Stern v. Barnett, supra; Blue Mountain Construction Co. v. Werner, 279 F.2d 305 (9th Cir. 1959), cert. denied, 361 U.S. 931, 80 S.Ct. 371, 4 L.Ed.2d 354 (1960). And unless dismissal will cause some plain legal prejudice to the creditors, it normally will be proper. See 9 C. Wright & A. Miller, Federal Practice and Procedure § 2364 at 165 (1971).

[4] We see no indication in this case that the Referee abused his discretion in granting the dismissal. The Referee observed that the matters raised by the petition were extremely complex, possibly raising issues that would merit a jury trial and therefore be beyond his competence to adjudicate. In this connection, there was pending at the time of the dismissal an action brought by these appellants in state court. Furthermore, the motel, the principal asset of the partnership, had been forfeited out in favor of the secured creditors after the debtor had been unable to obtain a suitable offer to purchase the property. As a result, the Referee noted that these assets might be insufficient to assure payment of administrative expenses incurred by reason of the arrangement proceedings.

The appellants have pointed to nothing which in our view amounts to plain legal prejudice. The dismissal occurred early in the proceedings, less than two months after the filing of the petition and before the appointment of a trustee or a creditors' committee. The appellants are free to pursue their remedies in state court, and because Section 391 of the Bankruptcy Act, 11 U.S.C. § 791, suspends the running of all periods of limitations prescribed by the Bankruptcy Act during the pendency of proceedings under Chapter XI, the dismissal did not prejudice the appellants' right to commence involuntary bankruptcy proceedings.

Nor was it improper for the Referee to refuse to hear testimony at the dismissal hearing pertaining to the individual assets of the partners, which may have been reachable through the arrangement. The proceedings to that point presented a fairly substantial record upon which the Referee could make a decision. The creditors and the Receiver had submitted written responses to the motion to dismiss, and apparently the Referee felt that the testimony would be superfluous. *Cf.* Chase v. Ware, 41 F.R.D. 521 (N.D.Okl.1967). We cannot say that he erred in arriving at this conclusion.

In the absence of significant legal prejudice to the appellants, the granting of the debtor's motion to dismiss the Chapter XI proceedings was not improper. Accordingly, the judgment of the district court is affirmed.

Affirmed.

U.S.A. no. 3

FOTOCHROME, INC.,
Debtor-Appellant,

v.

COPAL COMPANY, LIMITED,
Claimant-Appellee.

No. 568, Docket 74-2082.

United States Court of Appeals,
Second Circuit.

Argued Jan. 30, 1975.

Decided May 29, 1975.

Creditor appealed from an order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, J., 377 F.Supp. 26, which reversed an order of the Bankruptcy Court which refused to recognize the finality of an arbitral award in Japan. The Court of Appeals, Gurfein, Circuit Judge, held that where a foreign creditor filed a claim in chapter XI proceedings based on a foreign arbitral award rendered in Japan in an arbitration commenced before the filing of the petition but completed

Note, 16 Virginia J. Int'l L. 216-224 (No. 2 1975)

afterwards, and the foreign creditor was not within the personal jurisdiction of the Bankruptcy Court for purposes of a stay, that Court did not have power to reconsider the merits of the underlying dispute; and that the creditor was required to secure judgment confirming the award, thus giving the debtor in possession the opportunity to contest the award on grounds set out in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and if successful, the creditor could then file the judgment as proof of a claim.

Affirmed.

1. Arbitration ⇐82.5

Public policy in favor of international arbitration is strong.

2. Arbitration ⇐82.5

Public policy limitation on United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards is to be construed narrowly to be applied only where enforcement would violate forum state's most basic notions of morality and justice. Convention of the Recognition and Enforcement of Foreign Arbitral Awards, art. V, subd. 2(b), 9 U.S.C.A. § 201 note.

3. Courts ⇐274.1

Bankruptcy court did not have personal jurisdiction over Japanese corporation which was neither present nor doing business in the United States for purpose of staying arbitration proceedings.

4. Bankruptcy ⇐391(3½)

Bankruptcy court's stay of arbitration proceedings cannot be effective without personal jurisdiction over creditor who has begun arbitration action in foreign tribunal that is not within jurisdiction of United States. Bankr.Act, § 2, sub. a(15), 11 U.S.C.A. § 11(a)(15).

5. Bankruptcy ⇐314(2)

Until arbitral award is merged in judgment, it is not provable debt under Bankruptcy Act. Bankr.Act, § 63, sub. a(5), 11 U.S.C.A. § 103(a)(5).

6. Bankruptcy ⇐365

Where foreign creditor filed claim in chapter XI proceeding based on foreign arbitral award rendered in Japan in arbitration commenced before filing of petition but completed afterwards, and foreign creditor was not within personal jurisdiction of bankruptcy court for purposes of a stay, that court did not have power to reconsider merits of underlying disputes. Bankr.Act, § 301 et seq., 11 U.S.C.A. § 701 et seq.; Convention of the Recognition and Enforcement of Foreign Arbitral Awards, arts. 3, 5, 9 U.S.C.A. § 201 note.

7. Bankruptcy ⇐319

Judgment obtained after petition in bankruptcy is filed and before discharge may in some circumstances be proved as claim against bankrupt's estate even though receiver, trustee or debtor in possession did not participate in suit resulting in judgment. Bankr.Act, § 63, sub. a(5), 11 U.S.C.A. § 103(a)(5).

8. Treaties ⇐6

Where both parties to bilateral treaty later became signatories to multinational convention covering same subject matter, convention was intended to control.

9. Bankruptcy ⇐359

In order to file claim in chapter XI proceeding based on foreign arbitral award rendered in Japan in arbitration commenced before filing of petition but completed afterwards, foreign creditor was required to secure judgment confirming arbitration award, giving debtor in possession the opportunity to contest the award on grounds set out in United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, and, if successful, creditor could then file judgment as proof of claim. Bankr.Act, § 301 et seq., 11 U.S.C.A. § 701 et seq.; Convention of the Recognition and Enforcement to Foreign Arbitral Awards, art. 3, 9 U.S.C.A. § 201 note.

Raymond F. Gregory, New York City, for debtor-appellant.

Dugald Campbell Brown, New York City (Whitman & Ransom, William M. Kahn and Gillard S. Glover, New York City, of counsel), for claimant-appellee.

Before OAKES and GURFEIN, Circuit Judges, and TENNEY, District Judge.*

GURFEIN, Circuit Judge:

The parties to this appeal present some interesting questions concerning the impact of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention")[1] upon the provisions of the Bankruptcy Act. We find that there is no conflict between the Convention and the Act on the facts of this case. We accordingly affirm the order of Judge Weinstein, 377 F.Supp. 26 (E.D.N.Y. 1974), which held that a Bankruptcy Court does not have the power in a Chapter XI arrangement to relitigate the merits of a contract dispute which has been resolved by binding arbitration in a foreign forum, commenced before the filing of the Chapter XI petition and concluded thereafter by an arbitral award in the foreign country.

Fotochrome, Inc. ("Fotochrome"), a Delaware corporation with offices in the Eastern District of New York, and Copal Company, Ltd. ("Copal"), a Japanese corporation, neither present nor doing business in the United States, entered into a contract in 1966 under which Copal would manufacture cameras in Japan according to specifications provided by Fotochrome, and Fotochrome would purchase the cameras for distribution in the United States. A dispute arose in which each party charged the other with failure to abide by the terms of the contract. Copal claimed damages of $631,501 for Fotochrome's breach of conditions in the contract and its failure to pay for delivered cameras; Fotochrome claimed damages of $823,582 for Copal's failure to meet the delivery schedule and for its manufacture of defective cameras.

The parties had agreed in their contract that final settlement of any disputes arising out of the contract would be reached by arbitration in Tokyo, Japan. In 1967, Copal filed a petition for arbitration with the Japan Commercial Arbitration Association ("JCAA"). Fotochrome filed a formal answer on July 31, 1967. The first of seventeen arbitral sessions was held by the JCAA on December 21, 1967. Fotochrome participated with Japanese counsel in all sessions except the last. Copal presented its evidence in sixteen sessions over the course of twenty-five months.

At the fourteenth session on October 1, 1969, Fotochrome's counsel asked to be allowed to examine two witnesses on his client's behalf. The tribunal scheduled examinations on October 31 and November 5, but the witnesses were not produced. Sessions were rescheduled for December 1 and, later, for January 27, but on each occasion, Fotochrome failed to produce its witnesses. On January 27, 1970 the arbitrators informed Fotochrome's counsel that if the witnesses did not appear at the next session, the arbitration might be terminated. The session was scheduled for March 31.

On March 26, 1970 Fotochrome filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. § 701 et seq., in the Eastern District of New York. Referee Sherman Warner issued an order on March 27 continuing Fotochrome as debtor in possession and enjoining "all creditors of the debtor . . . from commencing or continuing any actions, suits, *arbitrations*, or the enforcement of any claim in any Court against this debtor. . . ." (Emphasis supplied.) The restraining order, in terms, applied only to creditors, not to the debtor in possession. In any event, Fotochrome did not seek the court's permission to continue to participate in the JCAA arbitration, although it knew it was scheduled to present its case in Tokyo four days later.

* Of the Southern District of New York, sitting by designation.

1. 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38 (Dec. 29, 1970); implemented by 9 U.S.C. § 201 et seq.

On March 31, at the JCAA arbitral session, counsel for Fotochrome notified the tribunal that the petition had been filed in the United States District Court and that the stay had issued. He did not present the two witnesses as scheduled. On April 8, Fotochrome's counsel informed the JCAA that he had been discharged by his client. On April 9, the JCAA panel convened to consider the effect of Fotochrome's withdrawal and the stay order of the United States District Court. Copal urged the tribunal to proceed. On July 2, the tribunal decided that the bankruptcy court's stay was not effective with respect to it, and ordered the sessions terminated.

On September 18, the arbitral panel issued an award in favor of Copal in the amount of $624,457.80, plus interest from January 1, 1967. The tribunal resolved both Copal's claim and Fotochrome's counterclaim, which it dismissed, considering evidence supplied by both parties; it was unable, of course, to consider evidence that might have been supplied by the two witnesses Fotochrome had intended to present.

On October 21, Copal filed the arbitral award with the Tokyo District Court. As of that time, under Article 800 of the Japan Code of Civil Procedure, the award became in effect a final and conclusive judgment settling the rights and obligations of the parties in Japan.

On October 22, Copal filed a proof of claim in Fotochrome's bankruptcy proceedings in the amount of the arbitral award. Apparently in the belief that the Referee's stay would operate to bar proceedings to enforce the Japanese award in this country, Copal did not seek confirmation of the Japanese judgment either in the New York courts under the Act for the Recognition of Foreign Money Judgments, CPLR §§ 5301-09, or in a federal court under the Arbitration Act, 9 U.S.C. § 9, or the Convention, 9 U.S.C. § 207.

Fotochrome, as debtor in possession, challenged the claim presented to the Bankruptcy Court, and requested a hearing on the *merits* of Copal's underlying claim. Referee Parente, after a preliminary hearing, held that the Japanese award could not be treated as a final judgment in the bankruptcy proceeding and that the bankruptcy court should reconsider the merits of the underlying dispute. The Referee reasoned that under Section 2a(15) of the Bankruptcy Act, 11 U.S.C. § 11a(15), the restraining order of March 27 "effectively imposed [the Bankruptcy Court's] paramount authority over the estate of the debtor in possession ousting the jurisdiction of the Japan CAA." He ruled that the Japanese arbitral award, obtained after the filing of the petition for an arrangement without authority of the Bankruptcy Court, was not binding on the debtor in possession and could be reopened for consideration on the merits in the Chapter XI proceeding.

Judge Weinstein reversed the Referee's order, holding that the restraining order of the Bankruptcy Court had no extraterritorial effect as such, Japan not being within the territorial limits subject to the jurisdiction of the Bankruptcy Court, Section 2a of the Bankruptcy Act, 11 U.S.C. § 11(a), and because Copal did not have the requisite minimum contacts with the United States to render it subject to the *in personam* jurisdiction of the Bankruptcy Court; that the award was a final judgment under Japanese law; and that the provisions of the bilateral treaty on Friendship, Commerce and Navigation between the United States and Japan (the "Japanese Treaty")[2] and the Convention entitled Copal to seek confirmation of its award as a judgment in the United States.[3]

The New York and federal statutes and the Convention provide for two stages: recognition of the award and its enforcement. CPLR § 5303; 9 U.S.C.

2. 4 U.S.T. 2063, T.I.A.S. 2863 (April 2, 1953).

3. As Judge Weinstein noted, though the United States acceded to the Convention after the contract in suit was signed and shortly after the award was made, the Convention contains no prospective language and should be applied retroactively to existing arbitration agreements and awards. 377 F.Supp. at 30, citing Quigley, Convention on Foreign Arbitration Awards, 58 A.B.A.J. 821, 822 (1972).

§§ 9, 13; Convention, Art. III. The award itself is inchoate until enforced by judgment. Under the Federal Arbitration Act, 9 U.S.C. §§ 9 to 11, the enforcement of an arbitration award is subject to certain limited defenses. That is true, as well, under the New York CPLR §§ 5304, 5305, and the Convention, Art. V. The United Nations Convention further provides that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award is contrary to the public policy of the country. Art. V, 2(b).

We note at the outset that there is no reference to bankruptcy in the Convention. Nor is there any reference to whether the "public policy" of the forum state to require equal treatment of creditors in the case of bankruptcy is the kind of "public policy" that allows non-recognition of foreign arbitral awards. "The legislative history of the provision offers no certain guidelines to its construction." See Parsons & Whittemore Overseas Co., Inc. v. Societe General de L'Industrie Du Papier (Rakta), 508 F.2d 969, 973 (2 Cir. 1974).

[1, 2] The public policy in favor of international arbitration is strong. Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2 Cir. 1973), cert. denied, 416 U.S. 936, 94 S.Ct. 2389, 40 L.Ed.2d 763 (1974). And we have recently indicated that the "public policy" limitation on the Convention is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice. Parsons & Whittemore, *supra*, 508 F.2d at 974.

As we shall see, this appeal can be decided without the necessity of determining whether the Bankruptcy Act involves a "public policy" which is contrary to enforcement of arbitral awards under the Convention.

The questions that arise on this appeal are: (1) Is a foreign arbitral award rendered after the filing of a Chapter XI petition in the United States Bankruptcy Court nevertheless a valid determination on the merits? (2) If it is, what is the domestic "competent authority" to consider the limited defenses against its enforcement, the District Court or the Bankruptcy Court?

[3] We note at the outset that Judge Weinstein's holding, with regard to the Bankruptcy Court's lack of personal jurisdiction over Copal is clearly correct and we affirm it without further elaboration. The Bankruptcy Court did not enjoy personal jurisdiction over Copal until October 22, 1970 when Copal's claim was filed, for Copal did not have the "minimum contacts" with the United States required under Hanson v. Denckla, 357 U.S. 235, 251, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). Therefore, its stay did not operate against Copal. See Restatement 2d, Foreign Relations Law of the United States § 7 (1965). Nor did the stay operate against Fotochrome, for it was directed only to creditors. Fotochrome was free, certainly with the permission of the Bankruptcy Court, which it never sought, to complete the arbitration in Japan. The sole effect of the stay for the purposes of this case was to induce Copal to file a claim in bankruptcy based directly on the arbitral award rather than to seek prior confirmation in an American court of general jurisdiction. We hold that it should not have proceeded in that manner.

[4] There appears to be no specific statutory authority for a Bankruptcy Judge to stay a domestic arbitration proceeding, although we assume, arguendo, that he may do so. See 11 U.S.C. §§ 11a(15), 714; but see 1A Collier, On Bankruptcy ¶ 11.28 at 1149-50 (14th ed. 1974). But such stay cannot be effective, in any event, without *in personam* jurisdiction over the creditor who has begun an action in a foreign tribunal that is not within the jurisdiction of the United States. Nor can it be argued that the stay must have affected the arbitration

because of the Bankruptcy Court's jurisdiction over the debtor's assets. Even within the territorial jurisdiction of the United States, the jurisdiction of the Bankruptcy Court over matters affecting those assets is not necessarily exclusive. See Thompson v. Magnolia Co., 309 U.S. 478, 483, 60 S.Ct. 628, 84 L.Ed. 876 (1940); 3 Collier, *supra*, ¶ 57.15[3.2] at 260.

[5] Neither the Convention nor the arbitration statutes indicates what should be done in the event of the bankruptcy of one of the parties to an arbitration. Nor does the Bankruptcy Act reveal how a Bankruptcy Judge should handle an arbitration award filed as proof of claim under Section 63a(5) of the Bankruptcy Act, 11 U.S.C. § 103(a)(5). That section requires the Bankruptcy Court to accept as a final adjudication of a claim "provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge . . . ." But an arbitral award cannot be considered a "judgment" within the terms of the statute, for the process of procuring a judgment based on an arbitral award involves the due process right to contest the award on the limited statutory grounds permitted. Without such an opportunity to contest confirmation, it is hard to see how the award itself can be sufficient for a proof of claim in bankruptcy. Until its merger in a judgment, we do not think it is a provable debt under Section 63a(5) of the Bankruptcy Act.

[6] It is nevertheless a binding adjudication on the merits. We conclude that a foreign arbitral award rendered after the filing of a Chapter XI petition in a United States Bankruptcy Court in an arbitration proceeding commenced prior to such filing is a valid determination on the merits and is unreviewable by the Bankruptcy Court.

A proceeding looking to an ultimate distribution of assets, or, we presume, an arrangement of the debtor under Chapter XI as well, has a twofold aspect, as Justice Brandeis noted in Richle v. Margolies, 279 U.S. 218, 224-25, 49 S.Ct. 310, 313, 73 L.Ed. 669 (1929)—a) distribution of the property and b) determination of the amount of indebtedness to particular creditors. The latter function "is strictly a proceeding *in personam*." Ibid. In *Richle*, an *in personam* suit against the debtor, which had been commenced before the receivership, was allowed to continue to judgment in the state court without the participation of the receiver, the default judgment being accepted as an adjudication of the existence of the indebtedness. The Supreme Court noted further:

> "The establishment of a claim constituting the basis of the right to participate in the distribution of property in the possession of one court is often conclusively determined by a judgment obtained in another court." 279 U.S. at 225, 49 S.Ct. at 313.

[7] The analogy carries us to the point that a judgment obtained after a petition is filed and before discharge may in some circumstances be proved as a claim against the estate under Section 63a(5) of the Bankruptcy Act even though the receiver or trustee (or debtor in possession) did not participate in the suit resulting in the judgment. The analogy was carried forward to a Chapter X reorganization by this court in Doyle v. Nemerov's Executors, 223 F.2d 54 (2 Cir. 1955), where Judge Learned Hand observed "although the section [§ 11 of the Bankruptcy Act, 11 U.S.C. § 29] gave the bankruptcy court power before adjudication to enjoin suits, the petition did not stay them automatically." 223 F.2d at 56. In the case of this Chapter XI proceeding, the result is a *fortiori*, for the debtor in possession had actually participated in the Japanese arbitration, which began before the petition was filed.

[8] The conclusion that we must enforce the award as a valid determination on the merits is mandated by the United Nations Convention, which provides in Article III:

> "Each Contracting State shall recognize arbitral awards as binding and

Art. III

enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." 21 U.S.T. 2517, 2519, T.I.A.S. 6997 at 3, 330 U.N.T.S. 38, 40 (1970).

Under this Article, equal treatment of foreign awards is the minimum required of a Contracting State. Foreign awards are vulnerable to attack only on the grounds expressed in other articles of the Convention, particularly Article V. See 9 U.S.C. § 207; 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, 1065–66 (1961).

Under the Convention it seems quite clear that enforcement may be refused at the instance of the losing party only on proof of specified conditions, one of which is that "[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*." (Emphasis added.) Art. V, 1(b).

These provisions of the Convention are made effective by the statute which implements the Convention. 9 U.S.C. § 207 provides in part: "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."

At this point we must, however, recognize another difficulty. We have recently held that if the arbitral award actually results in a judgment in the foreign country, it may be enforced as a foreign money judgment in the State of New York, regardless of the limiting provisions of the Convention and subject only to the non-enforcement provisions of Article 53 of the New York C.P.L.R. Island Territory of Curacao v. Solitron Devices, Inc., *supra*.

This raises the question whether the Japanese arbitration award has, *ipso facto*, the status of a judgment, in which event arguments against enforcement would be limited to those provided in Article 53 of the C.P.L.R. if enforcement is sought in the state courts of New York. If it is not equivalent to a judgment, enforcement is governed by the provisions of the Convention.

It is true that, in literal terms, as Judge Weinstein noted, Article 800 of the Japanese Code of Civil Procedure provides: "An [arbitral] award shall have the same effect as a judgment which is final and conclusive between the parties." The Judge stated that the Japanese award may be recognized pursuant to New York's statute on recognition of foreign country money judgments, C.P.L.R. §§ 5301–5309 (1970), cit-

4. The Japanese Treaty, a general treaty, is not quite as specific in its arbitration clause as the Convention. Article IV, ¶ 2 provides:

> "Awards duly rendered pursuant to any contracts [providing for arbitration of disputes], which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy." 4 U.S.T. 2063 at 2068, T.I.A.S. 2863 at 7.

To the extent that there may be a conflict between the Treaty and the Convention, we think that where both parties to a bilateral treaty, Japan and the United States, later become signatories to a multinational convention covering the same subject matter, the Convention is intended to control. We reach this conclusion despite the saving clause preserving the validity of bilateral agreements between the contracting states. Convention, Article VII. The adhesion of additional signatories does not affect the circumstance that each signatory, bound by bilateral agreement, is modifying its earlier engagement vis-a-vis the other, but only to the extent necessary. Furthermore, inasmuch as both agreements further the same purpose, the one tending to further that purpose most forcefully, the Convention, should be given effect.

ing the *Solitron* case, but also noted the provision for removal from state to federal court in actions relating to the Convention. 9 U.S.C. § 205. He carefully refrained from a definitive choice between state and federal courts, declaring that "Copal is now free to seek recognition of its award as an American judgment. Fotochrome may prove grounds for nonrecognition." We think that Judge Weinstein was right in concluding that the Japanese arbitral award may not itself be treated as a foreign money judgment.

[9] Under the Convention, enforcement of an arbitral award may be refused at the instance of the losing party on proof of specified conditions. Art. VI, 1(b). There is, in addition, a requirement in Article III of the Convention, as we have seen, that each contracting state shall enforce arbitral awards in accordance with the rules of procedure of the territory where the award is relied upon. Since under our procedure the losing party may object to confirmation on limited grounds that are specified in the Convention, we cannot treat the Japanese arbitral award as equivalent to a final judgment barring such recourse by the losing party when enforcement is sought. We need not rely on theories of territorial jurisdiction to conclude that a foreign award can never be self-executing in the forum state but must be merged in a local judgment to be effective as a matter of domestic law. See Lorenzen, Commercial Arbitration—Enforcement of Foreign Awards, 45 Yale L.J. 39, 56 (1935). The Convention itself makes a distinction between recognition and enforcement of an arbitral award. And when grounds are specified for non-enforcement, such a provision necessarily implies a remedy for its assertion.

The award, on this analysis, is therefore not a judgment under Section 63a(5) of the Bankruptcy Act, 11 U.S.C. § 103a(5), and its filing as a proof of claim was premature. Copal must seek a judgment based on the award in a District Court of the United States under 9 U.S.C. § 207.[5] Fotochrome must, in turn, be given the right to assert the non-enforceability of the award under conditions specified in Article V of the Convention. The determination of the enforcement of the award is a matter not before us on this appeal.

The restraining order of the Bankruptcy Court must be vacated with respect to Copal to allow it to secure a judgment. Both the Supreme Court in Scherk v. Alberto-Culver Co., *supra*, and this court in *Solitron Devices*, *supra*, have stressed the need for encouraging international arbitration and for putting no roadblocks in its way.

It may, indeed, seem anomalous that a domestic contracting party might have been restrained from pursuing the arbitration remedy upon the filing of the petition herein, while a Japanese contracting party, similarly situated, may proceed to an arbitration award.

The result is not quite as anomalous as appears, however. For in a converse situation an American company might procure an arbitral award in the United States against a Japanese firm in financial trouble whose Japanese creditors

5. The question whether foreign arbitral awards will be enforceable in the United States courts has become a subject of only historical interest so far as nationals of countries signatory to the Convention are concerned, for 9 U.S.C. § 207 gives federal jurisdiction for the enforcement of such awards, implementing the Convention.

Before the Convention, although an arbitral award rendered in another state of the Union was entitled to full faith and credit, Fauntleroy v. Lum, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039 (1908), that obviously did not, in terms, apply to awards made in foreign countries. See generally, Von Mehren and Trautman, Recognition of Foreign Adjudications, 81 Harv. L.Rev. 1601, 1606 (1968); Restatement 2d, Conflict of Laws § 98, Comment b (1971). Only one state had a statute providing for the enforcement of foreign arbitral awards, see Domke, The Law and Practice of Commercial Arbitration 361 n.1 (1968), and, curiously, the Federal Arbitration Act, though it embraces foreign commerce, makes no provision for the enforcement of foreign arbitral awards under the Act unless the parties, by agreement, have specified a court in which an order confirming the award may be made. See 9 U.S.C. § 9. That is now largely covered by Sections 203 and 207 of Title 9.

might be under a stay from a Japanese court.

We are not concerned here with a case where the Japanese firm seeking arbitration in Japan is also doing business here and is subject to an *in personam* restraint by a United States Bankruptcy Court from proceeding against its contracting party whose assets are under the exclusive jurisdiction of the Federal Bankruptcy Court. That situation we leave for another day.

The order of the District Court reversing the order of the Bankruptcy Judge is affirmed. Appellee may seek confirmation of its arbitral award by judgment in the United States District Court under 9 U.S.C. § 207, and, if successful, may thereafter file a proof of claim in the Chapter XI proceeding based upon the judgment so obtained.

Roger H. MASON, Plaintiff-Appellant,

v.

OWENS-ILLINOIS, INC., Defendant-Appellee.

No. 74-1770.

United States Court of Appeals, Sixth Circuit.

June 10, 1975.

Action was brought by former employee against former employer under federal statute granting all persons the same rights as are enjoyed by white citizens against former employer for damages on alleged discriminatory employment practices. The United States District Court for the Southern District of Ohio, Eastern Division, Carl B. Rubin, J., entered judgment in favor of the defendant and the plaintiff appealed. The Court of Appeals, Engel, Circuit Judge, held that the most analogous cause of action under the Ohio law was an action upon liability created by statute for which the period of limitations was six years rather than the Ohio Civil Rights Act for which there was a one-year statute of limitations.

Reversed.

1. Limitation of Actions ⇐=34(1)

Where former employee brought action in federal court in Ohio against former employer slightly more than two years after alleged discriminatory conduct under federal statute granting all persons the same rights as are enjoyed by white citizens, the most analogous cause of action was the Ohio six-year statute of limitations for actions brought on action for liability created by statute to which a six-year statute of limitations was applicable rather than Ohio Civil Rights Act dealing with administrative complaints regarding discriminatory conduct and governed by one-year statute of limitations. 42 U.S.C.A. § 1981; R.C. Ohio §§ 2305.07, 4112.05(B).

2. Civil Rights ⇐=38

Former employee's action against former employer under federal statute granting all persons same legal benefits as is enjoyed by white citizens was not barred by the failure of the former employee to timely pursue remedies provided by the Equal Employment Opportunity provisions of the Civil Rights Act. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 706(e), 42 U.S.C.A. § 2000e-5(f).

William T. Johnson, Columbus, Ohio, for plaintiff-appellant.

Lester S. Lash, Vorys, Sater, Seymour & Pease, Robert F. Weaver, Jr., Columbus, Ohio, for defendant-appellee.

Before MILLER and ENGEL, Circuit Judges, and CECIL, Senior Circuit Judge.

ENGEL, Circuit Judge.

In this appeal we are called upon to decide the question of which Ohio statute of limitations should be applied to an action brought under 42 U.S.C. § 198

FOTOCHROME

Holding: pending foreign arbitration proceedings are not subject to stays by a bankruptcy judge.

FACTS – Fotochrome (NY) fell in dispute with Copal (Japan). Under the provisions of the contract the parties proceeded to arbitration before the CAA, Tokyo, [illegible].
All evidence was presented in 13 days of hearings, both parties being represented by local counsel.
On March [illegible], 1970, while the parties were awaiting the issuance of the award, Fotochrome filed a Ch. XI arrangement in the New York Court. The following day, the Bankruptcy Judge issued an order staying all proceedings including pending arbitrations. (Bankruptcy Act § 11(a))
Copies of this order were delivered to Copal and CAA.
Fotochrome "withdrew" from the arbitral proceedings.
Unimpeded, the award was rendered by the arbitrators, awarding Copal $ 600,000.
Copal entered judgment in Japan.
To [illegible] [illegible] judgment on the award in an American court on the theory that it was [illegible] in this country by the stay of March, 1970.
Bankruptcy judge refused to recognize the finality of the award and held that he had the power to [illegible] the issues of liability de novo.
Appeal followed.

JURISDICTION OF BANKRUPTCY JUDGE was not present – No in personam jurisdiction as there was no contact between U.S.A. and Copal.

RECOGNITION OF THE ARBITRAL AWARD
Under Japanese law the award was final.
Copal was unable to confirm its award as judgment in the U.S. courts in the face of the Referee's order.
Copal then sought to enforce its award in the U.S. so that it would be a provable debt for the purposes of bankruptcy proceedings.

The court based the enforcement on the NY Conv and the FCN treaty. These treaties compel the court to grant the same finality to the award in the U.S. court as it has been allowed in Japanese court.
The award is [illegible] [illegible] [illegible] [illegible] American counterpart had Fotochrome been involved in American arbitration proceedings the Bankruptcy judge's order would have prevented the confirmation of the award. The reason is the Supremacy Clause. A treaty is the supreme law of the land. The [illegible] [illegible] the [illegible] of [illegible].
Because the Referee had no jurisdiction over Copal, the award became final in Japan. The treaty compels us to recognize it as final in the USA. Moreover, an American corporation facing [illegible] unfavourable arbitration awards may not file for Ch. XI arrangement [illegible] to [illegible] [illegible] award final and binding [illegible] [illegible]

CONFIRMATION, Copal is free to seek recognition as American judgment. Fotochrome may prove grounds for non-recognition. If Copal wins it will [illegible]

Note : 16 Virginia J. Int'l Law p. 716 - 724 (1975-76)

U.S.A. no. 3

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

dubbel

No. 568—September Term, 1974.

(Argued January 30, 1975 Decided May 29, 1975.)

Docket No. 74-2082

FOTOCHROME, INC.,

Debtor-Appellant,

—against—

COPAL COMPANY, LIMITED,

Claimant-Appellee.

Before:

OAKES and GURFEIN, *Circuit Judges,*
and TENNEY, *District Judge.**

Appeal from an order of the District Court for the Eastern District of New York, Jack B. Weinstein, *J.*, reversing an order of the Bankruptcy Court. The Court of Appeals, Gurfein, *Circuit Judge*, held that where a foreign creditor files a claim in Chapter XI proceeding based on a foreign arbitral award rendered in Japan in an arbitration commenced before the filing of the petition but completed afterwards, and where the foreign creditor was not within the personal jurisdiction of the Bankruptcy Court for purposes of a stay, that Court does not have the power to reconsider the merits of the underlying dis-

* Of the Southern District of New York, sitting by designation.

pute. The creditor must secure a judgment confirming the award, however, giving the debtor in possession the opportunity to contest the award on grounds set out in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and if successful, the creditor may then file the judgment as proof of claim.

Affirmed.

RAYMOND F. GREGORY, New York, N.Y., *for Debtor-Appellant.*

DUGALD CAMPBELL BROWN, New York, N.Y. (Whitman & Ransom, and William M. Kahn, and Gillard S. Glover, New York, N.Y., of counsel), *for Claimant-Appellee.*

GURFEIN, *Circuit Judge:*

The parties to this appeal present some interesting questions concerning the impact of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention")[1] upon the provisions of the Bankruptcy Act. We find that there is no conflict between the Convention and the Act on the facts of this case. We accordingly affirm the order of Judge Weinstein, 377 F. Supp. 26 (E.D.N.Y. 1974), which held that a Bankruptcy Court does not have the power in a Chapter XI arrangement to relitigate the merits of a contract dispute which has been resolved by binding arbitration in a foreign forum, commenced before the filing of the Chapter XI petition and concluded thereafter by an arbitral award in the foreign country.

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1 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38 (Dec. 29, 1970); implemented by 9 U.S.C. § 201 et seq.

Fotochrome, Inc. ("Fotochrome"), a Delaware corporation with offices in the Eastern District of New York, and Copal Company, Ltd. ("Copal"), a Japanese corporation, neither present nor doing business in the United States, entered into a contract in 1966 under which Copal would manufacture cameras in Japan according to specifications provided by Fotochrome, and Fotochrome would purchase the cameras for distribution in the United States. A dispute arose in which each party charged the other with failure to abide by the terms of the contract. Copal claimed damages of $631,501 for Fotochrome's breach of conditions in the contract and its failure to pay for delivered cameras; Fotochrome claimed damages of $828,582 for Copal's failure to meet the delivery schedule and for its manufacture of defective cameras.

The parties had agreed in their contract that final settlement of any disputes arising out of the contract would be reached by arbitration in Tokyo, Japan. In 1967, Copal filed a petition for arbitration with the Japan Commercial Arbitration Association ("JCAA"); Fotochrome filed a formal answer on July 31, 1967. The first of seventeen arbitral sessions was held by the JCAA on December 21, 1967. Fotochrome participated with Japanese counsel in all sessions except the last. Copal presented its evidence in sixteen sessions over the course of twenty-five months.

At the fourteenth session on October 1, 1969, Fotochrome's counsel asked to be allowed to examine two witnesses on his client's behalf. The tribunal scheduled examinations on October 31 and November 5, but the witnesses were not produced. Sessions were rescheduled for December 4 and, later, for January 27, but on each occasion, Fotochrome failed to produce its witnesses. On January 27, 1970 the arbitrators informed Fotochrome's counsel that if the witnesses did not appear at the next session,

the arbitration might be terminated. The session was scheduled for March 31.

On March 26, 1970 Fotochrome filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. §§ 701 et seq., in the Eastern District of New York. Referee Sherman Warner issued an order on March 27 continuing Fotochrome as debtor in possession and enjoining "all creditors of the debtor . . . from commencing or continuing any actions, suits, *arbitrations*, or the enforcement of any claim in any Court against this debtor. . . ." (Emphasis supplied.) The restraining order, in terms, applied only to creditors, not to the debtor in possession. In any event, Fotochrome did not seek the court's permission to continue to participate in the JCAA arbitration, although it knew it was scheduled to present its case in Tokyo four days later.

On March 31, at the JCAA arbitral session, counsel for Fotochrome notified the tribunal that the petition had been filed in the United States District Court and that the stay had issued. He did not present the two witnesses as scheduled. On April 8, Fotochrome's counsel informed the JCAA that he had been discharged by his client. On April 9, the JCAA panel convened to consider the effect of Fotochrome's withdrawal and the stay order of the United States District Court. Copal urged the tribunal to proceed. On July 2, the tribunal decided that the bankruptcy court's stay was not effective with respect to it, and ordered the sessions terminated.

On September 18, the arbitral panel issued an award in favor of Copal in the amount of $624,457.80, plus interest from January 1, 1967. The tribunal resolved both Copal's claim and Fotochrome's counterclaim, which it dismissed, considering evidence supplied by both parties;

it was unable, of course, to consider evidence that might have been supplied by the two witnesses Fotochrome had intended to present.

On October 21, Copal filed the arbitral award with the Tokyo District Court. As of that time, under Article 800 of the Japan Code of Civil Procedure, the award became in effect a final and conclusive judgment settling the rights and obligations of the parties in Japan.

On October 22, Copal filed a proof of claim in Fotochrome's bankruptcy proceedings in the amount of the arbitral award. Apparently in the belief that the Referee's stay would operate to bar proceedings to enforce the Japanese award in this country, Copal did not seek confirmation of the Japanese judgment either in the New York courts under the Act for the Recognition of Foreign Money Judgments, CPLR §§ 5301-09, or in a federal court under the Arbitration Act, 9 U.S.C. § 9, or the Convention, 9 U.S.C. § 207.

Fotochrome, as debtor in possession, challenged the claim presented to the Bankruptcy Court, and requested a hearing on the *merits* of Copal's underlying claim. Referee Parente, after a preliminary hearing, held that the Japanese award could not be treated as a final judgment in the bankruptcy proceeding and that the bankruptcy court would reconsider the merits of the underlying dispute. The Referee reasoned that under Section 2a(15) of the Bankruptcy Act, 11 U.S.C. §11a(15), the restraining order of March 27 "effectively imposed [the Bankruptcy Court's] paramount authority over the estate of the debtor in possession ousting the jurisdiction of the Japan CAA." He ruled that the Japanese arbitral award, obtained after the filing of the petition for an arrangement, without authority of the Bankruptcy Court, was not binding on the debtor in possession and could

be reopened for consideration on the merits in the Chapter XI proceeding.

Judge Weinstein reversed the Referee's order, holding that the restraining order of the Bankruptcy Court had no extraterritorial effect as such, Japan not being within the territorial limits subject to the jurisdiction of the Bankruptcy Court, Section 2a of the Bankruptcy Act, 11 U.S.C. § 11(a), and because Copal did not have the requisite minimum contacts with the United States to render it subject to the *in personam* jurisdiction of the Bankruptcy Court; that the award was a final judgment under Japanese law; and that the provisions of the bilateral treaty on Friendship, Commerce and Navigation between the United States and Japan (the "Japanese Treaty")[2] and the Convention entitled Copal to seek confirmation of its award as a judgment in the United States.[3]

The New York and federal statutes and the Convention provide for two stages: recognition of the award and its enforcement. CPLR § 5303; 9 U.S.C. §§ 9, 13; Convention, Art. III. The award itself is inchoate until enforced by judgment. Under the Federal Arbitration Act, 9 U.S.C. §§ 9 to 11, the enforcement of an arbitration award is subject to certain limited defenses. That is true, as well, under the New York CPLR §§ 5304, 5305, and the Convention, Art. V. The United Nations Convention further provides that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recog-

2 4 U.S.T. 2063, T.I.A.S. 2863 (April 2, 1953).

3 As Judge Weinstein noted, though the United States acceded to the Convention after the contract in suit was signed and shortly after the award was made, the Convention contains no prospective language and should be applied retroactively to existing arbitration agreements and awards. 377 F. Supp. at 30, citing Quigley, Convention on Foreign Arbitration Awards, 58 A.B.A.J. 821, 822 (1972).

nition or enforcement of the award is contrary to the public policy of the country. Art. V, 2(b).

We note at the outset that there is no reference to bankruptcy in the Convention. Nor is there any reference to whether the "public policy" of the forum state to require equal treatment of creditors in the case of bankruptcy is the kind of "public policy" that allows non-recognition of foreign arbitral awards. "The legislative history of the provision offers no certain guidelines to its construction." See *Parsons & Whittemore Overseas Co., Inc. v. Societe General de L'Industrie Du Papier (Rakta)*, 508 F.2d 969, 973 (2 Cir. 1974).

The public policy in favor of international arbitration is strong. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974); *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313 (2 Cir. 1973), *cert. denied*, 416 U.S. 986 (1974). And we have recently indicated that the "public policy" limitation on the Convention is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice. *Parsons & Whittemore*, *supra*, 508 F.2d at 974.

As we shall see, this appeal can be decided without the necessity of determining whether the Bankruptcy Act involves a "public policy" which is contrary to enforcement of arbitral awards under the Convention.

The questions that arise on this appeal are: (1) Is a foreign arbitral award rendered after the filing of a Chapter XI petition in the United States Bankruptcy Court nevertheless a valid determination on the merits? (2) If it is, what is the domestic "competent authority" to consider the limited defenses against its enforcement, the District Court or the Bankruptcy Court?

We note at the outset that Judge Weinstein's holding with regard to the Bankruptcy Court's lack of personal

jurisdiction over Copal is clearly correct and we affirm it without further elaboration. The Bankruptcy Court did not enjoy personal jurisdiction over Copal until October 22, 1970 when Copal's claim was filed, for Copal did not have the "minimum contacts" with the United States required under *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958). Therefore, its stay did not operate against Copal. See Restatement 2d, Foreign Relations Law of the United States § 7 (1965). Nor did the stay operate against Fotochrome, for it was directed only to creditors. Fotochrome was free, certainly with the permission of the Bankruptcy Court, which it never sought, to complete the arbitration in Japan. The sole effect of the stay for the purposes of this case was to induce Copal to file a claim in bankruptcy based directly on the arbitral award rather than to seek prior confirmation in an American court of general jurisdiction. We hold that it should not have proceeded in that manner.

There appears to be no specific statutory authority for a Bankruptcy Judge to stay a domestic arbitration proceeding, although we assume, arguendo, that he may do so. See 11 U.S.C. §§ 11a(15), 714; but see 1A Collier, On Bankruptcy ¶ 11.08 at 1149-50 (14th ed. 1974). But such stay cannot be effective, in any event, without *in personam* jurisdiction over the creditor who has begun an action in a foreign tribunal that is not within the jurisdiction of the United States. Nor can it be argued that the stay must have affected the arbitration because of the Bankruptcy Court's jurisdiction over the debtor's assets. Even within the territorial jurisdiction of the United States, the jurisdiction of the Bankruptcy Court over matters affecting those assets is not necessarily exclusive. See *Thompson* v. *Magnolia Co.*, 309 U.S. 478, 483 (1940); 3 *Collier, supra*, ¶ 57.15 [3.2] at 260.

Neither the Convention nor the arbitration statutes indicates what should be done in the event of the bankruptcy of one of the parties to an arbitration. Nor does the Bankruptcy Act reveal how a Bankruptcy Judge should handle an arbitration award filed as proof of claim under Section 63a(5) of the Bankruptcy Act, 11 U.S.C. § 103(a)(5). That section requires the Bankruptcy Court to accept as a final adjudication of a claim "provable debts reduced to judgment after the filing of the petition and before the consideration of the bankrupt's application for a discharge. . . ." But an arbitral award cannot be considered a "judgment" within the terms of the statute, for the process of procuring a judgment based on an arbitral award involves the due process right to contest the award on the limited statutory grounds permitted. Without such an opportunity to contest confirmation, it is hard to see how the award itself can be sufficient for a proof of claim in bankruptcy. Until its merger in a judgment, we do not think it is a provable debt under Section 63(a)(5) of the Bankruptcy Act.

It is nevertheless a binding adjudication on the merits. We conclude that a foreign arbitral award rendered after the filing of a Chapter XI petition in a United States Bankruptcy Court in an arbitration proceeding commenced prior to such filing is a valid determination on the merits and is unreviewable by the Bankruptcy Court.

A proceeding looking to an ultimate distribution of assets, or, we presume, an arrangement of the debtor under Chapter XI as well, has a twofold aspect, as Justice Brandeis noted in *Riehle* v. *Margolies*, 279 U.S. 218, 224-25 (1929)—a) distribution of the property and b) determination of the amount of indebtedness to particular creditors. The latter function "is strictly a proceeding *in personam*." Ibid. In *Riehle*, an *in personam* suit against the debtor, which had been commenced before the receivership, was

allowed to continue to judgment in the state court without the participation of the receiver, the default judgment being accepted as an adjudication of the existence of the indebtedness. The Supreme Court noted further:

> "The establishment of a claim constituting the basis of the right to participate in the distribution of property in the possession of one court is often conclusively determined by a judgment obtained in another court." 279 U.S. at 225.

The analogy carries us to the point that a judgment obtained after a petition is filed and before discharge may in some circumstances be proved as a claim against the estate under Section 63(a)(5) of the Bankruptcy Act even though the receiver or trustee (or debtor in possession) did not participate in the suit resulting in the judgment. The analogy was carried forward to a Chapter X reorganization by this court in *Doyle* v. *Nemerov's Executors*, 223 F.2d 54 (2 Cir. 1955), where Judge Learned Hand observed "although the section [§ 11 of the Bankruptcy Act, 11 U.S.C. § 29] gave the bankruptcy court power before adjudication to enjoin suits, the petition did not stay them automatically." 223 F.2d at 56. In the case of this Chapter XI proceeding, the result is *a fortiori*, for the debtor in possession had actually participated in the Japanese arbitration, which began before the petition was filed.

The conclusion that we must enforce the award as a valid determination on the merits is mandated by the United Nations Convention, which provides in Article III:

> "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 relied upon, under the conditions laid down in the

following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." 21 U.S.T. 2517, 2519, T.I.A.S. 6997 at 3, 330 U.N.T.S. 38, 40 (1970).

Under this Article, equal treatment of foreign awards is the minimum required of a Contracting State. Foreign awards are vulnerable to attack only on the grounds expressed in other articles of the Convention, particularly Article V. See 9 U.S.C. § 207; 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, 1065-66 (1961).[4]

Under the Convention it seems quite clear that enforcement may be refused at the instance of the losing party only on proof of specified conditions, one of which is

4 The Japanese Treaty, a general treaty, is not quite as specific in its arbitration clause as the Convention. Article IV, ¶ 2 provides:

"Awards duly rendered pursuant to any . . . contracts [providing for arbitration of disputes], which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy." 4 U.S.T. 2063 at 2068, T.I.A.S. 2863 at 7.

To the extent that there may be a conflict between the Treaty and the Convention, we think that where both parties to a bilateral treaty, Japan and the United States, later become signatories to a multinational convention covering the same subject matter, the Convention is intended to control. We reach this conclusion despite the saving clause preserving the validity of bilateral agreements between the contracting states. Convention, Article VII. The adhesion of additional signatories does not affect the circumstance that each signatory, bound by bilateral agreement, is modifying its earlier engagement vis-a-vis the other, but only to the extent necessary. Furthermore, inasmuch as both agreements further the same purpose, the one tending to further that purpose most forcefully, the Convention, should be given effect.

that "[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.*" (Emphasis added.) Art. V, 1(b).

These provisions of the Convention are made effective by the statute which implements the Convention. 9 U.S.C. § 207 provides in part: "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."

At this point we must, however, recognize another difficulty. We have recently held that if the arbitral award actually results in a judgment in the foreign country, it may be enforced as a foreign money judgment in the State of New York, regardless of the limiting provisions of the Convention and subject only to the non-enforcement provisions of Article 53 of the New York C.P.L.R. *Island Territory of Curacao* v. *Solitron Devices, Inc.*, *supra*.

This raises the question whether the Japanese arbitration award has, *ipso facto*, the status of a judgment, in which event arguments against enforcement would be limited to those provided in Article 53 of the C.P.L.R. if enforcement is sought in the state courts of New York. If it is not equivalent to a judgment, enforcement is governed by the provisions of the Convention.

It is true that, in literal terms, as Judge Weinstein noted, Article 800 of the Japanese Code of Civil Procedure provides: "An [arbitral] award shall have the same effect as a judgment which is final and conclusive between the parties." The Judge stated that the Japanese award may be recognized pursuant to New York's statute on recognition of foreign country money judgments, C.P.L.R. §§ 5301-5309 (1970), citing the *Solitron* case, but also

noted the provision for removal from state to federal court in actions relating to the Convention. 9 U.S.C. § 205. He carefully refrained from a definitive choice between state and federal courts, declaring that "Copal is now free to seek recognition of its award as an American judgment. Fotochrome may prove grounds for non-recognition." We think that Judge Weinstein was right in concluding that the Japanese arbitral award may not itself be treated as a foreign money judgment.

Under the Convention, enforcement of an arbitral award may be refused at the instance of the losing party on proof of specified conditions. Art. VI, 1(b). There is, in addition, a requirement in Article III of the Convention, as we have seen, that each contracting state shall enforce arbitral awards in accordance with the rules of procedure of the territory where the award is relied upon. Since under our procedure the losing party may object to confirmation on limited grounds that are specified in the Convention, we cannot treat the Japanese arbitral award as equivalent to a final judgment barring such recourse by the losing party when enforcement is sought. We need not rely on theories of territorial jurisdiction to conclude that a foreign award can never be self-executing in the forum state but must be merged in a local judgment to be effective as a matter of domestic law. See Lorenzen, Commercial Arbitration—Enforcement of Foreign Awards, 45 *Yale L.J.* 39, 56 (1935). The Convention itself makes a distinction between recognition and enforcement of an arbitral award. And when grounds are specified for non-enforcement, such a provision necessarily implies a remedy for its assertion.

The award, on this analysis, is therefore not a judgment under Section 63(a)(5) of the Bankruptcy Act, 11 U.S.C. § 103a(5), and its filing as a proof of claim was premature. Copal must seek a judgment based on the award in

a District Court of the United States under 9 U.S.C. § 207.[5] Fotochrome must, in turn, be given the right to assert the non-enforceability of the award under conditions specified in Article V of the Convention. The determination of the enforcement of the award is a matter not before us on this appeal.

The restraining order of the Bankruptcy Court must be vacated with respect to Copal to allow it to secure a judgment. Both the Supreme Court in *Scherk* v. *Alberto-Culver Co.*, *supra*, and this court in *Solitron Devices*, *supra*, have stressed the need for encouraging international arbitration and for putting no roadblocks in its way.

It may, indeed, seem anomalous that a domestic contracting party might have been restrained from pursuing the arbitration remedy upon the filing of the petition herein, while a Japanese contracting party, similarly situated, may proceed to an arbitration award.

The result is not quite as anomalous as appears, however. For in a converse situation an American company might procure an arbitral award in the United States

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5 The question whether foreign arbitral awards will be enforceable in the United States courts has become a subject of only historical interest so far as nationals of countries signatory to the Convention are concerned, for 9 U.S.C. § 207 gives federal jurisdiction for the enforcement of such awards, implementing the Convention.

Before the Convention, although an arbitral award rendered in another state of the Union was entitled to full faith and credit, *Fauntleroy* v. *Lum*, 210 U.S. 230 (1908), that obviously did not, in terms, apply to awards made in foreign countries. See generally, Von Mehren and Trautman, Recognition of Foreign Adjudications, 81 Harv. L. Rev. 1601, 1606 (1968); Restatement 2d, Conflict of Laws § 98, Comment b (1971). No state had a statute providing for the enforcement of foreign arbitral awards, see Domke, Enforcement of Foreign Arbitral Awards in the United States, 13 Arb. J. (N.S.) 91, 92 (1958), and, curiously, the Federal Arbitration Act, though it embraces foreign commerce, makes no provision for the enforcement of foreign arbitral awards under the Act unless the parties, by agreement, have specified a court in which an order confirming the award may be made. See 9 U.S.C. § 9. That is now largely covered by Sections 203 and 207 of Title 9.

against a Japanese firm in financial trouble whose Japanese creditors might be under a stay from a Japanese court.

We are not concerned here with a case where the Japanese firm seeking arbitration in Japan is also doing business here and is subject to an *in personam* restraint by a United States Bankruptcy Court from proceeding against its contracting party whose assets are under the exclusive jurisdiction of the Federal Bankruptcy Court. That situation we leave for another day.

The order of the District Court reversing the order of the Bankruptcy Judge is affirmed. Appellee may seek confirmation of its arbitral award by judgment in the United States District Court under 9 U.S.C. § 207, and, if successful, may thereafter file a proof of claim in the Chapter XI proceeding based upon the judgment so obtained.

Thus, Fotochrome, as a debtor in possession, had the normal choices of a trustee in bankruptcy with respect to the continuation of its pending action. It could have intervened and assumed the continued prosecution of the action as debtor in possession or declined to take over prosecution because of the likelihood of involving the estate in fruitless litigation. 4A Collier on Bankruptcy, §70 at 384, 385 (14th ed. 1974); Meyer v. Fleming, 327 U.S. 161 (1946); Paradise v. Vogtlandische Maschinen-Fabrik, 99 F. 2d 53 (3rd Cir. 1938). Fotochrome, as debtor in possession, when informed that the JCAA was going to continue the arbitration without it, chose the latter alternative. Fotochrome thereby failed to take the necessary and available action to continue the prosecution of its claim against Copal.

Clearly Fotochrome's failure to advance its position before the JCAA was wilful and not mandated by the Bankruptcy Act. Accordingly, Fotochrome's refusal to utilize the four separate opportunities to present its case before the JCAA and Fotochrome's refusal to continue to participate in the arbitration proceedings once it filed a petition for arrangement does not support the proposition that the JCAA or Copal prohibited Fotochrome from being present at each and every stage of the arbitration proceeding.

Both New York Law and Federal Law Require Recognition of Foreign Judgments Even if Obtained Upon Default

The facts of the instant case demonstrate that the

arbitral judgment of the JCAA was not tantamount to a default judgment; however, even if the arbitral judgment is so characterized both New York law and Federal law require that it be enforced by the courts of the United States. This rule was enunciated by the Supreme Court in the 1928 case of Riehle v. Margolies, supra, wherein the Court stated at 225:

> A judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, in the absence of fraud or collusion, even if obtained upon a default.

Both New York law, pursuant to the New York Uniform Foreign Country Money Judgments Recognition Act, N.Y. Civ. Prac. Law §§5301-09 (McKinney 1970), and Federal Law, pursuant to the United Nations Convention, require recognition of foreign arbitral judgments which result from proceedings in which the American party defaults. New Central Jute Mills Co. v. City Trade & Industries, Ltd. 65 Misc. 2d 653 (Sup.Ct., N.Y. Co. 1971), Island Territory of Curacao v. Solitron Devices Inc., 356 F. Supp. 1 (S.D. N.Y. 1973)

In Island Territory of Curacao, an American semiconductor manufacturer, Solitron, entered into a contract with the Island Territory of Curacao, the terms of which required, inter alia, the arbitration of any and all disputes before an arbitration tribunal in Curacao. In order to facilitate arbitration, Solitron appointed local counsel as its agent for the receipt of process. Subsequently, a dispute arose between the parties and a demand for arbitration was served upon Solitron. Solitron, much like Fotochrome

herein, discharged its local counsel and refused to participate in the arbitration proceedings. Nevertheless, the arbitration tribunal proceeded with the arbitration and granted an award in favor of Curacao.

Pursuant to the provisions of the United Nations Convention, Curacao commenced enforcement proceedings in the United States. Solitron opposed enforcement of the award and, as Fotochrome herein, asserted that the nature of the proceeding was such as to constitute a denial of due process. The District Court rejected Solitron's argument and stated at 13:

> Where a party is sued in a foreign country upon a contract made there, he is subject to the procedure of the court in which the action is pending, and must resort to it for the purpose of his defense, if he has any, and any error committed must be reviewed or corrected in the usual way. So long as he has the benefit of such rules and regulations as have been adopted or are in use for the ordinary administration of justice among the citizens or subjects of the country, he cannot complain, and justice is not denied to him. The presumption is that the rights and liability of the defendant have been determined according to the law and procedure of the country where the judgment was rendered. Dunstan v. Higgins, 138 N.Y. 70 (1893)

Fotochrome could have commenced a procedure to cancel the arbitral judgment of the JCAA in the courts of Japan. The Japan Code of Civil Procedure §801 ("CCP") enumerates specific grounds upon which a party may apply to a Japanese court for cancellation of an arbitration award. In addition to the traditional grounds for cancelling an award such as fraud, bias and corruption, the

CCP specifically states that an award may be cancelled if a party can prove that he was not given an opportunity to be examined in the arbitration proceeding. Article 801 (4) of The Japan Code of Civil Procedure.

If Fotochrome seriously believed that it was denied the opportunity to present its case before the JCAA, it could have made an application, predicated upon its due process argument, to the Japanese District Court for cancellation of the arbitral judgment. The failure of Fotochrome to utilize the available Japanese procedures** precludes it from raising a due process argument in this Court. Cf. Cook Industries, Inc. v. C. Itoh & Co. (America) Inc., 449 F.2d 106 (2d Cir. 1971).

As stated by the Court in Island Territory of Curacao:

"Solitron [like Fotochrome herein] had an opportunity to urge this point before the arbitrators or in the courts of Curacao but elected to forego the opportunity. This Court may not now correct the alleged error." Island Territory of Curacao v. Solitron Devices Inc., supra, at 13.

In New Central Jute Mills Co. v. City Trade & Industries, Ltd., supra, the defendant failed to participate in two arbitration proceedings before an Indian arbitration panel which were commenced by the plaintiff pursuant to the terms of the parties' contract. Subsequent to the awards but prior to their reduction

** Moreover, Japan has a comprehensive insolvency law which is in many respects similar to that of the United States. The Japanese law provides for bankruptcy, reorganization, and compositions and is available on an equal basis to domestic and foreign corporations. Fotochrome could have sought the protection of this law for its Japanese property. Bankruptcy Law (of Japan) (Law No. 71,1922, as amended by Law No. 100,1971)

to judgment by the High Court of Calcutta, the defendant commenced an accounting action in the Supreme Court of the State of New York. The Supreme Court ordered arbitration of the parties' dispute but the parties stipulated to stay this order.

Once the Indian awards were reduced to judgments, the plaintiff commenced enforcement proceedings in New York. Defendant opposed enforcement and argued that the parties' stipulation which had been entered into with respect to the Supreme Court action amounted to a stay of the Indian arbitration proceeding. Defendant also argued that it was not afforded adequate notice of the confirmation proceedings and that therefore the award contravened the public policy of the state because it violated traditional notions of due process.

The Court rejected defendant's argument and stated at 657:

> Having been amply notified of the plaintiff's intention to proceed with the confirmation of the awards in India, defendant now can hardly claim to have been defrauded or misled. Nothing in this record indicates that the Indian judgment obtained by the plaintiff is repugnant to the public policy of this State nor, more than ample notice having been accorded to defendant at all times, can it be claimed that the judgment rendered was incompatible with our notions of due process.

Accordingly, the award of the JCAA does not violate the due process clause of the Fifth Amendment of the United States Constitution.

The Public Policy Of The United States Requires The Recognition and Enforcement of Commercial Arbitration Agreements in International Contracts

Fotochrome has essentially asserted, for the first time in this Court, that the arbitration clause of the parties' transnational contract violates the public policy of the United States. However, the public policy of the United States with respect to arbitration agreements such as that involved in the instant case is explicitly set forth in the United States Arbitration Act, 9 U.S.C. §§1 et seq. (1947) which reads, in pertinent part, as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. Id. §2.

The emerging public policy of the United States, as evidenced by two recent Supreme Court cases, favors the enforcement of contractual agreements for arbitration of international disputes even at the expense of existing and apparently conflicting domestic legislation. Scherk v. Alberto-Culver Co., 42 U.S.L. Week 4911 (U.S. June 17, 1974); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

In Scherk v. Alberto-Culver Co., supra, an American manufacturer and distributor of toiletries, entered into a contract for the purchase of the stock of three interrelated German and Liechtenstein businesses owned by Scherk together with all rights held by these enterprises to trademarks in cosmetic goods. The contract provided for the resolution of any and all disputes before the International Chamber of Commerce in Paris, France and stipulated that the interpretation of the contract should be governed by the law of Illinois.

Subsequent to the consummation of the parties' contract, Alberto-Culver Co. ("Culver") discovered that the trademarks were subject to substantial encumbrances. Culver thereupon instituted suit in the United States District Court for the Northern District of Illinois. Culver contended that because Scherk's fraudulent representations concerning the trademarks violated §10(b) of the Securities Exchange Act of 1934 and Rule 10-b-5 promulgated thereunder, the arbitration clause contained within the parties' international contract was unenforceable under the holding of Wilko v. Swan 346 U.S. 427 (1953)*. The District Court granted a preliminary order enjoining Scherk from proceeding with

*Wilko v. Swan, supra held that an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933, in view of the language of §14 of the Securities Act of 1933.

arbitration and this order was affirmed by the United States Court of Appeals for the Seventh Circuit. 484 F. 2d 611 (7th Cir. 1973)

The United States Supreme Court reversed the judgment of the Court of Appeals and stated:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable pre-condition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.
>
> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. (42 U.S.L Week at 4914).

In M/S Bremen v. Zapata Off-Shore Company, supra, the Supreme Court held that a forum clause in an international towage agreement which stipulated that all disputes should be resolved before the High Court of London, was controlling despite the fact that the English courts would enforce an exculpatory clause which would not be applied by American admiralty courts.

The Court stated at 17:

> This case, however, involves a freely negotiated international commercial transaction be[illegible]

> German and an American corporation for towage of a vessel from the Gulf of Mexico to the Adriatic Sea. As noted, selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation. Whatever 'inconvenience' Empata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

The instant case presents another situation in which the terms of a private international agreement should be given full effect. Although recognition and enforcement of the JCAA arbitral judgment is mandated by the United Nations Convention and the FCN Treaty, the granting of recognition to this award would also be consonant with the expressed public policy of the United States.

Conclusion

For the reasons stated herein, we respectfully request that the decision of the United States District Court for the

Bankruptcy was correct in ruling that the merits of Copal's claim should be examined anew.

POINT II

The Treaties with Japan do not Prohibit the Bankruptcy Court from Denying Finality to the Arbitral Award

The District Court held that the treaties with Japan required the Bankruptcy Court to grant the arbitral award the same finality as it had been allowed in the Japanese courts (153a). The 1953 Treaty with Japan on Friendship, Commerce and Navigation provides for the enforcement of agreements to arbitrate.

> "Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by either such courts, except where found contrary to public policy."

Treaty with Japan on Friendship, Commerce and Navigation, Art. IV, para. 2, 4 U.S.T. 2063 at 2068

The United Nations Convention on the Recognition and

Enforcement of Foreign Arbitral Awards, acceded to by the United States in 1970, contains a similar provision:

> "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 relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of the arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. III, 21 U.S.T. 2517 at 2519. The Convention, however, declares that recognition and enforcement of the award may be refused.

> "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (b) The party against whom the award is envoked... was otherwise unable to present his case....
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (b) The recognition or enforcement of the award would be contrary to the public

policy of that country."

Art. V, 21 U.S.T. 2517 at 2520

One commentator has observed that the words "otherwise un to present his case" incorporates in the treaty the basic concept of due process". 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 at 1067.

New York law also recognizes the failure to provide due process as ground for non-recognition of a foreign award.

> "(a) No recognition. A foreign country judgment is not conclusive if:
>
> 1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."

C.P.L.R. §5304.

Having been denied the opportunity to present its defense through the oral testimony of its witnesses, Fotochrome has been made the victim of a procedure totally foreign to American concepts of due process. An arbitral award rendered under such procedures is obviously subject to attack. The United Nations Convention, therefore, did

not require the Bankruptcy Court to recognize the Japanese arbitral award as final and binding.

The Friendship, Commerce and Navigation Treaty as well as the United Nations Convention except from their enforcement provisions those arbitral awards found contrary to public policy of the country where enforcement of the award is sought. Public policy is to be found in the Constitution, the legislative acts, and the decisions of the courts. Building Service Employees International Union Local 262 v. Gazzam, 339 U.S. 532 (1949). Although the award of the Japan CAA in and of itself may not violate our public policy, the manner in which the award was obtained certainly does. The enforcement of an arbitral award, domestic or foreign, inherently defective by reason of a denial of due process, is abhorent to our judicial processes. Of necessity, its enforcement would be contrary to our public policy.

The District Court recognized that the result of his decision was "troubling" (145a), and that it "might somewhat disturb the draftsmen of the Bankruptcy Act" (156a). The Court believed, however, that "some stability of expectation in the resolution of disputes through arbitration to protect against the uncertainties of foreign litigation seem desirable" (156a).

It is difficult to perceive that these expectations will be thwarted by reason of a trial on the merits before the Bankruptcy Court. Even the Japan CAA appeared to doubt that its award could be enforced in this country (57a). Copal, moreover, when served with the referee's order, was placed on notice that the Bankruptcy Court claimed jurisdiction over Fotochrome and its property. The filing of a petition in bankruptcy is "a caveat to all the world" International Bank v. Sherman, 101 U.S. 403 (1880). Copal could have readily predicted that its insistence that the arbitration proceed without the presence of Fotochrome would result in an attack on the award. The treaties were not intended to produce a "stability of expectation" at the expense of the law.

CONCLUSION

Fotochrome, as debtor in possession, lacked the authority to submit to the Japan CAA its defense to Copal's claim. The refusal of the arbitrators to order the hearings held in abeyance until Fotochrome's authority to proceed was granted, constituted, under American precepts, a denial of due process of law. Arbitral awards rendered without

due process are excepted from the enforcement provisions of the treaties with Japan. The decision and order of the District Court, therefore, should be reversed.

Respectfully submitted,

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FOTOCHROME District Court

Facts The arbitration was initiated and the hearings were held before the Bankruptcy proceedings. Arbitration took place in Tokyo (C.A.A.J.) Both parties (U.S. and Japan) participated.
Before the award was rendered Fotochrome (U.S.) filed for bankruptcy arrangements in the U.S. court. The Referee ordered a stay of all proceedings including arbitration. Thereafter, the award was rendered and a judgment entered on Japan. The bankruptcy judge refused the award, and ruled to rehear de novo.

District Court

The bankruptcy judge had no jurisdiction in personam over Copal to order a stay of the arbitration.
According to Japanese law the award is final.
The New York Convention, through the Supremacy Clause, compels a U.S. court to grant the same finality in the U.S.A.. This takes precedent over the domestic law which in such situation would have barred the enforcement of an award rendered after filing arrangements for bankrup
The award may be confirmed.

Note An interesting observation of the court is: "An American corporation facing imminently unfavourable arbitrations abroad may not file for Ch. XI arrangements in the U.S.A. to avoid final and binding arbitral judgments abroad".

Obsv.

Finally I think this is rather a question of U.S. Treaty Law (through the Supremacy Clause a treaty supersedes national law), than of public policy. It could have been argued that rendering an award, notwithstanding bankruptcy proceedings, frustrates the U.S. proceedings to the extent that recognition of such award would violate the U.S. public policy. (It could have been based on Art. V para. 2 under b.). But this point does not appear explicitly in the opinion. Any way, although bankruptcy proceedings are underway, arbitration may continue abroad, and the award be submitted as provable debt under the New York Convention.

FOTOCHROME - Court of Appeals.

At the outset the court noted that the Bankruptcy Judge lacked jurisdiction in personam over COPAL to issue an order staying the arbitration.
Unclear is the question whether he could even stay a domestic arbitration.
Nor is it clear what should be done if an award is filed as proof of claim in bankruptcy (Sect. 63 a (5) of the Bankruptcy Act).
The answer to the first question was negative. An arbitration commenced before the filing of bankruptcy may continue and the award is a valid determination on the merits and unreviewable by the Bankruptcy Court, even if the debtor did no longer participate.
The award itself, however, cannot be filed as a claim of a provable debt reduced to judgment as it is required for by Sect. 63 a (5). The award should have attained the status of judgment. Although under Japanese law the award has beco effictive as a judgment, an actual judgment has not be entered upon in Japan. Therefore it cannot be recognized and enforced as a judgment in the U.S.A.
The enforcement is mandated by Art. III of the NY Convention. But the filing of the award was premature, since FOTOCHROME should be given the right to assert the defences for non-enforcement of Art. V para. 1., and since, as it is explain above, a judgment on the award was required. The District Court is in this resp the competent court.

The court observed in the beginning that this case is decided without relying on the public policy of Art. V para. 2.

The retroactivity of the NY Convention was mentioned in note 3 (referring to the observation made in the District Court).

Note 4 refers to Art. VII. Notwithstanding Art. VII, the NY Convention is deemed to take precedent over the Treaty of FCN with Japan.