants at 12.

166. Brief for Appellee at 20 n.9.

167. Article 37 of the Tribunal Rules states the following:

(1) Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

(2) If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.

2 Iran-U.S. Cl. Trib. Rep. 405, 437 (1984).

Parties to a hearing may make a motion for an additional award. The Iranian parties made such a request in the present case, requesting the Tribunal "to correct the award and render a complimentary award". Reply Brief for the Appellants, at 13 n.9. The Chamber denied the motion, not for a lack of authority but on the merits, "on the ground that the award had 'specifically addressed the issue of payment for and delivery of the goods in question.'" *Id.* Consequently, there is future review of the same merits upon application. *Id.*

one's case" as a due process defense means being unable only after *all possible avenues* have been explored. That effort was not evidenced here; therefore, the claim that Avco was "unable to present their case," is without merit.

In alleging a violation of due process, the burden of proof is on the party opposing enforcement.<sup>168</sup> In a civil action, this proof must be by a "preponderance of the evidence," demonstrating that the existence of a contested fact is *more probable* than its nonexistence.<sup>169</sup> Avco has not been able to show that Judge Mangard's remarks were, more probably than not, meant as a binding rule. That this standard was met here by Avco is an incredible assertion; at best, the evidence presented by both sides is equal. In close cases, where neither side has clearly and convincingly proved its case, the party asserting the claim must fail for having declined to meet its burden.

It seems clear that Judge Mangard's remarks were not meant as a "ruling" but merely to serve as a "precaution." Additionally, it seems evident that Avco had considerable notice that summaries alone might not be sufficient at the hearing. Despite this, Avco decided to take the risk by not acting to take all necessary precautions. A violation of due process does not exist where there has been considerable advance notice but the party receiving notice does nothing.<sup>170</sup> The conclusion of the Second Circuit flouts the theory of due process, and is inconsistent with other decisions dealing with the same issue. In reality, if Avco was unable to present its case, it was due to an unprofessional lack of preparedness for all the developments likely to emerge in the course of arbitration.

### *B. Finding a Due Process Violation is Inconsistent with Previous Cases*

The Due Process exception has been narrowly construed.<sup>171</sup> In most cases where this defense has been raised, the defense has not been granted. Several cases illustrate the narrow application of the due process exception.

In *Parsons & Whittemore Overseas Co. v. Société Générale*

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168. New York Convention, *supra* note 5, art. V; see also text accompanying note 76.

169. EDWARD CLEARY ET AL., MCCORMICK ON EVIDENCE 957 (3d ed. 1984).

170. See *supra* notes 108-13 and accompanying text.

171. See *supra* part II.E; see also McLaughlin & Genevro, *supra* note 1, at 266.

*de l'Industrie du Papier (RAKTA)*,<sup>172</sup> Parsons, an American company, was held liable to the Egyptian company RAKTA in an arbitration proceeding. Parsons's inability to produce a witness did not result in a violation of due process. The Court of Appeals for the Second Circuit held that "inability to produce one's witnesses before an arbitral tribunal is a risk inherent in an agreement to submit to arbitration. By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights . . . in favor of arbitration 'with all of its well known advantages and drawbacks.'"<sup>173</sup> Consequently, the court held there was no violation of due process.<sup>174</sup>

In that decision, the Second Circuit incisively notes there are inherent risks and disadvantages to arbitration. In *Parsons & Whittemore*, the American party took those risks and failed. In *Avco*, the American party similarly took risks and failed as well. In both cases, the American parties were not fully prepared. Avco's risk was whether the Tribunal would accept or reject the summaries of the invoices. There is an important distinction, however, between the risk undertaken by Parsons and the risk assumed by Avco. The risk in *Parsons & Whittemore* involved the appearance of a witness. Circumstances beyond anyone's control may make it impossible for a witness to attend a hearing. On the other hand, the risk assumed by Avco was entirely of its own making, and under its control. Avco had notice of the fact that presenting the summaries alone may be opposed.<sup>175</sup> Avco could have nullified this risk, but chose not to. However, oddly enough, the Second Circuit allowed Avco's defense to stand. Based on the Second Circuit's decision in *Parsons and Whittemore*, narrowly constricting the due process defense, one would have expected that Avco's due process defense would similarly fail.

*Geotech Lizens AG v. Evergreen Sys., Inc.*<sup>176</sup> involved the nonappearance of one party at the arbitration hearing, despite having received notice. The nonappearing party sought to deny

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172. 508 F.2d 969 (2d Cir. 1974); see also *supra* notes 114-18 and accompanying text.

173. 508 F.2d at 975.

174. *Id.*

175. See *supra* notes 144-70 and accompanying text.

176. 697 F. Supp 1248 (E.D.N.Y. 1988); see also *supra* notes 112-13 and accompanying text.

enforcement, alleging a violation of due process. The District Court for the Eastern District of New York denied the allegation of a violation of due process, stating, "Evergreen's failure to participate was a decision that was reached only after the Company had full knowledge of the peril at which it acted. Accordingly, the Court holds that recognition and enforcement of the award will not violate the notice provisions of section (1)(b) of Article V."<sup>177</sup>

Although the aspect of due process violation alleged in *Geotech Lizens AG* concerned the "notice" element of due process, not the "unable to present one's case" aspect, the reasoning behind the court's decision applies to all due process defenses in Article (V)(1)(b). The court's reasoning was that since Evergreen knew of the peril it assumed as a result of its (non)action, Evergreen cannot allege a due process defense. Comparison to the *Avco* case is clear. *Avco* also voluntarily assumed the risk and should also have recognized the peril of not presenting the actual invoices. But the Second Circuit refused to follow this logic and is therefore inconsistent with the *Geotech Lizens AG* decision.

Finally, in 1978, the court of appeals of Hamburg<sup>178</sup> denied the respondent the defense of violation of due process, despite the fact that the respondent had first received documents from his opponent the night before the trial and did not have the opportunity to read them. The court held that the "counterpart of due process is an active participation in the arbitral proceedings; by not unpacking the documents, the respondent had willfully not taken notice of them."<sup>179</sup> Although decisions of foreign courts do not have binding authority in United States courts, they can serve as persuasive authority. As the American court did in *Parsons & Whittemore*,<sup>180</sup> the German court held that each party to a dispute will be held accountable to prepare as fully as possible. *Avco*, in its dispute with Iran Aircraft Industries, had a full

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177. 697 F. Supp. at 1253.

178. VAN DEN BERG, *supra* note 2, at 307 (citing Judgment of July 27, 1978, OLG of Hamburg, No. 18 (F.R.G.)); see also *supra* note 119 and accompanying text.

179. VAN DEN BERG, *supra* note 2, at 307 (citing Judgment of July 27, 1978, OLG of Hamburg, No. 18 (F.R.G.)).

180. *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RATKA)*, 508 F.2d 969 (2d Cir. 1974).

year and a half between the time of the prehearing conference and the hearing to duly prepare and assemble all the evidence. It did not do so. In short, Avco was voluntarily unprepared for all circumstances. Once again, there is a inconsistency in the reasoning between the two decisions. In the German case, where it can be strongly argued that the respondent was not permitted sufficient time to prepare, and was therefore unable to present his case, the court nevertheless held there was no violation of due process. In the Avco case, where there was ample time to prepare, the Second Circuit held there was a violation of due process.

The three cases cited show that arbitration awards will be enforced and that the due process defense is narrowly construed and not easily granted. The decision rendered by the Second Circuit in *Iran Aircraft Indus. v. Avco Corp.*<sup>181</sup> is inconsistent with other decisions dealing with the Article V(1)(b) defense.

*C. A Due Process Violation Does Not Exist Where the Result of the Case Would have been the Same Absent Any Violation*

There is another consideration here: Should a violation of due process result in the denial of enforcement of award where the result of the arbitration would have been the same even if no violation had existed? This question was addressed by the Court of Appeals in Hamburg in a case where the arbitrator had not forwarded a claimant's letter to a respondent, who consequently was unable to respond to it.<sup>182</sup> The Court held that the question to be asked was whether, had the violation not occurred, the result of the arbitration would have been different. "This would mean that if it were beyond doubt that the arbitral decision would have been the same, a serious violation might not lead to a refusal of enforcement of the award."<sup>183</sup> Apparently, if it is clear that the arbitral decision would *not* have been different had there *not* been a violation of due process, it would make no sense to refuse enforcement.<sup>184</sup>

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181. 980 F.2d 141 (2d Cir. 1992).

182. VAN DEN BERG, *supra* note 2, at 301 (citing Judgment of Apr. 3, 1975, OLG of Hamburg, No. 11 (F.R.G.)).

183. VAN DEN BERG, *supra* note 2, at 301-02 (quoting Judgment of Apr. 3, 1975, OLG of Hamburg, No. 11 (F.R.G.)).

184. VAN DEN BERG, *supra* note 2, at 302.



A lack of due process, under certain circumstances, does not necessarily preclude enforcement of the award. "A legal justification for this point of view can be found in the opening line of paragraph 1 of Article V: 'Recognition and enforcement of the award *may* be refused.'"<sup>185</sup> As noted above, although decisions of foreign courts are not binding on United States courts, they can, and often do, serve as persuasive authority.

In *Iran Aircraft Indus. v. Avco Corp.*<sup>186</sup> it is unclear if the award would have been different even had the invoices been present. At the hearing, the panel stated in its opinion:

The Tribunal notes that the independent accountant retained by the Claimant was instructed only to verify whether there existed an invoice corresponding to each entry of AVCO's accounts receivable ledgers submitted by the Claimant and whether the amounts reflected in the ledgers agreed with the amounts reflected on the corresponding underlying copies of invoices. Such a procedure, indeed, provides the Tribunal with adequate evidence of the existence of the invoices listed in AVCO's accounts receivable ledgers.<sup>187</sup>

The panel added:

AVCO relies primarily on affidavits of its officers and an independent accountant, and has not produced any purchase orders, bills of lading, written demand for payment or other documentary evidence . . . [T]he Tribunal cannot grant AVCO's claim solely on the basis of an affidavit and a list of invoices, even if the existence of the invoices was certified by an independent audit.<sup>188</sup>

Judge Ansari in his separate opinion stated further:

even assuming that the auditor was impartial and independent, his report cannot constitute evidence of the veracity of

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185. VAN DEN BERG, *supra* note 2, at 302. The use of the word "may" implies that the court can exercise discretion in deciding whether to enforce the arbitration award or not. Just because one of the defenses has sufficiently been made out, does not automatically imply that the court has to deny enforcement. They "may" or "may not" deny enforcement. This analysis supports the argument that although a violation of due process may have occurred, the arbitration award does not have to be vacated.

186. 980 F.2d 141 (2d Cir. 1992).

187. *Avco Corp. v. Iran Aircraft Indus.*, 19 Iran-U.S. Cl. Trib. Rep. 200, 208 (1988).

188. *Id.* at 214.

the purport and substance of the invoices in dispute, because the mere conformity of the invoices at issue in the claim with the Claimant's ledgers provides nothing more than the very claim brought by the Claimant.<sup>189</sup>

These statements show that the existence of the invoices was not in question. The arbitrators believed that the invoices did exist. However, their mere existence does not authenticate their claims. Something additional is required to verify the amounts in the invoices—actual documentary evidence, such as purchase orders or bills of lading—that would confirm the truthfulness of what the invoices recorded. The Iranian parties did not dispute that they owed Avco some money for services rendered, but they did not assent to the *amounts* alleged in the invoices.<sup>190</sup> Arthur Young & Co., the independent auditor, did not clarify this because all it did was verify that what was in Avco's Accounts Receivable ledger was what appeared on the invoices. The auditor did not attest to the appropriateness of the invoices' numbers.<sup>191</sup> It appears, then, that even the presence of the actual invoices would not have been sufficient in the absence of some corroborating evidence confirming the accuracy of the amounts being claimed. It was not the actual invoices the Tribunal needed, but rather some proof that what was in the invoices was accurate.<sup>192</sup> Avco alleged violation of due process because they were misled about the necessity of presenting the invoices. Accordingly, even had Avco been able to present the invoices before the panel, the results of the hearing may well have been the same. Therefore, even if Avco's due process rights were violated, if it were beyond question that the decision rendered by the panel would not have been different had the invoices been present, then the serious violation of due process would have had no effect and the decision could still have been enforced.<sup>193</sup>

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189. *Id.* at 244 (Introduction of separate opinion of Judge Ansari).

190. Brief for Appellant at 9-10, 35-36.

191. *See supra* notes 187-89 and accompanying text.

192. *See supra* notes 187-89 and accompanying text.

193. VAN DEN BERG, *supra* note 2, at 301-02.

*C. Reasons for the Second Circuit Decision*

One may only speculate as to why the court decided the way it did. In light of the fact that Judge Mangard's remarks were meant as a precaution and not a "ruling," and because of the apparent inconsistency between the *Iran Aircraft Indus. v. Avco Corp.*<sup>194</sup> decision and other decisions in cases dealing with the Article V(1)(b) defense, this Comment asserts that there may be a higher level of scrutiny applied by the Second Circuit court to decisions rendered by the United States-Iran Claims Tribunal. There may be an unvoiced and unconscious bias stemming from anti-Iranian feelings in general, and against decisions rendered by the Tribunal in particular. First, Iran is widely perceived as hostile towards the United States and, by extension, United States interests. Indeed the United States has no diplomatic relations with Iran. This perception may unconsciously bias judicial review of decisions that favor Iranian parties over the interests of United States parties.

Second, the Tribunal itself was created as a direct consequence of the resolution of the Iranian hostage crisis,<sup>195</sup> an incident which caused Americans to harbor great resentment towards Iran. This resentment was exacerbated by the establishment of the United States-Iran Claims Tribunal because it meant that nationals of the United States had no choice but to present their cases in that forum.<sup>196</sup> A party wanting his case heard in the United States could not do so. The party was not free to choose. Americans do not take kindly to curtailment of their freedoms.<sup>197</sup> This abridgement of freedom of choice, taken together with general resentment of a perceived foe with whom we have no diplomatic relations in the emotionally charged atmosphere of hostages, may be what lead the Second Circuit to apply stricter scrutiny of the due process defense when reviewing decisions of the Tribunal that favored Iranian parties over the interests of United States parties. Although such reasoning is mere speculation since the Ninth Circuit has enforced a decision rendered by the Tribunal in favor of Iran,<sup>198</sup> nevertheless, such reasoning is possible. Judges in

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194. 980 F.2d 141 (2d Cir. 1992).

195. See *supra* notes 18-33 and accompanying text.

196. 980 F.2d at 143.

197. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

198. *Iran v. Gould*, 887 F.2d 1357 (9th Cir. 1989).

different circuits may be swayed by different considerations.

It is striking that arbitration awards rendered by panels established independently by the parties concerned are routinely "rubberstamped,"<sup>199</sup> while an award arbitrated by a body established by two nation-states is not readily enforced.<sup>200</sup> One would expect, in light of the strong bias in favor of enforcement of foreign arbitral awards,<sup>201</sup> that the "seal of approval" given to the arbitration panel by the two nations in dispute would result in the enforcement of its decisions.

It is also possible that the Second Circuit may have been influenced by an event which compromised the prestige of the United States-Iran Claims Tribunal. In its brief to the court, Avco related an incident which occurred prior to Judge Mangard's resignation from the Tribunal.<sup>202</sup> In September 1984, at a meeting of the full Tribunal, all proceedings were suspended after two Iranian arbitrators physically attacked Judge Mangard and tried to strangle him with his tie.<sup>203</sup> One of the arbitrator-assailants subsequently declared, "[i]f Mangard ever dares to enter the tribunal chamber again, either his corpse or my corpse will leave it rolling down the stairs."<sup>204</sup> Not surprisingly, in January of 1985, Mangard did resign from the Tribunal.<sup>205</sup> One may infer that Judge Mangard's resignation from the Tribunal by the time of the Avco hearing is related to the 1984 events. Avco asserts that the change in the composition of the Tribunal contributed to

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199. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983); *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975); *International Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, Industrial Y Commercial*, 745 F. Supp. 172 (S.D.N.Y. 1990); *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800 (D. Del. 1990). It should be noted that the Second Circuit has in the past enforced decisions rendered by other foreign arbitration panels, therefore it is intriguing that it did not do so in this case.

200. There are few other cases, with Iran or an Iranian national as a party, involving enforcement of a foreign arbitration award. The cases that exist concerning decisions of the United States-Iran Claims Tribunal do not focus on the enforcement issue. *See Chas. T. Main Int'l v. Khuzestan Water & Power Auth.*, 651 F.2d 800 (1st Cir. 1981); *Sperry Corp. v. United States*, 12 Cl. Ct. 736 (1987).

201. *See supra* note 120 and accompanying text.

202. Brief for Appellee at 39 n.24.

203. *Id.*; *see also Around the World; Iranian Judge Threatens A Swede at The Hague*, N.Y. TIMES, Sept. 7, 1984, at A5.

204. Brief for Appellee at 39 n.24.

205. *Id.*

the fact that Judge Mangard's "ruling" was not honored in the Tribunal's award.<sup>206</sup> By recounting this story, it appears Avco is attempting to tarnish the validity of the Tribunal as an arbitration body. Indeed, that was how Iran's counsel saw it.<sup>207</sup> There is no way to ascertain if these events actually compromised the Tribunal in the eyes of the court. As a result of Avco's recounting of this incident and Judge Mangard's subsequent resignation, the legitimacy of the Tribunal may have been impugned, thus explaining the court's decision.

The application of a higher level of scrutiny is unfair, of course, when applied only to one country. It is important to remember that the Iranian parties suffer from the same lack of choice: they, too, may only submit disputes with the United States to the Tribunal. When seeking enforcement of an award in the United States, the Iranian party is at the mercy of United States courts. It is the assertion of this Comment that in cases involving enforcement of foreign arbitration awards, there should be one standard of review, irrespective of the panel that established the award. Awards rendered by the United States-Iran Claims Tribunal should not be subject to a more stringent review because the parties to the dispute had no choice but to submit their dispute to that Tribunal, because of the history of that panel, or for any other reason. Neither should they be afforded deferential review because the Tribunal is a result of an agreement between two independent nation-states. If the level of scrutiny is to be a strict one, it must be applied across the board.

#### IV. CONCLUSION

The New York Convention was an international effort to make the arbitration process simpler and more efficient. The Supreme Court said:

The goal of the Convention and the principle purpose underlying American adoption and implementation of it was to encourage the recognition and enforcement of commercial

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206. *Id.*

207. Reply Brief for Appellants at 18-19. Counsel for Iran Aircraft Industries states: "It is totally unseemly for a party to defame, in a document filed in a United States court of law, members of a respected International Tribunal . . . . We respectfully request the Court order that pages 39 and 40 of Avco's brief be stricken as scandalous, . . . ." *Id.*

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.<sup>208</sup>

In this respect it has been successful. Arbitration awards are recognized in most countries, as is the enforcement of awards. The decision rendered by the Second Circuit in *Iran Aircraft Indus. v. Avco Corp.*<sup>209</sup> does not uphold the purpose of the agreement. Although the New York Convention provides some exceptions to enforcement of awards,<sup>210</sup> these exceptions have been consistently construed narrowly. The Avco decision was inconsistent with the prevailing application of the due process exception. By allowing Avco to successfully use the due process defense in this case, the Second Circuit has permitted Avco latitude not granted other respondents who advanced a similar defense. The inevitable result will be increased litigation in American courts, with diminished predictability. It has generally been held that "there should be great hesitation in upsetting an arbitration award."<sup>211</sup> This decision does little to "unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced . . . ."<sup>212</sup> and weakens the purpose of the New York Convention.

*Cindy Silverstein*

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

209. 980 F.2d 141 (2d Cir. 1992).

210. New York Convention, *supra* note 5, art. V.

211. *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133, 139 (D.N.J. 1976).

212. *Scherk*, 417 U.S. at 520 n.15.

