

**UNCITRAL MODEL LAW**

Articles 1, 34, 35, and 36

[excerpted in Documentary Supplement at pp. 93, 102-04]

**FEDERAL ARBITRATION ACT**

9 U.S.C. §§9, 10, 202, and 304

[excerpted in Documentary Supplement at pp. 115-16, 118, 120]

**SWISS LAW ON PRIVATE INTERNATIONAL LAW**

Articles 176, 190, and 194

[excerpted in Documentary Supplement at pp. 123, 126, 127]

**BRIER v. NORTHSTAR MARINE INC.**

1992 WL 350292 (D.N.J. 1992)

[excerpted above at pp. 144-46]

**BERGESEN v. JOSEPH MULLER CORP.**

710 F.2d 929 (2d Cir. 1983)

[excerpted above at pp. 141-44]

**YUSUF AHMED ALGHANIM & SONS, WLL v. TOYS "R" US, INC.**

126 F.3d 15 (2d Cir. 1997)

MINER, Circuit Judge. Appeal from a judgment entered in the U.S. District Court for the Southern District of New York denying respondents' cross-motion to vacate or modify an arbitration award and granting the petition to confirm the award. The [district] court found that while the petition for confirmation was brought under the [New York] Convention, respondents' cross-motion to vacate or modify the award was properly brought under the [FAA], and thus those claims were governed by the [FAA's] implied grounds for vacatur. Nonetheless, the court granted the petition to confirm the award, finding that respondents' allegations of error in the arbitral award were without merit. . . . [W]e affirm.

In November of 1982, respondent-appellant Toys "R" Us, Inc. ( . . . "Toys 'R' Us") and petitioner-appellee Yusuf Ahmed Alghanim & Sons, WLL ("Alghanim"), a privately owned Kuwaiti business, entered into a License and Technical Assistance Agreement (the "agreement") and a Supply Agreement. Through the agreement, Toys "R" Us granted Alghanim a limited right to open Toys "R" Us stores and use its trademarks in Kuwait and 13 other countries located in and around the Middle East

(the "territory"). Toys "R" Us further agreed to supply Alghanim with its technology, expertise and assistance in the toy business. [Disputes arose between Toys "R" Us and Alghanim, leading the former to terminate the agreement and contract with a new Kuwaiti distributor.] . . . Toys "R" Us invoked the dispute-resolution mechanism in the agreement, initiating an arbitration before the [AAA]. Toys "R" Us sought a declaration that the agreement was terminated on December 31, 1993. Alghanim responded by counterclaiming for breach of contract. . . . On July 11, 1996, the arbitrator awarded Alghanim \$46.44 million for lost profits under the agreement. . . .

Alghanim petitioned the district court to confirm the award under the [New York] Convention. Toys "R" Us cross-moved to vacate or modify the award under the FAA, arguing that the award was clearly irrational, in manifest disregard of the law, and in manifest disregard of the terms of the agreement. The district court concluded that "[t]he Convention and the FAA afford overlapping coverage, and the fact that a petition to confirm is brought under the Convention does not foreclose a cross-motion to vacate under the FAA, and the Court will consider [Toys "R" Us's] cross-motion under the standards of the FAA." . . . [T]he district court confirmed the award. . . . This appeal followed. . . .

Toys "R" Us argues that the district court correctly determined that the provisions of the FAA apply to its cross-motion to vacate or modify the arbitral award. In particular, Toys "R" Us contends that the FAA and the Convention have overlapping coverage. Thus, Toys "R" Us argues, even though the petition to confirm the arbitral award was brought under the Convention, the FAA's implied grounds for vacatur should apply to Toys "R" Us's cross-motion to vacate or modify because the cross-motion was brought under the FAA. We agree that the FAA governs Toys "R" Us's cross-motion.

Neither party seriously disputes the applicability of the Convention to this case and it is clear to us that the Convention does apply. The Convention provides that it will apply "to the recognition and enforcement of 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, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." Convention Art. I(1) (emphasis added). The Convention does not define nondomestic awards. See *Bergesen, supra*. In *Bergesen*, we held "that awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction." The Seventh Circuit similarly has interpreted §202 to mean that "any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention." *Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir.).

The Convention's applicability in this case is clear. The dispute giving rise to this appeal involved two nondomestic parties and one [U.S.] corporation, and principally involved conduct and contract performance in the Middle East. Thus, we consider the arbitral award leading to this action a non-domestic award and thus within the scope of the Convention.

Toys "R" Us argues that the district court properly found that it had the authority under the Convention to apply the FAA's implied grounds for setting aside the award. We agree. Under the Convention [sic], the district court's role in reviewing a

foreign arbitral award is strictly limited: "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. §207. Enforcement may also be refused if "[t]he subject matter of the difference is not capable of settlement by arbitration," or if "recognition or enforcement of the award would be contrary to the public policy" of the country in which enforcement or recognition is sought. [Article V's] seven grounds are the only grounds explicitly provided under the Convention.

In determining the availability of the FAA's implied grounds for setting aside, the text of the Convention leaves us with two questions: (1) whether, in addition to the Convention's express grounds for refusal, other grounds can be read into the Convention by implication, much as American courts have read implied grounds for relief into the FAA, and (2) whether, under Article V(1)(e), the courts of the United States are authorized to apply United States procedural arbitral law, *i.e.*, the FAA, to nondomestic awards rendered in the United States. We answer the first question in the negative and the second in the affirmative.

We have held that the FAA and the Convention have "overlapping coverage" to the extent that they do not conflict. *Bergesen*; see 9 U.S.C. §208 (FAA may apply to actions brought under the Convention "to the extent that [the FAA] is not in conflict with [9 U.S.C. §§201-208] or the Convention as ratified by the United States"); *Lander Co. v. MMP Inv., Inc.*, 107 F.3d 476, 481 (7th Cir. 1997). However, by that same token, to the extent that the Convention prescribes the exclusive grounds for relief from an award under the Convention, that application of the FAA's implied grounds would be in conflict, and is thus precluded. See, *e.g.*, *M & C Corp. v. Erwin Behr GmbH & Co.*, KG, 87 F.3d 844, 851 (6th Cir. 1996). . . .

There is now considerable case law holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award. . . . This conclusion is consistent with the Convention's pro-enforcement bias. See, *e.g.*, *Scherk, supra*. We join these courts in declining to read into the Convention the FAA's implied defenses to confirmation of an arbitral award.

Although Article V provides the exclusive grounds for refusing confirmation under the Convention, one of those exclusive grounds is where "[t]he award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Convention Art. V(1)(e). Those courts holding that implied defenses were inapplicable under the Convention did so in the context of petitions to confirm awards rendered abroad. These courts were not presented with the question whether Article V(1)(e) authorizes an action to set aside an arbitral award under the domestic law of the state in which, or under which, the award was rendered. We, however, are faced head-on with that question in the case before us, because the arbitral award in this case was rendered in the United States, and both confirmation and vacatur were then sought in the United States. We read Article V(1)(e) . . . to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award. The district court in *Spector v. Torenberg*, 852 F. Supp. 201 (S.D.N.Y. 1994), reached the same conclusion . . . , reasoning that, because the Convention allows the district court to refuse to enforce an award that has been vacated by a competent authority in the country where the award was rendered, the court may apply FAA standards to a motion to vacate a nondomestic award rendered in the United States.

Our conclusion also is consistent with the reasoning of courts that have refused to apply non-Convention grounds for relief where awards were rendered outside the United States. For example, the Sixth Circuit in *M & C* concluded that it should not apply the FAA's implied grounds for vacatur, because the United States did not provide the law of the arbitration for the purposes of Article V(1)(e) of the Convention. 87 F.3d at 849. Similarly, in *Int'l Standard Electric Corp. v. Bidas Sociedad Anónima Petrolera Industrial Y Comercial* 754 F. Supp. 172 (S.D.N.Y. 1990), the district court decided that only the state under whose procedural law the arbitration was conducted has jurisdiction under Article V(1)(e) to vacate the award, whereas on a petition for confirmation made in any other state, only the defenses to confirmation listed in Article V of the Convention are available. This interpretation of Article V(1)(e) also finds support in the scholarly work of commentators on the Convention and in the judicial decisions of our sister signatories to the Convention. There appears to be no dispute among these authorities that an action to set aside an international arbitral award, as contemplated by Article V(1)(e), is controlled by the domestic law of the rendering state. . . .

There is no indication in the Convention of any intention to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law. The Convention succeeded and replaced the Geneva Convention. The primary defect of the Geneva Convention was that it required an award first to be recognized in the rendering state before it could be enforced abroad, the so-called requirement of "double *exequatur*." The Convention eliminated this problem by eradicating the requirement that a court in the rendering state recognize an award before it could be taken and enforced abroad. In so doing, the Convention intentionally "liberalized procedures for enforcing foreign arbitral awards."

Nonetheless, under the Convention, the power and authority of the local courts of the rendering state remain of paramount importance. "What the Convention did not do . . . was provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration." [Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 Tex. Int'l L.J. 1, 11 (1995).] Another commentator explained: "Significantly, [Article V(1)(e)] fails to specify the grounds upon which the rendering State may set aside or suspend the award. While it would have provided greater reliability to the enforcement of awards under the Convention had the available grounds been defined in some way, such action would have constituted meddling with national procedure for handling domestic awards, a subject beyond the competence of the Conference." 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, 1070 (1961). From the plain language and history of the Convention, it is thus apparent that a party may seek to vacate or set aside an award in the state in which, or under the law of which, the award is rendered. Moreover, the language and history of the Convention make it clear that such a motion is to be governed by domestic law of the rendering state, despite the fact that the award is nondomestic within the meaning of the Convention as we have interpreted it in *Bergesen*.

In sum, we conclude that the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance

with its domestic arbitral law and its full panoply of express and implied grounds for relief. See Convention Art. V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention. . . .

### NOTES

1. *Jurisdictional requirements for awards under Article I of New York Convention.* Consider Articles I and V of the New York Convention. Broadly speaking, what categories of awards does the Convention apply to? Any awards? Any awards made in another nation? In another Contracting State? Any other awards? In general terms, what is the difference between a "foreign" and a "non-domestic" award? Compare Article I of the New York Convention with Article I of the European Convention. How are the two instruments different in their jurisdictional requirements for arbitral awards? What is the purpose of limiting the scope of the New York and the European Conventions to certain categories of awards? Compare the treatment of "arbitration agreements" under the New York Convention. See *supra* pp. 139-40, 147-48.
2. *No express jurisdictional requirements for awards under Inter-American Convention.* The Inter-American Convention does not contain any express jurisdictional requirements for those awards that are subject to its provisions. (In particular, and in contrast to the New York Convention, nothing limits the Inter-American Convention to "foreign" and "non-domestic" awards.) Does that mean that the Inter-American Convention applies to *all* awards in the courts of signatory states? Would this be sensible? Consider the title and preamble to the Inter-American Convention. Do they limit the Convention to "international" arbitral awards? See *supra* p. 148. How should "international" awards be defined?
3. *Article I of the New York Convention: "foreign" awards.* Consider the first jurisdictional basis, under Article I, for concluding that an award is subject to the New York Convention. Under Article I, the Convention will apply to awards "made in the territory of a State other than the State where the recognition and enforcement of such award[] [is] sought" — that is, the Convention will be applicable to recognition proceedings in a Contracting State's courts if the proceedings involve an award which is "foreign" in that State.  
When will an award be "foreign" under Article I of the Convention? Note that an award is "foreign" in a particular Contracting State when the award is "made" in a different state. Note also that an award which is "foreign" in one state need not be "foreign" in other states: That is, an award "made" in State A will be "foreign" in State B (and State C) but *not* in State A. Why does the Convention apply primarily to "foreign" awards, made outside the territory of a Contracting State, and not to awards made within that Contracting State? What are the consequences of applying the Convention to a particular award? See *infra* pp. 1032-45, 1125-36.
4. *When is an award "foreign" under the New York Convention?* When will an award be "foreign" for purposes of Article I of the New York Convention? What is the source of the legal rules that apply to determine if an award is "foreign"?

- (a) *Authorities holding that all awards "made" outside the judicial enforcement forum are "foreign."* Many authorities have interpreted Article I as categorically applying the Convention to *all* awards rendered outside the Contracting State where recognition is sought. In the words of one commentator, the "Convention always applies to the recognition and enforcement of an arbitral award made in another state . . . , whilst it may, in addition, apply to the recognition and enforcement of an arbitral award made in the State where the recognition and enforcement are sought if such an award is considered non-domestic." van den Berg, *When is an Arbitral Award Non-Domestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 39 (1985). See also Outhwaite v. Hiscox (1991) W.L.R. 297 (House of Lords) ("in the negotiations leading to the Convention there emerged divergent views between the delegates about the appropriate criterion for determining to what awards the Convention should apply and that the school of thought which favoured the simple, if arbitrary, geographical test of where the award was made ultimately won the day, but subject to a compromise addition which included also awards not considered as 'domestic' in the enforcing state"); G. Petrochilos, *Procedural Law in International Arbitration* 347 (2004) ("all awards made outside the territory of the enforcement forum are Convention awards"). Is this conclusion not what the plain language of Article I(1) requires?
- (b) *Determining where an award is "made."* Where is an award "made" for purposes of Article I? Does Article I provide that an award is "made" where the arbitral hearings are held? Where the award is signed?  
Recall the discussion in Chapter 7 above of the arbitral seat, *supra* pp. 535-61, 577-95. As discussed above, virtually all contemporary authorities hold that an award is "made" at the seat of the arbitration, either as specified in the arbitration agreement or subsequently by the arbitral tribunal or institution. See *supra* p. 559. Thus, the English Arbitration Act, 1996, provides that "where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, dispatched, or delivered to any of the parties." English Arbitration Act, 1996, §53. Articles 1(2) and 31 of the UNCITRAL Model Law achieve the same result, providing that an award shall be deemed to have been made at the "place of arbitration" agreed by parties (or selected by the arbitrators or appointing authority). Other developed jurisdictions adopt the same approach. G. Born, *International Commercial Arbitration* 2370 (2009).  
Recall that it is very common for hearings to be held, for the convenience of the arbitrators and parties, at a place other than the seat of the arbitration selected in the arbitration agreement. See *supra* p. 560. As also discussed above, virtually all authorities hold that an award continues to be "made" in the arbitral seat, despite the fact that hearings or deliberations are held outside the arbitral seat. See *supra* pp. 559-60. Nonetheless, there have been a few idiosyncratic decisions holding that an award is "made" where it was signed or where hearings were conducted for convenience. *Hiscox v. Outhwaite* [1991] 2 W.L.R. 1321 (House of Lords) (award "made" where it was signed, rather than in arbitral seat; decision since overruled by English Arbitration Act); Judgment of 28 February 2005, XXX Y.B. Comm. Arb. 139 (Svea Ct. App.) (2005) (award "made" where hearings were conducted for convenience, rather than in arbitral seat). See Mann, *Where Is an Award*

"Made"? 1 Arb. Int'l 107 (1985) ("an award is 'made' at the place at which the arbitration is held, i.e., the arbitral seat. It is by no means necessarily identical with the place or places where hearings are being held or where the parties or the arbitrators reside. It is rather the place fixed in the contract or the submission or the minutes of the hearing or is found to be the contract or point of the arbitral proceedings."). What is the consequence, under the Convention, of concluding that an award is "made" in a particular jurisdiction? What effect does this have on the places where the award will be "foreign"? On the place where an action to annul the award may be brought?

- (c) Does Article I prescribe a uniform international standard defining where an award is "made"? Does the New York Convention prescribe a uniform international standard for determining where an arbitral award is "made"? For example, would the Convention permit a Contracting State to treat any award made by a tribunal that included one of its nationals as made within that Contracting State? Any award that applies the state's substantive law as made within that state? Does the Convention prescribe a uniform rule, providing that awards are "made" in the parties' agreed arbitral seat? What purposes would be served by such a rule?
- (d) Authorities concluding that some awards made outside the judicial enforcement forum are not "foreign." Are there circumstances in which an award made outside the territory of a Contracting State will not be "foreign" within that State? For example, are there circumstances in which an award made in State A will not be "foreign" in State B (or State C)?

Consider the analysis in *Northstar*. *Northstar* involved enforcement of an arbitration agreement (rather than an award). Under the *Northstar* rationale, however, would an award made in England between two U.S. parties necessarily be subject to the Convention in U.S. courts? Relying on §202 of the FAA, *Northstar* suggested that some awards made outside the United States will not be "foreign" awards: In particular, §202 provides that, in cases involving U.S. citizens, a "reasonable relation" with a foreign state is required for an award to be subject to the Convention. Other U.S. courts have reached similar conclusions, holding or suggesting that awards in domestic U.S. disputes, between U.S. nationals and under U.S. law, will not be "foreign," even if they are made abroad. See, e.g., *Jones v. Sea Tow Servs. Freeport N.Y., Inc.*, 30 F.3d 360 (2d Cir. 1994); *Ensco Offshore Co. v. Titan Marine LLC*, 370 F. Supp. 2d 594, 598-601 (S.D. Tex. 2005); *Reinholtz v. Retriever Marine Towing & Salvage*, 1993 WL 414719 (S.D. Fla. 1993), *aff'd*, 46 F.3d 71 (11th Cir. 1995).

Similarly, in *Nat'l Thermal Power Corp. v. The Singer Co.*, 7 Mealey's Int'l Arb. Rep. C-1 (June 1992), the India Supreme Court held that an award made in England was a domestic Indian award, not a "foreign" award subject to the Convention, because it was rendered pursuant to an arbitration agreement governed by Indian law: "An award is 'foreign' not merely because it is made in the territory of a foreign State, but because it is made in such a territory on an arbitration agreement not governed by the law of India." See *infra* pp. 1036-39, 1041.

Are the *Northstar* and *National Thermal* holdings consistent with the Convention? Does Article I(1) permit nations to say that some awards made abroad are not "foreign"? If so, what potential threats does this pose to the Convention? What, for example, would prevent a Contracting State from

treating awards in all disputes governed by its substantive law as "domestic" and not "foreign"? What consequences would this have for the Convention?

Consider *Northstar* again. What exactly is the court's rationale? What types of agreements and awards does the court's holding encompass? Suppose the parties had both been sophisticated companies. Would the result have been any different? Is the *Northstar* reasoning persuasive? Suppose a U.S. company's Indian subsidiary enters into a contract with an Indian company, with an arbitration clause providing for arbitration in Switzerland. Should the resulting award be deemed "foreign" in India? Does *Northstar* jeopardize this?

Why was the U.S. court reluctant in *Northstar* to treat an award in a dispute between two U.S. residents (with no foreign connections), which involved purely U.S. conduct, as "foreign"? Was the court in fact concerned that the Convention might be used to circumvent important U.S. public policies (and, in particular, that a party with overweening economic leverage might force a weaker counter-party to accept this)? If this is the concern, what does the Convention permit the court to do in a recognition action? Consider Articles V(2)(a) and (b) of the Convention. How might these provisions address the U.S. court's apparent concerns?

5. Article I of New York Convention: An award made in a Contracting State can be subject to the Convention in that State if it is "non-domestic." As noted above, the Convention does not necessarily apply only to awards that are "foreign" in a Contracting State. In addition, Article I provides that the Convention will apply to "non-domestic" awards in certain circumstances.

Some commentators have said that "the question what constitutes a non-domestic award within the meaning of the New York Convention is one of the most complicated issues posed by this Treaty." van den Berg, *When Is an Arbitral Award Non-Domestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 26 (1985). As Bergesen suggests, the language of Article I(1) was a compromise. During drafting of the Convention, various civil law states initially opposed a territorial criteria that defined awards based on where they were made. In contrast, common law and Eastern European states at first favored variations of the territorial requirement of Article I(1)'s first clause. The final version of the Convention sought to bridge these two views.

Preliminary drafts of the Convention adopted the "territorial" perspective and provided that it would apply to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State in which such awards are relied upon." U.N. Doc. E/2704 and Corr. 1, reprinted in 1 International Commercial Arbitration: New York Convention at III.A.1.7 (G. Gaja ed., 1985). French, German, and other civil law delegates criticized this proposal, on the grounds that:

If it was agreed that the place where the award was made should not be considered a determining factor . . . whether an award was to be regarded as national [i.e., domestic] or foreign could be made dependent on the nationality of parties, the subject of the dispute, or the rules of procedure applied. The last seemed to constitute the most appropriate defining factor. The nature, and hence the nationality, of an arbitral award would then be derived from the rules of procedure under which it had been made. Moreover, it should be noted that those rules depended to a large extent, at least in German law, on the will of the parties and, failing that, on the arbitral body itself. . . .

U.N. Doc. E/CONF.26/SR.4, reprinted in 1 International Commercial Arbitration: New York Convention at III.C.16-17 (G. Gaja ed. 1985). The German delegate subsequently commented that if two German parties conduct an arbitration in London, subject to German law as the curial law, then, under German law, the award would not be foreign, but domestic. *Id.* at III.C.28. Other delegates agreed, and a number of civil law states proposed the following amendment: "This Convention shall apply to the recognition and enforcement of arbitral awards other than those considered as domestic in the country in which they are relied upon." *Id.* at III.B.1.2. In response to these criticisms, a Working Group was established to draft a compromise acceptable to all parties. The "compromise" was essentially the same as Article I(1) as finally adopted:

"This Convention shall apply to the recognition and enforcement of 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 disputes or differences between physical and legal persons. It shall also apply to arbitral awards not considered as domestic awards in the State where the recognition and enforcement are sought." *Id.* at III.B.4.2.

This was scarcely a compromise: "In fact, the compromise reached at the New York Conference was in favour of the territorialists." van den Berg, *When Is an Arbitral Award Non-Domestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 39 (1985). That is because the non-territorial criteria for defining the Convention's application, contained in the second sentence of Article I(1), was an extension of the Convention: In addition to the non-territorial criteria added in the second sentence of Article I(1), the Convention was applicable, through the first sentence of Article I(1), which was retained, to all awards made in foreign countries. "[T]he New York Convention always applies to the recognition and enforcement of an arbitral award made in another State . . . , whilst it may, in addition, apply to the recognition and enforcement of an arbitral award made in the State where the recognition and enforcement are sought if such an award is considered non-domestic." *Id.*

6. *Rationale of Bergesen*. Relying on Article I(1)'s second sentence, *Bergesen* and *Toys-R-Us* hold that awards made in the United States were "non-domestic" under Article I(1) and, therefore, subject to the Convention and its implementing legislation. Other U.S. courts have also held that awards made in the United States may be "non-domestic." See, e.g., *Karaha Bodas Co. v. Perusahaan Pertambangan* etc., 364 F.3d 274, 287-88 (5th Cir. 2004); *Jacada (Europe), Ltd v. Int'l Mktg Strategies, Inc.*, 401 F.3d 701, 705-10 (6th Cir. 2005). Are *Bergesen* and its progeny correctly decided? Note that virtually no other Contracting State has defined any category of awards as "non-domestic." G. Born, *International Commercial Arbitration* 2367-69 (2009).

- (a) *No definition of "non-domestic" award in Convention*. The *Bergesen* court first reasoned that the Convention simply "did not define non-domestic awards," thereby leaving it to Contracting States to adopt their own definitions. Is that correct? Is there anything in the Convention or its purposes that would forbid the United States from regarding awards made in New York under U.S. arbitration law as non-domestic, and thus subjecting those awards to the Convention in U.S. courts? What if the United States were to regard every

award as non-domestic? Would this undermine the Convention or adversely affect other Contracting States?

Is not the real threat to the Convention the opposite: narrow national court definitions of "foreign" and "non-domestic" awards that place inappropriately restrictive limits on the Convention's scope? See the *Northstar Power*, holding awards made outside India "domestic" in certain circumstances, *infra* pp. 1036-39, 1041.

- (b) *How should "non-domestic" awards be defined?* Assuming that the Convention permits the definition of non-domestic awards adopted in *Bergesen*, is that a wise decision? Should not U.S. and other courts be mindful of the legislative history and purpose of the Convention in defining "non-domestic" awards? The Convention's legislative history strongly suggests, as outlined above, that "non-domestic" awards were intended to be those that, while made within a state's territory, were made pursuant to the arbitration law of another country; an example, discussed above, would be two Germans arbitrating in Germany with English law as the procedural law of the arbitration. See *supra* pp. 1021-22. Should U.S. law define "non-domestic" awards as awards made outside the United States, but with the FAA being chosen as the procedural law of the arbitration?
- (c) *Definition of "non-domestic" in §202 of the FAA*. After concluding that the Convention left each Contracting State free to define "non-domestic," *Bergesen* turned to §202 of the FAA for the U.S. definition of the term. Section 202 provides that, if a U.S. arbitration involves only U.S. citizens, the Convention may be applicable, but only if the parties' "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. §202 (1982). Note that the second sentence of §202 provides that the Convention will *not* apply to certain agreements and awards. See *supra* pp. 149-50 for an explanation of Congress's purposes in enacting §202, indicating that the section was intended to exclude certain primarily domestic disputes from the Convention's scope.

Section 202's "reasonable relationship" standard was derived from §1-105 of the U.S. Uniform Commercial Code. See Foreign Arbitral Awards, S. Rep. No. 91-702, 91st Cong., 2d Sess. 6 (1970) (Appendix; Statement of Richard D. Kearney) ("The reasonable relationship criterion is taken from the general provisions of the Uniform Commercial Code [§1-105(1)]."). As noted above, §1-105 (in its original version) provided that the law chosen by a contractual choice-of-law clause must be reasonably related to the parties' transaction. See *supra* pp. 149-50, 932-33. This "reasonable relationship" standard appears to be that which was adopted by the court in *Bergesen*.

Consider the *Bergesen* court's reliance on §202 to define a "non-domestic" award under Article I(1). Did Congress in fact "spell out its definition" of a non-domestic award in §202, as *Bergesen* concluded? Is §202 nonetheless relevant to fashioning a definition of "non-domestic" awards under U.S. law? Are the Convention's goals furthered by adopting *Bergesen's* reading of §202?

- (d) *Standards for determining when awards "made" in the United States will be "non-domestic" after Bergesen.* Under *Bergesen's* analysis, how would §202's "reasonable relationship" standard be applied to define what awards are "non-domestic"? What if an arbitration involved one or more foreign nationals (rather than only U.S. nationals); would an award made in the United States always be "non-domestic"? What if an arbitration involved a dispute where some of the contractual performance occurred abroad? Where foreign substantive law governed the dispute? Won't a "reasonable relationship" requirement result in treating a substantial number of awards made in the United States as "non-domestic"?
7. *Consequences under New York Convention of classifying award as "foreign" or "non-domestic."* What are the consequences of treating an award as "foreign" or "non-domestic" under the Convention?
- (a) *"Foreign" and "non-domestic" awards are presumptively entitled to recognition under Article III and can be denied recognition only on grounds specified in Article V.* As *Toys "R" Us* explains, if an award is "foreign" or "non-domestic" in a particular Contracting State, it will be subject to Article III, requiring that the State presumptively recognize and enforce the award. In addition, a "foreign" or "non-domestic" award will ordinarily be subject to non-recognition and non-enforcement only if one of the exceptions set forth in Article V of the Convention is applicable. *See supra* pp. 31-36 and *infra* pp. 1125-36, 1136-1205. In contrast, as *Toys "R" Us* holds, an award that is not "foreign" can generally be annulled on any grounds available under local law. *See supra* pp. 559, 576-77 and *infra* pp. 1093-94.
- (b) *"Foreign" award cannot be annulled outside of arbitral seat.* If an award is "foreign" in a Contracting State, then that State may not entertain an application to annul the award under local law. Rather, the award may only be annulled where the award was made, in the arbitral seat. *See infra* pp. 1032-45. Recall the discussion of this structural aspect of the Convention in *Karaha Bodas*. *See supra* pp. 546-49.
- (c) *Possibility of annulling "non-domestic" award in arbitral seat under local law.* Does the Convention permit a "non-domestic" award to be annulled in the arbitral seat (which treats the award as "non-domestic")? Or, if an award is characterized as "non-domestic" in a particular Contracting State, is it then subject only to recognition or non-recognition under Article V of the Convention, and not to annulment? If annulment of a "non-domestic" award in the arbitral seat is permitted, what grounds may be relied upon to annul the award — any grounds permitted under local law or only grounds permitted for non-recognition under Article V of the Convention?
- Toys "R" Us* addressed these issues and concluded that the Convention (and §207 of the FAA) permits actions under the first chapter of the FAA to annul a "non-domestic" award, made in the United States, applying the FAA's vacatur standards. What is the rationale supporting this conclusion? Note that characterizing an award as "non-domestic" does not affect the place where the award was "made"; in *Bergesen*, the award was still "made" in New York, even though the award is "non-domestic." If an award is made in a particular Contracting State, does Article V(1)(e) of the Convention permit actions to annul the award in that state — including actions to annul on grounds not specified in Article V of the Convention? *See infra* pp. 1039-43,

1093-94; *Hebei Import & Export Corp. v. Polytek Engineering Co.*, 14 Mealey's Int'l Arb. Rep. 3 (Feb. 1999) (Hong Kong Ct. App. 1999) (New York Convention "distinguishes between proceedings to set aside an award in the court of supervisory jurisdiction . . . and proceedings in the court of enforcement. Proceedings to set aside are governed by the law under which the award was made up or the law of the place where it was made, while proceedings in the court of enforcement are governed by the law of that forum"). What in the Convention would prohibit an annulment action in a Contracting State if an award is "made" in that state? What effect does designating an award of "non-domestic" have? If a state were free to annul "non-domestic" awards under local law, would the designation of such awards as "non-domestic" have any meaning at all?

In *Toys "R" Us*, the court held that a "non-domestic" award, made in the United States, could be annulled on all of the grounds permitted under the FAA for domestic awards, including manifest disregard. Other U.S. courts have apparently adopted this analysis, holding that §10 grounds are available for annulling a non-domestic award made in the United States. *See Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007); *Lucent Tech., Inc. v. Tatum Co.*, 379 F.3d 24 (2d Cir. 2004); *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003); *Jacada (Europe), Ltd v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 709-10 (6th Cir. 2005). In contrast, other authorities have concluded, usually without significant discussion, that only Article V grounds are available in actions in the arbitral seat to annul "non-domestic" awards. *See Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998) (only grounds enumerated in Article V may be basis for vacating award subject to Convention, including "non-domestic" awards made in United States); *Fiat SpA v. Ministry of Finance and Planning*, 1989 U.S. Dist. LEXIS 11995 (S.D.N.Y. 1989) ("Since the Convention, as supplemented by the [FAA], applies to arbitration awards rendered in the United States involving foreign interests, Article V(1)(c) shall apply . . . here").

Which approach *should* national courts take to the debate described above (and addressed in *Toys "R" Us*)? If an award is treated by a Contracting State as "non-domestic," should the award then be subject to annulment under local law in that state? If the award can be annulled, what is the meaning of its categorization as "non-domestic"? Should the characterization of an award as "non-domestic" mean that the award should be treated under the Convention as if it were a "foreign" award? Wouldn't that mean not subjecting the award to annulment in local courts, and only permitting actions to recognize and enforce the award? If a U.S. court does not have authority to annul a "non-domestic" award made in the United States, what Contracting State would have such authority? Any state? Would it be acceptable for there to be awards not subject to annulment anywhere? *See infra* pp. 1094-95.

- (d) *Possible limits on grounds for annulment of "non-domestic" award in arbitral seat under local law.* Even if an award that is "non-domestic" in a Contracting State can be subject to an annulment action in that state, should domestic grounds for annulling awards be available in such an annulment action (without regard to Article V of the Convention)? If an award can be annulled pursuant to local law, what is the point of characterizing the award as "non-domestic"? Would it make sense for the characterization of an award as "non-domestic" to have no meaning? Was *Toys "R" Us* correctly decided?

*Brier v. Northstar Marine, Inc.*

*Bergesen v. Joseph Muller Corp.*

*Yusuf Ahmed Alghanim & Sons, WLL v. Toys "R" Us, Inc.*

**Notes**

3. Reciprocity Requirements Under International Conventions and National Arbitration Legislation

New York Convention, Articles I(3) and XIV

Inter-American Convention

*Fertilizer Corp. of India v. IDI Management, Inc.*

*National Iranian Oil Co. v. Ashland Oil, Inc.*

**Notes**

Limits on Forums for Annulling International Arbitral Awards

*PT Garuda Indonesia v. Birgen Air*

*Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*

*Union of India v. McDonnell Douglas Corporation*

*International Standard Electric Corporation v.*

*Bridas Sociedad Anonima Petrolera, Industrial y Comercial*

*National Thermal Power Corporation v. The Singer Company*