APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 16-17623; 17-12163

D.C. Docket No. 1:16-cv-24275-FAM

INVERSIONES Y PROCESADORA TROPICAL INPROTSA, S.A., a Costa Rican Corporation,

Plaintiff-Appellant,

versus

DEL MONTE INTERNATIONAL GMBH, a Swiss Corporation,

Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(April 23, 2019)

Before MARCUS, BLACK and WALKER,* Circuit Judges.

BLACK, Circuit Judge:

Appellant Inversiones y Procesadora Tropical INPROTSA, S.A. (INPROTSA) appeals from the district court's orders denying its petition to vacate and confirming an international arbitral award issued in favor of Appellee Del Monte International GmbH (Del Monte). INPROTSA contends the district court lacked subject-matter jurisdiction over its petition to vacate the arbitral award, which Del Monte removed from state court. It further contends that, even if the district court had jurisdiction, the petition to vacate should not have been dismissed on the ground that INPROTSA failed to assert a valid defense under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention). Finally, INPROTSA contends the district court erred by granting Del Monte's motion to confirm the award. We affirm the district court.

I. BACKGROUND

The MD-2 pineapple variety was developed by the Pineapple Research Institute of Hawaii (the Institute), an agricultural research organization that at one point was run jointly by Del Monte, the Dole Fruit Company (Dole), and the Maui Pineapple Company (Maui). Dole withdrew from the Institute before the MD-2 was created. And Maui, for its part, played little to no role in developing the MD-2.

* Honorable John M. Walker, Jr., Circuit Judge for the United States Court of Appeals for the Second Circuit, sitting by designation.

Instead, the MD-2's commercial development was driven largely (if not solely) by Del Monte. Del Monte initiated tests on the variety in 1980, released the variety to its Hawaiian operations in 1981, began selling the MD-2 in North America and Europe in 1987, and introduced the variety to Costa Rica in 1994, where it worked to adapt the MD-2 to that country's climate and conditions. According to Del Monte, through its efforts, the MD-2 became the most popular pineapple variety in the world.

Del Monte did not, however, hold a patent on the MD-2. And given the MD-2's commercial success, Del Monte was not the only pineapple producer interested in selling the variety. Indeed, Dole commercialized the MD-2 in 2000, which prompted a federal lawsuit from Del Monte (the Dole Litigation). Del Monte asserted claims for unfair competition, trade-secret violations, and conversion of vegetative material, alleging that Dole infringed its rights by—among other things—misappropriating knowledge and materials Del Monte developed in Costa Rica.

The Dole Litigation eventually settled in 2002 and, as a result, Del Monte acknowledged it did not have the exclusive right to sell the MD-2. But before that settlement, while the Dole Litigation was pending, INPROTSA weighed offers from both Dole and Del Monte to begin producing the MD-2 at its Costa Rican plantation. In the end, INPROTSA chose to go with Del Monte, noting among other factors that a ruling against Dole in the Dole Litigation might leave INPROTSA without a market for its pineapples.

In May 2001, against that backdrop, INPROTSA and Del Monte entered into an agreement (the Agreement) for the production, packaging, and sale of MD-2 pineapples. Under the Agreement, Del Monte agreed to provide INPROTSA with MD-2 seeds[1] at no cost. INPROTSA, in turn, acknowledged that Del Monte maintained ownership of all MD-2 seeds used on INPROTSA's plantation. INPROTSA further agreed to grow, sell, package, and deliver MD-2 pineapples exclusively to Del Monte. The parties also stipulated that Del Monte was "the exclusive owner of the variety known as MD-2," and they agreed that if the Agreement were terminated for any reason, including its expiration, INPROTSA would cease producing the MD-2 and either destroy its plant stock or return it to Del Monte.

During the 12-year term of the Agreement, Del Monte provided tens of millions of MD-2 seeds at no cost, and Del Monte purchased more than $200 million in pineapples from INPROTSA. After the Agreement expired in 2013, however, INPROTSA neither destroyed nor returned its MD-2 plant stock to Del Monte. Instead, it sold the MD-2 pineapples to third parties.

Del Monte initiated an arbitration against INPROTSA in the International Court of Arbitration of the International Chamber of Commerce (ICC) in

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[1] Commercial pineapples are not grown from "seeds" in the ordinary sense of the word. They are grown by planting the leaves from the crown of the pineapple fruit or by planting seedlings that grow out of the pineapple plant's stem. The term "pineapple seeds" thus refers collectively to crowns or seedlings that can be planted in the soil to produce new plants. It is in this sense we use the term "seeds" in this Opinion.

Miami. Del Monte alleged that INPROTSA breached the Agreement and converted its plant stock, for which Del Monte sought specific performance, injunctive relief, and damages. INPROTSA responded by arguing—among other things—that because Del Monte did not exclusively own the MD-2 variety, which INPROTSA contended was a condition precedent to its obligations under the Agreement, INPROTSA was not obligated to sell exclusively to Del Monte or return its MD-2 plant stock. INPROTSA also contended it was fraudulently induced to enter the Agreement by Del Monte's false representation that it had exclusive ownership of the MD-2 variety.

The arbitration tribunal issued its award (the Award) on June 10, 2016. In a thorough opinion, to which there was a dissent,[2] the tribunal ruled in favor of Del Monte on its claim that INPROTSA breached the Agreement. Specifically, the tribunal concluded that Del Monte's exclusive ownership of the MD-2 variety (as against third parties) was not a condition precedent to INPROTSA's contractual obligation to return or destroy the plants derived from seeds Del Monte provided at no cost under the Agreement. Thus, INPROTSA breached the Agreement by selling, rather than returning or

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[2] The dissenting arbitrator would have ruled that INPROTSA was no longer obligated to sell exclusively to Del Monte or cease its MD-2 production once Del Monte relinquished its claim to exclusive ownership of the MD-2 pineapple as part of the settlement in the Dole Litigation. The dissenting arbitrator also did not agree with either the majority's damages award or its grant of injunctive relief.

destroying, the pineapples it derived from Del Monte's seeds.

Further, the tribunal rejected INPROTSA's contention that it was fraudulently induced to enter into the Agreement. After considering the evidence provided by the parties, the tribunal first determined that Del Monte's claim to exclusive ownership of the MD-2 was not fraudulent, because it was based on Del Monte's reasonable belief at the time that it had a proprietary interest grounded in its commercial development of the MD-2—regardless of whether it held a patent on the variety.[3] The fact that Del Monte subsequently renounced any broader rights to exclusive ownership of the MD-2 as against third parties did not render any prior representations knowingly false.

The tribunal also found that the Agreement's statement regarding exclusive ownership of the MD-2 was not a unilateral *representation* proffered by Del Monte; rather, it was a joint *stipulation*, accepted as true by sophisticated parties with knowledge of both the pineapple industry and the contested nature of Del Monte's claim to a proprietary interest in the MD-2. And even if it were a false representation, INPROTSA could not reasonably have relied on it

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[3] INPROTSA's arguments on appeal rely heavily on Magistrate Judge Simonton's conclusion, in the context of a discovery dispute in the Dole Litigation, that Del Monte sought to mislead growers in Costa Rica by sending out threatening letters implying it held a patent on the MD-2. *See* USDC Doc. 1 at 155–57. The tribunal specifically found, however, that "there is no evidence or allegation that Del Monte represented to INPROTSA that Del Monte held a patent or a trademark on the MD-2 hybrid." USDC Doc. 1 at 113. INPROTSA points to no record evidence refuting that finding.

because INPROTSA knew Del Monte's claim to exclusive ownership was contested when it entered into the Agreement.

Finally, the tribunal determined INPROTSA was aware of the falsity of any purported representation by at least 2002, after which INPROTSA ratified the Agreement:

> [INPROTSA] cannot blow cold and hot at the same time: enjoy the benefits of the Agreement for 12 years in which it never raised Del Monte's supposed fraudulent conduct, particularly after the Settlement Agreement putting an end to the [Dole] Litigation in 2002 . . . , but then seek to liberate itself under Florida law from contractual stipulations it freely and knowingly accepted to be bound by and enforce[d].

USDC Doc. 1 at 119–20.

The tribunal thus awarded Del Monte specific performance, injunctive relief, damages, interest, costs, and attorney's fees. More specifically, it required INPROTSA to either return or destroy 93% of the MD-2 vegetative materials on its plantation—which the tribunal found were attributable to the seeds provided by Del Monte. It also enjoined INPROTSA from selling 93% of its MD-2 pineapples to third parties until it complied with its obligation to destroy or return the MD-2 plant stock. With respect to damages, the tribunal determined that, under Florida law, Del Monte was entitled to disgorgement of the money INPROTSA received by selling the MD-2 pineapples to third parties in breach of the Agreement.

The tribunal recognized that the evidence on which a damages award might be fashioned was limited. Although it had evidence concerning INPROTSA's gross sales in 2014, it lacked any information concerning INPROTSA's sales in 2015. Likewise, because INPROTSA refused to provide any information about its profits or expenses during discovery, it was impossible to calculate an award based solely on the *profits* INPROTSA improperly obtained after the expiration of the Agreement. Thus, the tribunal concluded that, under the circumstances and evidence provided, Del Monte's damages should be limited to $26.133 million— 93% of INPROTSA's MD-2 sales in 2014. In other words, the tribunal refused to speculate about either INPROTSA's 2015 sales (which would have increased damages) or INPROTSA's expenses (which would have decreased damages).

INPROTSA promptly moved for correction and clarification of the Award under Article 35 of the ICC rules governing the arbitration, ostensibly seeking "to correct or clarify certain clerical, computational or typographical errors, or errors of a similar nature, contained in the Award."[4] USDC 1 at 190.

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[4] The record does not appear to contain a copy of the ICC Arbitration Rules in force at the time. We note, however, that the current version of the ICC Arbitration Rules provides in Article 36(1) that "the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award." ICC Arbitration Rules, http://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_36 (last visited Feb. 13, 2019). We further note that INPROTSA later contended that the tribunal's power to correct the award was grounded in Article

INPROTSA contended the tribunal's damages award was erroneous as a matter of Florida law because Del Monte did not prove the amount of INPROTSA's profits from the breach. According to INPROTSA, because Del Monte provided evidence of only INPROTSA's revenues,[5] Del Monte's claim for damages should have been dismissed in its entirety.

The tribunal denied the motion, concluding it lacked authority to revisit the merits of its substantive damages award. The tribunal reasoned that Article 35 of the governing ICC Arbitration Rules allowed only for interpretation of the Award or correction of errors of the clerical, computational, and typographical variety. Article 35 did not provide authority to revise an Award on the merits, based on an alleged substantive error of law.

II. PROCEDURAL HISTORY

In September 2016, INPROTSA filed a petition to vacate the Award in Florida's Eleventh Judicial Circuit. Del Monte then removed the petition to the United States District Court for the Southern District of Florida, citing 9 U.S.C. §§ 203 and 205, as well as 28 U.S.C. §§ 1331 and 1441. Soon after, Del Monte filed a combined motion to dismiss the petition to vacate and cross-petition to confirm the Award. INPROTSA, in turn, filed a motion to

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36. *See* USDC Doc. 70 at 7 ("ICC Article 36(2) explicitly granted the right to seek such a correction.").

[5] INPROTSA's motion for clarification did not address the tribunal's finding that INPROTSA refused to provide Del Monte with evidence of its expenses during discovery. Nor did it explain why such a finding would not be relevant to Del Monte's purported burden to prove the amount of INPROTSA's profits under Florida law.

remand the proceeding to state court, contending the district court lacked subject-matter jurisdiction.

The district court granted Del Monte's motion to dismiss the petition to vacate and denied INPROTSA's motion to remand, reasoning that INPROTSA's petition to vacate—which was based on Florida law—failed to assert a valid defense under the Convention, as required by our opinion in *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998). The district court did not, however, expressly address Del Monte's cross-petition to confirm the Award. As a result, there were some procedural detours that need not be recounted in detail here. Ultimately, on limited remand from this Court, the district court granted Del Monte's cross-petition and confirmed the Award in a reasoned opinion.[6]

The district court concluded it had subject-matter jurisdiction under 9 U.S.C. § 203. It then determined that INPROTSA failed to establish a valid ground for resisting confirmation under the Convention.[7] Specifically, as is relevant to the issues on appeal, the district court rejected INPROTSA's contention that the Award was procured through fraud. The district court first noted there were no arguments being raised that the arbitration process itself "was

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[6] Del Monte's motion to dismiss this appeal (Doc. 19), which is premised on the district court's purported failure to resolve its cross-petition, is therefore DENIED as moot.

[7] Alternatively, the district court ruled that INPROTSA was barred from asserting defenses to confirmation because it did not timely serve notice of its petition to vacate, as required under 9 U.S.C. § 12.

fraudulent, that the arbitration tribunal acted fraudulently, or that the final award was procured by fraud." USDC Doc. 47 at 9. It continued by noting that the tribunal reviewed the evidence submitted by INPROTSA and determined there was no fraud. INPROTSA could not avoid the Award simply because it disagreed with the arbitrator's conclusion on that issue. Otherwise, "any losing party raising a fraud defense in an international arbitration[] could relitigate the issue in federal court." *Id.* at 10. Such a result itself would violate this country's public policy favoring arbitration as an efficient means for resolving disputes. In the end, the district court concluded that "[t]he arbitration panel's consideration and ruling on the merits of INPROTSA's fraud defense does not violate the most basic notions of morality and justice requiring this Court to deny confirmation of the arbitral award." *Id.* (quotation omitted).

INPROTSA timely appealed the district court's orders both dismissing its petition to vacate the Award and granting Del Monte's cross-petition to confirm the Award.

III. DISCUSSION

A. Jurisdiction[8]

INPROTSA contends the district court lacked subject-matter jurisdiction over its petition to vacate. Its argument is based on a narrow reading of 9 U.S.C. § 203, the jurisdictional provision in the statute implementing the Convention (the

[8] We review de novo issues concerning federal subject-matter jurisdiction. *Caron v. NCL (Bahamas), Ltd.*, 910 F.3d 1359, 1363 (11th Cir. 2018).

Convention Act), which provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203.

According to INPROTSA, we have recognized only two causes of action under the Convention—an action to compel arbitration and an action to confirm an arbitral award. *See Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1286 (11th Cir. 2015) ("To implement the . . . Convention, the Convention Act provides two causes of action in federal court for a party seeking to enforce arbitration agreements covered by the . . . Convention: (1) an action to *compel arbitration* in accord with the terms of the agreement, 9 U.S.C. § 206, and (2) at a later stage, an action to *confirm an arbitral award* made pursuant to an arbitration agreement, 9 U.S.C. § 207."); *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1262–63 (11th Cir. 2011) (same); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1290–91 (11th Cir. 2004) (same). Thus, INPROTSA contends, because a petition to vacate an arbitral award is not one of the causes of action expressly provided by the Convention Act, it cannot be "[a]n action or proceeding falling under the Convention." 9 U.S.C. § 203. Consequently, a federal court cannot exercise subject-matter jurisdiction over a petition to vacate an arbitral award, even if the award itself falls under the Convention.

INPROTSA nevertheless concedes the district court had *removal* jurisdiction, because the subject matter of its petition to vacate "relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. § 205. But removal jurisdiction is not

necessarily coterminous with subject-matter jurisdiction. *See Cogdell v. Wyeth*, 366 F.3d 1245, 1248 (11th Cir. 2004). Thus, INPROTSA contends we must distinguish between the purportedly narrow scope of subject-matter jurisdiction provided under § 203 and the broader scope of removal jurisdiction provided under § 205. In other words, INPROTSA insists that, because Congress used different language in §§ 203 and 205, we must assume it intended to require federal courts to remand any "action[s] or proceeding[s]" removed under § 205 that are not covered under § 203, which INPROTSA contends is limited to those actions or proceedings expressly provided by the Convention Act. We disagree.

As an initial matter, INPROTSA incorrectly assumes that the Convention Act provides an exhaustive list of actions and proceedings "falling under the Convention." 9 U.S.C. § 203. The Convention Act is merely a statute by which the Convention has been implemented in this country. *See* 9 U.S.C. § 201. The relevant inquiry under § 203 is not whether a particular action or proceeding is provided by the Convention Act; it is whether the "action or proceeding fall[s] under the Convention" itself. 9 U.S.C. § 203. And our observation in previous cases cited by INPROTSA—that the Convention Act appears to expressly recognize only two causes of action—does not resolve that inquiry. *See Escobar*, 805 F.3d at 1286[9]; *Lindo*, 652 F.3d at 1262–63; *Czarina*, 358 F.3d at 1290–91.

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[9] *Escobar* implicitly undermines INPROTSA's interpretation of § 203 in this case. In *Escobar*, the defendant removed an action under § 205 *before* filing a motion to compel the case to

We note further that INPROTSA acknowledged before the district court that, "[a]lthough the Convention does not provide grounds for vacatur, *it explicitly permits such proceedings* in the countries in which an award was rendered or whose law served as governing law for the arbitration." USDC Doc. 15 at 8 (emphasis added) (citing the Convention art. V(1)(e)). Thus, INPROTSA must concede the Convention, at the very least, contemplates and expressly recognizes vacatur proceedings.

But even if we assume vacatur proceedings are not expressly provided by the Convention, INPROTSA's argument fails because it incorrectly assumes an action or proceeding cannot *fall under* a particular body of law unless the action or proceeding is *provided by* that body of law. In other words, even if the Convention does not expressly provide a cause of action for vacatur, an action seeking vacatur nevertheless could fall under the Convention. Indeed, many causes of action are provided by statutes entirely distinct from the body of law on which the action is based. For example, a cause of action to vindicate certain constitutional rights is provided by statute (*e.g.*, 42 U.S.C. §§ 1981, 1983). But it would be odd to suggest that an action or proceeding seeking to vindicate constitutional rights would not fall under the purview of the Constitution, merely because the Constitution itself did not expressly provide the cause of action.

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arbitration. 805 F.3d at 1282–83. Under INPROTSA's reasoning, there would have been no jurisdiction, because the case removed from state court was neither an action to compel arbitration nor an action to confirm an arbitral award.

In our view, an action or proceeding "fall[s] under the Convention," for purposes of § 203, when it involves subject matter that—at least in part—is subject to the Convention, such that the action or proceeding implicates interests the Convention seeks to protect. In practice, this will require that the case sufficiently relate to an agreement or award subject to the Convention, such that the agreement or award "could conceivably affect the outcome of the case." *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1324 (11th Cir. 2018).

Our interpretation of § 203 is reinforced by our understanding of § 205. Section 205 demonstrates congressional intent to provide a federal forum for resolving issues implicating the Convention. We have explained that "[r]emoval jurisdiction can be considered a 'species' of subject matter jurisdiction in that it defines a federal court's power to hear a particular kind of case—one that was originally brought in a state court." *Cogdell*, 366 F.3d at 1248. We agree with INPROTSA that removal jurisdiction is not necessarily coincident with original subject-matter jurisdiction. *See id.*; *see also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S. Ct. 2411, 2417 (2007) ("[W]hen a district court remands a properly removed case because it nonetheless lacks subject-matter jurisdiction, the remand is covered by [28 U.S.C.] § 1447(c) and thus shielded from review by § 1447(d)."). But the situations in which removal and subject-matter jurisdiction do not line up typically involve circumstances distinct from those presented in this case.

Indeed, district courts sometimes lack removal jurisdiction, despite having original subject-matter jurisdiction, because other requirements of the removal statute are not satisfied. *See Cogdell*, 366 F.3d at 1248. Likewise, subsequent events might divest a district court of its subject-matter jurisdiction, even though the case was properly removed under the applicable removal statute. *See Powerex*, 551 U.S. at 232, 127 S. Ct. at 2417. For example, a case may be removed on the basis of diversity jurisdiction and then remanded later on the ground that diversity jurisdiction was subsequently destroyed by the addition of a non-diverse party. *See id.* at 231–32, 127 S. Ct. at 2417. But INPROTSA has provided no examples of a circumstance in which a court had removal jurisdiction over a case for which it lacked subject-matter jurisdiction *at the time of removal*.

In this case, Congress specifically authorized removal "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. § 205. It would make little sense for Congress to specifically authorize removal of cases over which the federal courts would lack subject-matter jurisdiction. It would likewise be puzzling for Congress to provide a federal forum for a party seeking to determine whether an international arbitral award should be enforced, while requiring the same litigants to remain in state court to determine whether the same award should be vacated under principles controlled largely by federal law.

It makes far more sense to conclude Congress intended § 203 to be read consistently with § 205 as conferring subject-matter jurisdiction over actions or proceedings sufficiently related to agreements or awards subject to the Convention. We therefore conclude the district court had subject-matter jurisdiction over INPROTSA's petition to vacate the Award.[10]

B. Dismissal of the Petition to Vacate[11]

INPROTSA next challenges the district court's summary dismissal of its petition to vacate on the ground that it did not raise any of the defenses outlined by the Convention. INPROTSA contends the district court erred by applying our holding in *Industrial Risk*—that the defenses enumerated by the Convention provide the exclusive grounds for

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[10] We express no opinion on whether the Convention Act implicitly permits a petition to vacate an international arbitral award filed directly in the district court. *See* 9 U.S.C. § 204 ("An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States."). It is enough, in this case, to say that the district court had subject-matter jurisdiction over INPROTSA's petition once it was removed from state court under § 205.

[11] In reviewing denials of motions to vacate arbitration awards, we review "the district court's findings of fact for clear error and its legal conclusions *de novo*." *Bamberger Rosenheim, Ltd., (Israel) v. OA Dev., Inc., (U.S.)*, 862 F.3d 1284, 1286 (11th Cir. 2017).

vacating an award subject to the Convention.[12] *See* 141 F.3d at 1446. According to INPROTSA, *Industrial Risk* was both wrongly decided and abrogated by the Supreme Court's subsequent decision in *BG Group PLC v. Republic of Argentina*, 572 U.S. 25, 44–45, 134 S. Ct. 1198, 1212–13 (2014).

As an initial matter, INPROTSA's contention that *Industrial Risk* was wrongly decided is irrelevant to our analysis of whether we are bound by its holding that the Convention provides the exclusive grounds for vacating an international arbitral award. *See United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) ("[A] panel cannot overrule a prior one's holding even though convinced it is wrong."). Under our rule concerning prior-panel precedent, "[w]e are bound by the holdings of earlier panels unless and until they are clearly overruled by this court *en banc* or by the Supreme Court." *Randall v. Scott*, 610 F.3d

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[12] INPROTSA also argued, in a single footnote in its opening brief, that the district court erred by "retroactively" applying our precedent to a petition removed from state court. In support, it cited a Florida case stating that state courts are not bound to follow opinions of the lower federal courts. Br. of Appellant. at 39 n.8 (citing *Pignato v. Great W. Bank*, 664 So. 2d 1011, 1015 (Fla. 4th DCA 1995)). But INPROTSA provides no argument or authority for the counterintuitive proposition that, in a non-diversity case removed from state court, a district court is free (much less required) to disregard the precedent of the court of appeals for the circuit in which that district court is located, on an issue to which federal law applies. By failing to sufficiently develop its argument on that issue in its opening brief, INPROTSA has abandoned it. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.").

701, 707 (11th Cir. 2010). The relevant inquiry, then, is whether *Industrial Risk* has been clearly overruled by the Supreme Court. It has not.

"To constitute an 'overruling' for the purposes of [the] prior panel precedent rule, the Supreme Court decision 'must be clearly on point.'" *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003)). Moreover, "the intervening Supreme Court case [must] actually abrogate or *directly* conflict with, as opposed to merely weaken, the holding of the prior panel." *Id.* (emphasis added). Nothing in *BG Group* directly conflicts with *Industrial Risk*.

In *BG Group*, the Supreme Court granted certiorari to address the narrow issue of whether a particular kind of decision by an arbitrator is entitled to deference. *See* 572 U.S. at 29, 134 S. Ct. at 1203–04 ("The question before us is whether a court of the United States, in reviewing an arbitration award made under [an investment treaty between the United Kingdom and Argentina], should interpret and apply the local litigation requirement *de novo*, or with the deference that courts ordinarily owe arbitration decisions."). The Court was not asked to decide whether the Convention provides the exclusive grounds for vacating awards subject to the Convention, the parties did not brief that issue, and the Court did not address that issue in its opinion.

Rather, the Court was asked to vacate the award on the ground that the arbitrators "exceeded their powers" within the meaning of 9 U.S.C. § 10(a)(4) of the Federal Arbitration Act (FAA)—a ground not specifically provided by the Convention. 572 U.S. at

44, 134 S. Ct. at 1212. The Court reviewed the award and refused to vacate it, concluding the arbitrators had not "exceeded their powers." 572 U.S. at 44–45, 134 S. Ct. at 1212–13. The Court's reasoning in refusing to vacate the award—that an asserted ground for vacatur under the FAA did not apply on the merits—does not *directly* conflict with *Industrial Risk*'s holding that such a ground would not have warranted vacatur because the ground is not enumerated in the Convention.

At most, the Supreme Court's analysis *indirectly* suggests that the Convention does not supply the exclusive grounds for vacating an international arbitral award. *See Bamberger Rosenheim, Ltd., (Israel) v. OA Dev., Inc., (U.S.)*, 862 F.3d 1284, 1287 n.2 (11th Cir. 2017) (noting the tension between *Industrial Risk* and *BG Group*). But that is not enough under our precedent to conclude *Industrial Risk* has been overruled. *See Kaley*, 579 F.3d at 1255. The district court thus did not err by dismissing the petition to vacate, because INPROTSA did not assert a valid defense under the Convention.[13]

But even if we were not bound by *Industrial Risk*, the petition to vacate would warrant denial. Of the original grounds cited in INPROTSA's petition, it asserts only three on appeal,[14] and none supports vacatur in this case.

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[13] INPROTSA conceded as much at oral argument, acknowledging it would lose on the vacatur issue to the extent *Industrial Risk* was not overruled. *See* Oral Argument at 10:25–10:44.

[14] INPROTSA's petition to vacate did not purport to rely on the FAA. Nevertheless, in response to Del Monte's motion to dismiss the petition, INPROTSA urged the district court to

INPROTSA first contends the tribunal exceeded its authority when it "rewrote the parties' agreement by reading out the 'as long as' language" which INPROTSA contends "condition[ed] INPROTSA's agreement not to sell to third-parties [on] Del Monte's 'exclusive ownership' of the MD-2 variety." Br. of Appellant at 41. INPROTSA's argument on this issue fails because the "as long as" language to which it refers,[15] found in the Agreement's *Segunda* (Second) clause, is ambiguous as to: (1) whether it modifies only INPROTSA's obligation to avoid selling to third parties; or (2) whether it also modifies INPROTSA's obligation to return or destroy the plants derived from Del Monte's MD-2 seeds upon termination of the Agreement. The obligation to return or destroy the plant stock derived from Del Monte's seeds is found in a different part of the Agreement's *Segunda* (Second) clause, and it is not

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consider its arguments that the tribunal exceeded its powers both under state law and the FAA, representing that the grounds on which they relied were the same under either body of law. *See* USDC Doc. 15 at 9 (citing 9 U.S.C. § 10). We therefore conclude INPROTSA did not waive its arguments under the FAA by failing to assert them first before the district court. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004).

[15] The tribunal based its decision on the original Agreement as written in Spanish. But the parties submitted conflicting translations of the Agreement's *Segunda* (Second) clause in English—neither of which was adopted by the tribunal. Under INPROTSA's version, the language on which it bases its argument states: "[*A*]*s long as* [Del Monte is] the exclusive owner[] of this variety, [INPROTSA] guarantees that it shall only sell the MD-2 fruit grown in its farm to [Del Monte] or to any of its affiliates, pursuant to the terms of this agreement." USDC Doc. 1 at 139 (emphasis added).

immediately preceded by the "as long as" qualifier.[16] *See* USDC Doc. 1 at 42–43 (Spanish), 126 (tribunal's interpretation), 139–40 (parties' competing translations).

It would make sense for Del Monte to impose these obligations independently. For example, it would be prudent to require INPROTSA to respect Del Monte's (purported) exclusive rights to the MD-2 variety, as against third parties, by requiring INPROTSA to refrain from selling MD-2 pineapples to such parties, "as long as" Del Monte maintained exclusive rights to the variety. It would also make perfect sense for Del Monte to impose an

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[16] According to INPROTSA's translation, the *Segunda* (Second) clause continues:

> [Del Monte] shall supply the MD-2 variety seed to [INPROTSA] in Buenos Aires de Puntarenas and at no cost. . . . Thus, [INPROTSA] acknowledges that the seed to be received in its farm is exclusively owned by [Del Monte], and it shall not make any use of it or of any other vegetative material derived or obtained from the planting to be developed, unless it has the prior written consent of [Del Monte]. In this regard, the only purpose of this pineapple purchase and sale agreement is the production of the MD-2 variety, for its exclusive sale to [Del Monte], and therefore, if for any reason [INPROTSA] ceases to sell this pineapple to [Del Monte], or in the event that the agreement is terminated for any reason and at any time, either before or at completion of its term, [INPROTSA] shall immediately cease production of this variety, pledging to destroy or return to [Del Monte] the vegetative material owned by it.

Id. at 139–40.

independent obligation on INPROTSA to avoid selling MD-2 pineapples derived from the seeds it provided to INPROTSA at no cost—regardless of whether it held exclusive rights in the variety as against third parties. Interpreting these obligations as independent would also be consistent with the tribunal's observation that INPROTSA's obligation to return or destroy the plant stock was acknowledged elsewhere in the contract without referring to Del Monte's exclusive ownership of the MD-2 variety. *See* USDC Doc. 1 at 122.

It does not matter whether the tribunal's interpretation is correct; it is enough to note that the "as long as" language on which INPROTSA relies does not unambiguously condition INPROTSA's obligation to destroy or return the plant stock derived from Del Monte's seeds on Del Monte's maintaining exclusive ownership of the variety as against third parties. And the tribunal at least arguably interpreted the contract. Thus, the tribunal did not exceed its authority. *See Wiregrass Metal Trades Council AFL-CIO v. Shaw Envt'l & Infrastructure, Inc.*, 837 F.3d 1083, 1088 (11th Cir. 2016) (holding that an arbitrator does not exceed its authority by incorrectly interpreting an ambiguous contractual provision); *Computer Task Grp., Inc. v. Palm Beach Cty.*, 782 So. 2d 942, 943 (Fla. 4th DCA 2001) ("Under federal authority, which would apply to the contract in this case, the test for whether an arbitrator exceeds his authority is whether the arbitrator had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrator correctly decided that issue.").

INPROTSA next contends the tribunal "exceeded its authority by imposing its own rough sense of justice by awarding damages far in excess of the amount allowed by Florida law." Br. of Appellant at 42. But the authorities on which INPROTSA relied to establish its contention that Florida law would not permit the award are not clearly on point—that is, they do not deal with a disgorgement award based on revenues where the defendant's profits could not be calculated because the defendant refused to provide evidence of its expenses during discovery. *See* USDC Doc. 1 at 33–34 (citing *HCA Health Serv's of Fla., Inc. v. Cyberknife Ctr. of Treasure Coast, LLC*, 204 So. 3d 469, 470–71 (Fla. 4th DCA 2016) (dealing with the measure of a plaintiff's expectation damages rather than the measure of a disgorgement award)). INPROTSA cited no authority holding that a disgorgement award under such circumstances would require speculation about the amount of the defendant's expenses.

Moreover, under Florida law, an arbitrator's mistake as to the correct measure of damages would not warrant vacatur. *See Commc'ns Workers of Am. v. Indian River Cty. Sch. Bd.*, 888 So. 2d 96, 99 (Fla. 4th DCA 2004) ("[T]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." (quoting Fla. Stat. § 682.13)); *Computer Task Grp.*, 782 So. 2d at 943 ("[T]he arbitrator had the authority to award damages under the contract. Even if he made an error of law in awarding some of the damages, a point we do not decide, we do not review his errors of law, if any.").

Lastly, INPROTSA contends the tribunal exceeded its authority by "refusing to apply the procedural rules the parties' [sic] had contracted for, i.e., ICC rules, permitting corrections of awards." Br. of Appellant at 42. But the tribunal, "comparatively more expert about the meaning of [its] own rule, [is] comparatively better able to interpret and to apply it." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85, 123 S. Ct. 588, 593 (2002). The tribunal did not exceed its power by reasonably construing its own rules as barring substantive reconsideration of the merits of its damages award.

Accordingly, the district court would not have erred by denying INPROTSA's petition to vacate, even if our holding in *Industrial Risk* were not binding.

C. Confirmation of the Award[17]

Finally, INPROTSA contends the Award should not have been confirmed, because the district court failed to consider the merits of INPROTSA's public-policy defenses.[18] Contrary to INPROTSA's assertion on this issue, the district court did, in fact, rule on the merits of its defenses. To the extent INPROTSA challenges the manner in which the district court

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[17] In reviewing a district court's confirmation of an arbitral award, we review its "findings of fact for clear error and its legal conclusions *de novo*." *Bamberger Rosenheim*, 862 F.3d at 1286.

[18] Because we affirm the district court's conclusions on the merits of INPROTSA's confirmation defenses, we need not address INPROTSA's contention that the district court erred by concluding INPROTSA was barred from asserting defenses to confirmation because of its alleged failure to timely serve notice of the petition to vacate.

addressed its fraud defense,[19] its argument lacks merit.

INPROTSA suggests that, because it asserted a public-policy defense based on fraud, the district court was required to disregard the arbitrator's findings and conduct its own inquiry into whether the agreement was fraudulently induced. From that premise, INPROTSA contends the district court should have concluded the Award was procured by fraud, based largely on a ruling Magistrate Judge Simonton made in the Dole Litigation.[20] We disagree.

INPROTSA's argument hinges on dicta from a footnote in the Supreme Court's opinion in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14, 94 S. Ct. 2449, 2457 n.14 (1974). In *Scherk*, the Supreme Court presumed without deciding that "the type of fraud alleged" in that case[21] "could be raised, under Art.

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[19] INPROTSA failed to develop arguments with respect to any of its other purported defenses to confirmation. Thus, any challenge to the district court's conclusions on those defenses is abandoned. *See Sapuppo*, 739 F.3d at 681.

[20] Magistrate Judge Simonton's finding, in the context of a discovery dispute to which INPROTSA was not a party, that Del Monte attempted to mislead certain Costa Rican growers (none of whom are alleged to have been INPROTSA) by sending out letters implying that it held a patent on the MD-2, does not establish that the Agreement between INPROTSA and Del Monte was fraudulently induced.

[21] The issue in *Scherk* was whether to apply the now overruled holding of *Wilko v. Swan*, 346 U.S. 427, 438, 74 S. Ct. 182, 188 (1953), that an agreement to arbitrate could not preclude a lawsuit alleging a violation of the Securities Act of 1933, to a lawsuit brought against a foreign party that alleged violations of Rule 10(b) of the Securities Exchange Act of 1934. *See Scherk*, 417 U.S. at 509–510, 94 S. Ct. at 2452–53. Thus, the "type of fraud alleged," with which the Supreme Court was

V of the Convention . . . in challenging the enforcement of whatever arbitral award [was] produced through arbitration." The Court further noted that "Article V(2)(b) of the Convention provides that a country may refuse recognition and enforcement of an award if 'recognition or enforcement of the award would be contrary to the public policy of that country.'" *Id.* (quoting the Convention art. V(2)(b)). Based on that language, INPROTSA contends it is entitled to re-litigate its fraud claim in federal court.

Even if we, like the Supreme Court in *Scherk*, were to presume without deciding that a defendant can assert a fraud-based public-policy defense to confirmation under the Convention, it would not allow for re-litigation of a fraudulent-inducement claim already determined through binding arbitration. If anything, public policy would require the federal courts to enforce the parties' agreement to arbitrate that claim. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04, 87 S. Ct. 1801, 1806 (1967) (explaining that, where an agreement to arbitrate is broad enough to encompass fraudulent-inducement claims, an arbitrator must resolve any claim that the entire contract—rather than just its arbitration clause—was fraudulently induced); *Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 995 (11th Cir. 2012) ("[S]ince the . . . allegations are more properly characterized as

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concerned in *Scherk*, was securities fraud. *See id*. at 519 n.14, 94 S. Ct. at 2457 n.14. We do not interpret *Scherk* as suggesting that an ordinary claim of fraudulent inducement, particularly one resolved through binding arbitration, would raise questions of public policy under the Convention.

relating to fraud in the inducement, the issue becomes one properly reserved for an arbitrator.").

Moreover, we have held in the context of the FAA that vacatur cannot be premised on a purported fraud known at the time of the arbitration. *See Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1015 n.16 (11th Cir. 1998) ("[T]he arbitrators had all the material information before them, a fact that precludes vacatur. . . ."), *overruled in part on other grounds by Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585, 128 S. Ct. 1396, 1403–04 (2008); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988) (holding that vacatur for fraud requires: (1) clear and convincing evidence; (2) that the fraud must not have been discoverable with due diligence prior to or during the arbitration; and (3) that the fraud materially relates to an issue in the arbitration); *see also A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir. 1992) ("[W]here the fraud or undue means is not only discoverable, but discovered and brought to the attention of the arbitrators, a disappointed party will not be given a second bite at the apple."). A fraud-based defense under the Convention could not possibly be broader than the fraud-based ground for vacatur expressly provided by the FAA. *See* 9 U.S.C. § 10(a)(1).

On the contrary, the public-policy defense under the Convention is very narrow. It "applies only when confirmation or enforcement of a foreign arbitration award would violate the forum state's most basic notions of morality and justice." *Bamberger Rosenheim*, 862 F.3d at 1289 n.4 (quoting *Ministry of Def. & Support for the Armed Forces of the Islamic*

Republic of Iran v. Cubic Def. Sys., Inc., 665 F.3d 1091, 1096–97 (9th Cir. 2011)). INPROTSA knew about the Dole Litigation at the time it contracted with Del Monte; therefore, enforcing the Award in this case does not offend public policy at all, much less meet the high threshold for such a defense to succeed under the Convention.

IV. CONCLUSION

The district court had jurisdiction over INPROTSA's petition to vacate the Award after it was removed from state court. The petition was appropriately dismissed for failing to assert a valid ground for vacatur, and the district court did not err by confirming the Award.[22]

AFFIRMED.

[22] Del Monte's motion for sanctions (Doc. 73) is DENIED because INPROTSA's appeal raises a number of non-frivolous challenges to the district court's orders.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17623-AA

INVERSIONES Y PROCESADORA TROPICAL INPROTSA, S.A., a Costa Rican Corporation,

Plaintiff-Appellant
Cross Appellee,

versus

DEL MONTE INTERNATIONAL GMBH, a Swiss Corporation,

Defendant-Appellee
Cross Appellant.

Appeals from the United States District Court
for the Southern District of Florida

Before: MARCUS and ROSENBAUM, Circuit Judges.

BY THE COURT:

The motion of Defendant-Appellee-Cross Appellant Del Monte International GMBH ("Del Monte") for a limited remand of this case is GRANTED.

Plaintiff-Appellant-Cross Appellee Inversiones y Procesadora Tropical INPROTSA, S.A. ("Inprotsa") has appealed from the district court's December 6, 2016 order, which granted Del Monte's motion to dismiss Inprotsa's petition to vacate an arbitration award. The court's order did not expressly address Del Monte's cross-petition to confirm the arbitration award. Del Monte filed a motion in the district court to clarify the order, asking the court to make clear whether it also intended to grant the cross-petition and confirm the award. In a February 9, 2017 order, the district court declined to rule on that motion, concluding that it lacked jurisdiction over the motion because Inprotsa had already filed this appeal. Del Monte now asks us to remand this case so that the district court can resolve the pending motion for clarification.

We express no opinion as to whether the district court's December 6 order resolved Del Monte's cross-petition to confirm the arbitration award. Whether or not it did so, this case is due to be remanded. On the one hand, if the order did in fact grant the cross-petition to confirm the award, then it is a final, appealable order. *See World Fuel Corp. v. Geithner,* 568 F.3d 1345, 1348 (11th Cir. 2009). In that case, Del Monte's motion for clarification was effectively a Rule 59(e) motion to alter or amend the judgment. *See* Fed. R. Civ. P. 59(e). As such, the motion must be resolved before we can exercise jurisdiction over the appeal. *See* Fed. R. App. P. 4(a)(4)(B). This is so even though Inprotsa's notice of appeal was filed before Del Monte's motion. *See Stansell v. Revolutionary Armed Forces of Colombia,* 771 F.3d 713, 745-46 (11th Cir. 2014). Notably, the district court's order of

February 9, 2017 did not resolve the motion for clarification; rather, that order expressly declined to do so.

On the other hand, if, as Del Monte urges, the December 6 order did not resolve the cross-petition to confirm, then the order is not final. *See Supreme Fuels Trading FZE v. Sargeant,* 689 F.3d 1244, 1245-46 (11th Cir. 2012). In that case, the order either is appealable as an interlocutory order, or it is not appealable. *See id.* If it is appealable as an interlocutory order, then the analysis is the same as if the order were final: we lack jurisdiction over the appeal until the district court resolves the motion for clarification. *See* Fed. R. Civ. P. 59(e); Fed. R. App. P. 4(a)(4)(B). By contrast, if the order did not resolve the cross-petition and is not appealable as an interlocutory order, then it is not appealable at all. *See* 28 U.S.C. § 1291.

In sum, in any event, this case is due to be remanded. Accordingly, we hereby remand this case to the district court, so that the court may resolve Del Monte's December 8, 2016 motion for clarification of the court's December 6 order. After the district court resolves that motion, the case should be returned to this Court for further proceedings.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 16-24275-CIV-MORENO

INVERSIONES Y PROCESADORA TROPICAL INPROTSA, S.A., a Costa Rican Corporation,

Petitioner,

vs.

DEL MONTE INTERNATIONAL GMBH, a Swiss Corporation,

Respondent.

_____/

ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION FOR REMAND

THIS CAUSE came before the Court upon Motion to Dismiss and Cross-Petition to Confirm Final Arbitral Award (**D.E. 6**), filed on **October 11, 2016** and Plaintiff's Motion for Remand (**D.E. 13**) filed on **October 21, 2016**.

THE COURT has considered the motions, the responses, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion to dismiss the Petition to Vacate Final Arbitral Award is GRANTED and the Petition to Vacate Final Arbitral Award is DISMISSED. In the Eleventh Circuit, the only grounds to vacate a non-domestic arbitration award are set forth in Article V of the New York Convention. *See Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998). Petitioner does not rely upon any of the New York Convention defenses in seeking to set aside the final arbitral award. Rather, Petitioner seeks to vacate the award based on Florida law governing domestic arbitrations, which is not the case here. Both sides here are foreign corporations and the dispute involves property located abroad and performance or enforcement abroad. Having failed to raise any New York Convention defenses, the Court grants the motion to dismiss the petition to vacate the arbitral award. *See also Costa v. Celebrity Cruises, Inc.*, 768 F. Supp. 2d 1237 (S.D. Fla. 2011) (dismissing petition to vacate arbitral award). It is

ADJUDGED that all other pending motions are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 5th of December 2016.

/s/ *Federico A. Moreno*
FEDERICO A. MORENO
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

Counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 16-24275-CIV-MORENO

INVERSIONES Y PROCESADORA TROPICAL INPROTSA, S.A., a Costa Rican Corporation,

Petitioner,

vs.

DEL MONTE INTERNATIONAL GMBH, a Swiss Corporation,

Respondent.
_____/

ORDER GRANTING CROSS-PETITION TO CONFIRM THE ARBITRAL AWARD

On December 6, 2016, this Court dismissed Inversiones y Procesadora Tropical INPROTSA, S.A.'s petition to vacate an Arbitral Award. INPROTSA, S.A. appealed that order to the Eleventh Circuit Court of Appeals. The Eleventh Circuit issued a limited remand requesting this Court rule on Del Monte International GmbH's cross-petition to confirm the arbitral award. The issues presented on the limited remand include whether the Court has jurisdiction, whether the cross-petition should be confirmed on the merits, and whether INPROTSA is timely raising affirmative defenses to the cross-petition. Having reviewed the issues, the Court finds there is jurisdiction over the cross-petition to confirm

the arbitral award. This Court also finds INPROTSA has not overcome the presumption in favor of confirming arbitration awards and INPROTSA's arguments are untimely. Accordingly, the Court grants Del Monte's cross-petition to confirm the arbitral award.

THIS CAUSE came before the Court upon the Cross-Petition to Confirm the Arbitral Award.

THE COURT has considered the motion, the response, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the cross-petition to confirm the arbitral award is GRANTED.

I. PROCEDURAL BACKGROUND

Petitioner, Inversiones y Procesadora Tropical INPROTSA, S.A., filed a petition to vacate an arbitral award in state court. Respondent, Del Monte International, GmbH, removed the case to this Court on October 7, 2016. Petitioner moved for remand to state court. Respondent moved to dismiss the petition to vacate the arbitral award and requested the Court confirm the arbitral award.

On December 6, 2016, the Court entered an Order dismissing the petition to vacate and denying all pending motions as moot. The Petitioner appealed and the Respondent moved for clarification as to whether the dismissal of the petition to vacate meant that the Court was confirming the arbitral award. Due to INPROTSA's Notice of Appeal, the Court denied the motion for clarification because it was divested of jurisdiction.

The Eleventh Circuit issued a Limited Remand requesting this Court decide whether to confirm the arbitration award.

II. FACTUAL BACKGROUND

The underlying arbitration arose out of an exclusive Pineapple Sales Agreement entered between the parties in May 2001. Del Monte claimed INPROTSA breached the agreement by selling pineapples originating from Del Monte's seeds to competitors. In March 2014, Del Monte commenced the arbitration proceedings before the International Court of Arbitration of the International Chamber of Commerce as required by the Agreement's arbitration clause. On June 10, 2016, the arbitrator issued a final award in favor of Del Monte in a 48-page order. In addition to specific performance and injunctive relief, the arbitrator ordered INPROTSA to pay Del Monte $26,133,000, plus pre and post-award interest, arbitral costs in the amount of $650,000 and attorney's fees in the amount of $2,507,440.54.

III. LEGAL ANALYSIS

A. Jurisdiction

Although this case is on a limited remand to decide whether to confirm the arbitral award, the Petitioner is raising the issue of whether the federal court has subject matter jurisdiction under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). "Federal courts operate under a continuing obligation to inquire into the existence of subject matter jurisdiction whenever it may be lacking. That obligation continues through every stage of a case

even if no party raises the issue." *RES-GA Cobblestone, LLC. v. Blake Constr. & Dev., LLC,* 718 F.3d 1308, 1313 (11th Cir. 2013).

Respondent removed this case on the basis that Section 203 of the Federal Arbitration Act provides jurisdiction. That section states lain action or proceeding falling under the New York Convention shall be deemed to arise under the the (sic) laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203.

Petitioner, INPROTSA, contends this Court does not have original subject matter jurisdiction over its petition to vacate, arguing that § 203 of the Federal Arbitration Act provides for jurisdiction only over petitions to compel arbitration or to confirm an arbitral award, and not over petitions to vacate an arbitral award. In making this argument, Petitioner relies on *Ingaseosas Int'l Co. v. Aconcagua Investing, Ltd.,* No. 09-23078-CIV-HUCK, 2011 WL 500042 at *3 (S.D. Fla. Feb. 10, 2011), where Judge Huck found there was no subject matter jurisdiction over a motion to vacate an arbitral award pursuant to the New York Convention. *Id.* (citing *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.,* 126 F.3d 15, 22 (2d Cir. 1997)). The reasoning underlying the *Ingaseosas* decision is that the New York Convention explicitly regulates only two types of proceedings — (1) for an order confirming an arbitration award (9 U.S.C. § 207) and (2) for orders compelling arbitration pursuant to an agreement (9 U.S.C. § 206).

In *Ingaseosas,* the court distinguished *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH,* 141 F.3d 1434, 1441 (11th Cir. 1998), where the Eleventh Circuit heard an appeal regarding a motion to vacate an arbitral award pursuant to the Convention. *Ingaseosas* states: "it is evident from the Eleventh Circuit's decision, and the utter absence of discussion regarding its subject matter jurisdiction to hear a motion to vacate pursuant to the Convention, that the Eleventh Circuit's subject matter jurisdiction derived not from the motion to vacate, but from the underlying motion to confirm the arbitral panel's award." *Ingaseosas,* 2011 WL 5000042 at *4 (distinguishing *Industrial Risk Insurers).*

Following *Ingaseosas* [1], however, the Eleventh Circuit in *Costa v. Celebrity Cruises, Inc.,* 470 F. App'x. 726 (11th Cir. 2012) affirmed the district court's denial of a motion to vacate an arbitration award. In the underlying case, *Costa v. Celebrity Cruises, Inc.,* 768 F. Supp. 2d 1237 (S.D. Fla. 2011), Judge Ungaro exercised jurisdiction over a motion to vacate an arbitration award finding the New York Convention and Chapter 2 of the Federal Arbitration Act exclusively govern arbitration between a citizen of the United States and citizens of foreign country. *Id.* (citing 9 U.S.C. § 207). In *Costa,* the district

[1] The Eleventh Circuit affirmed *Ingaseosas* on other grounds, finding that subsequent events made it impossible for the district court to grant effective relief "and thus the case is moot." *Ingaseosas Intl Co. v. Aconcagua Investing, Ltd,* 479 F. App'x 955, 958 (11th Cir. 2012). The Eleventh Circuit did not address *Ingaseosas* finding that subject matter jurisdiction was lacking over vacatur actions.

court determined that the only potential grounds for vacating the arbitration award are the seven defenses enumerated in the New York Convention. Finding none of the defenses applied, Judge Ungaro dismissed the motion to vacate the arbitration award. In *a per curiam* opinion, the Eleventh Circuit affirmed.

Despite *Costa,* the Petitioner INPROTSA is asking this Court to follow *Ingaseosas* and find there is no subject matter jurisdiction to hear a motion to vacate an arbitration award. It seems INPROTSA is asking the Court to split hair — finding jurisdiction is only proper if asked to confirm an award, but not if there is a motion to vacate the same award. INPROTSA also relies on an earlier Eleventh Circuit case, *Czarina LLC v. WF Poe Syndicate,* 358 F.3d 1286 (11th Cir. 2004), which held the New York Convention applied solely to those actions seeking to compel arbitration pursuant to 9 U.S.C. § 206 or to confirm an arbitration award pursuant to 9 U.S.C. § 207. In *Czarina,* however, the party seeking confirmation of the arbitral award failed to present proof of a written arbitration agreement, which was a prerequisite to any action to enforce an arbitral award pursuant to the New York Convention. The Eleventh Circuit found that because a party failed to meet the agreement-in-writing prerequisite, the district court lacked subject matter jurisdiction to enforce the award. *Czarina* does not stand for the limiting proposition that INPROTSA is urging the Court to adopt—that the Federal Arbitration Act only provides original jurisdiction over actions to compel arbitration and actions to confirm arbitration awards under the New York Convention. In

Czarina, the Eleventh Circuit did not analyze whether a federal court has subject matter jurisdiction under § 203 to adjudicate motions to vacate an arbitration award falling under the Convention.

Many federal courts, including this Court, have found jurisdiction over vacatur actions under § 203 of the New York Convention. *Cvoro v. Carnival Corp.,* 2017 WL 216020 (S.D. Fla. Jan. 17, 2017) (finding vacatur actions are proper under the New York Convention and that a district court has subject matter jurisdiction under 9 U.S.C. § 203 to consider a petition to vacate under the Convention); *Scandinavian Reinsurance Co., Ltd. v. Saint Paul Fire and Marine Ins. Co.,* 668 F.3d 60, 71 (2d Cir. 2012) ("the district court had subject matter jurisdiction under 9 U.S.C. § 203, which provides federal jurisdiction over actions to confirm or vacate an arbitral award that is governed by the [New York Convention]."); *Oilmar Co., Ltd. v. Energy Transport Ltd.,* No. 03—CV-1121, 2014 WL 8390659, *2 (D. Conn. Oct. 6, 2014) ("Subject-matter jurisdiction is conferred by section 203 of title 9 of the United States Code, which provides federal jurisdiction over actions to confirm or vacate an arbitration award governed by the [New York Convention.]"); *Zurich Am. Ins. Co. v. Team Tankers, A.S.,* No. 13-2945803-CIV, 2014 WL 2945803, *3 (S.D.N.Y. June 30, 2014), *aff'd* 811 F.3d 584 (2d Cir. 2016) ("Federal courts have subject matter jurisdiction over petitions to confirm or vacate awards that are governed by the New York Convention."). Consistent with this precedent, the Court finds there is federal jurisdiction over this petition to vacate, which was

removed to this Court and the subsequent cross-petition to confirm the arbitral award.

B. Cross-Petition to Confirm Arbitral Award

On December 6, 2016, this Court dismissed the petition to vacate the arbitral award finding that Petitioner did not assert any grounds to vacate a non-domestic arbitration award as set forth in Article V of the New York Convention. The petition was based on Florida law. Although the Court dismissed the petition to vacate the arbitral award, the Court did not explicitly rule on the pending cross-petition to confirm it. INPROTSA appealed the dismissal of the petition to vacate and the Respondent Del Monte sought clarification of the Court's order regarding the cross-petition to confirm. The Court denied the motion for clarification finding the notice of appeal divested it of jurisdiction. The Eleventh Circuit granted a limited remand for the Court to consider the merits of the cross-petition to confirm the arbitral award.

1. Legal Standard

To obtain recognition and enforcement of a final arbitration award, Del Monte must supply: (a) the duly authenticated original award or a duly certified copy thereof; (b) the original agreement referred to in article II or a duly certified copy thereof. Art. IV(1), New York Convention. Del Monte provided certified copies of the Final Award and Agreement in its petition to confirm the arbitration award. The Court must "confirm the [Final Award] unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said [New York] Convention" under Article V. 9 U.S.C. § 207; *Indus. Risk Insurers,* 141 F.3d at 1442. Pursuant to

the New York Convention, "[r]ecognition and enforcement of the award may be refused, at the request of the party whom it is invoked" if the "recognition or enforcement of the award would be contrary to the public policy" of the country where confirmation is sought. Article V(2)(b), New York Convention.

There is a "high threshold required to overturn an arbitration award under the [New York Convention]." *Sural v. Gov't of Trinidad & Tobago,* No. 15-22825-CIV-MOORE, 2016 WL 4264061, at *5 (S.D. Fla. Aug. 12, 2016). "Because the [Federal Arbitration] Act creates a 'presumption in favor of confirming arbitration awards,' judicial review of arbitral decisions is limited and a court 'must give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *Gerson v. UBS Fin. Serv. Inc.,* No.12-22087-CIV-MORENO, 2012 WL 3962374, *2 (S.D. Fla. Sept. 10, 2012) (internal citations omitted). An arbitral tribunal's findings and rulings "may not be subject to interference" simply because the losing party believes the tribunal reached the wrong result, or even if the tribunal did indeed reach the wrong result. *Chelsea Football Club, Ltd. v. Mutu,* 849 F. Supp. 2d 1341, 1344 (S.D. Fla. 2012). "An arbitrator's result may be wrong; it may appear unsupported; it may appear poorly reasoned; it may appear foolish. Yet, it may not be subject to court interference.'" *Id.* (quoting *Delta Air Lines v. Air Line Pilots Ass'n, Int'1,* 861 F.2d 665, 670 (11th Cir. 1988)). The Eleventh Circuit has also noted that "'[t]he Convention's public policy defense should be construed narrowly' and applies where enforcement

[of] the award 'would violate the forum state's most basic notions of morality and justice.'" *Costa,* 768 F. Supp. 2d at 1241 (quoting *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L 'Industrie du Papier,* 508 F.2d 969, 974 (2d Cir. 1974)).

2. Summary of the Parties' Positions

INPROTSA opposes the confirmation of the arbitral award arguing that the underlying premise of the arbitrator's decision is based on fraud. In the agreement, the parties "stipulated" that Del Monte owned the MD-2 pineapple variety. INPROTSA claims it only stipulated to that fact because Del Monte had falsely represented that it owned the MD-2 variety in letters to Costa Rican growers. A year after INPROTSA and Del Monte entered the agreement containing the stipulation, Judge Simonton in litigation between Del Monte and Dole held that Del Monte "knew that it did not have a patent on the MD-2 pineapple." Specifically, Judge Simonton found that the letters were "attempts by Del Monte to mislead growers in Costa Rica and in other places into believing that Del Monte had a United States patent on the MD-2 pineapple when Del Monte knew that it did not have one," and implying it would take legal action to protect the allegedly patented MD-2 pineapples. In this case, INPROTSA claims the arbitration award should not be confirmed because it is based on a stipulation that Del Monte procured through fraud. The arbitral tribunal had the benefit of Judge Simonton's findings in the Del Monte-Dole litigation.

INPROTSA also objects to the confirmation of the arbitral award claiming its due process rights were violated when the arbitrator failed to give probative

value to a letter from Fernando Baeza Melendez, a key witness who did not testify before the tribunal. Fernando Baeza Melendez, formerly INPROTSA's general manager, signed the agreement with Del Monte. Baeza's letter to the arbitral tribunal states he was unaware that Del Monte was not the exclusive owner of the MD-2 variety. Rather than rely on Baeza's letter, the arbitrator relied on the other witness testimony in issuing its award.

INPROTSA's final objection is that the award is contrary to notions of justice because it requires INPROTSA to return or destroy INPROTSA's own property. The arbitral tribunal concluded that INPROTSA acquired title to MD-2 seeds that Del Monte had provided over the years pursuant to the parties' agreement.

In response to INPROTSA's allegations of fraud, Del Monte argues the arbitral tribunal specifically held that the parties' agreement was not procured by fraud. Second, Del Monte asserts the arbitral tribunal admitted the Baeza letter into evidence over its objections, but found that the letter lacked probative value and was contradicted by live witness testimony. Third, Del Monte argues the arbitral tribunal's legal conclusion regarding the restrictive convenant does not amount to a violation of public policy. Finally, Del Monte argues that INPROTSA's petition to vacate is time-barred by the three-month statute of limitation imposed by 9 U.S.C. § 12 and therefore, all of INPROTSA's defenses to confirmation are also barred as a matter of law.

3. Is INPROTSA's fraud defense a valid public policy defense?

There is no argument that the two-year arbitration process was fraudulent, that the arbitration tribunal acted fraudulently, or that the final award was procured by fraud. Rather, the parties dispute whether the arbitration tribunal addressed the question of whether the parties' underlying agreement was procured by fraud. A review of the arbitration tribunal's decision shows that it addressed the issue. It stated: "there is no evidene (sic) of actual conduct by Del Monte toward INPROTSA aimed at fraudulently inducing [INPROTSA] to enter into the Agreement or causing it to accept clauses . . .." Final Award at ¶ 61. The arbitration panel also was aware of the Del Monte-Dole litigation. It stated: "The mere fact that INPROTSA was aware of the Del Monte-Dole litigation while it was deciding to enter or not into the Agreement shows that issues regarding Del Monte's proprietary rights on the MD-2 hybrid were controverted. . . Therefore, Del Monte did not fraudulently misrepresent the exclusive nature of such rights." Final Award at ¶ 51.

INPROTSA is asking this Court to rehash a losing argument before the arbitration panel. Given the legal standard and the summary proceedings to confirm arbitral awards, the Court will not overrule the arbitrator. It is well-settled that limited and circumscribed review of arbitral awards advances the "policy of expedited judicial action because they prevent a party who has lost in the arbitration process from filing a new suit in federal court and forcing relitigation of those issues." *Booth v. Home*

Publishing, Inc., 902 F.2d 925, 932 (11th Cir. 1990). The arbitration panel's consideration and ruling on the merits of INPROTSA's fraud defense does not violate the "most basic notions of morality and justice" requiring this Court to deny confirmation of the arbitral award. The arbitration tribunal ruled on the merits and simply disagreed with INPROTSA that there was fraud in the inducement. To rule otherwise would mean that any losing party raising a fraud defense in an international arbitration, could relitigate the issue in federal court. That certainly violates the presumption in favor of confirming arbitral awards.

4. Did the arbitration tribunal's treatment of the letter violate INPROTSA's due process rights?

INPROTSA argues the award is contrary to public policy because its due process rights were violated when the arbitral tribunal did not attribute probative value to Baeza's letter. INPROTSA elected not to call Baeza as a witness, even though he negotiated and signed the agreement on behalf of the company. The procedural rules governing the arbitration required the parties to file a witness list in advance of the hearing. INPROTSA did not list Baeza. The rules prohibited parties from submitting witness testimony unless they pre-filed the direct testimony in the form of a signed and sworn witness declaration. Baeza did not sign a witness declaration. All witnesses that presented evidence by way of declaration had to be presented for cross-examination at the final hearing. Baeza was not made available for cross-examination. INPROTSA attached Baeza's letter to another witness'

declaration, which was given to the arbitration tribunal with the final pre-hearing brief.

In another procedural order, the arbitral tribunal retained the discretion to decide the admissibility and weight of evidence. At the final hearing, Del Monte objected to the admissibility of the Baeza letter because Baeza was not listed as a witness, did not submit a sworn declaration, and the letter was unsworn and not authenticated. The arbitration tribunal overruled Del Monte's objections and admitted the letter. The arbitral tribunal attributed it no probative value as it conflicted with other witness testimony that was live at the final hearing. Specifically in the arbitral award, the tribunal relied on live testimony from INPROTSA's production manager, Jose Nixon Jimenez Castillo, who said that he was aware of the Del Monte/Dole litigation, which the pineapple industry followed, and that he specifically discussed the litigation with members of INPROTSA's management including Baeza. *See* Arbitral Award at ¶ 51 (D.E. 6-4).

Evidentiary decisions are not grounds to refuse confirmation of an arbitral award under the New York Convention's public policy defense. *See Unrvneshprom State Foreign Econ. Enter. v. Tradeway, Inc.,* No. 95-CV-10278, 1996 WL 107285, at *6 (S.D.N.Y. Mar. 12, 1996) (stating an arbitrator's "refusal to consider evidence of [a party's] counterclaims" does not "satisfy the narrow scope of the Article V(2)(b) defense under the United States public policy."); *see also Costa,* 768 F. Supp. 2d at 1241 ("Erroneous legal reasoning or misapplication of the law is generally not a violation of public policy within the meaning of the . .

.Convention.") (quoting *Karaha Bodas Co., LLC v. Perussahaan Pertambanguan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 306 (5th Cir. 2004)). The Court will not second-guess the decision of the arbitral tribunal to attribute no probative value to Baeza's letter and overrules INPROTSA's objection on this issue.

5. Does the award's requirement that INPROTSA return property violate notions of justice?

INPROTSA argues the award is contrary to "notions of justice" because it requires it to return its property to Del Monte. Although the arbitral tribunal found that INPROTSA had title to the seeds, it required INPROTSA to return or destroy the seeds. In so holding, the arbitral tribunal enforced the agreement's restrictive covenants and found legal "title" irrelevant. The parties contractually agreed to restrict the use of the property, the seeds, regardless of who technically owns them. INPROTSA had agreed to the restrictive covenants in exchange for Del Monte supplying INPROTSA with 61 million scarce MD-2 seeds.

The Court overrules INPROTSA's objection finding that the arbitral tribunal was giving effect to the parties' agreement. Interpreting the language of the agreement's restrictive covenants is within the legal authority of the arbitral tribunal and is not contrary to "notions of justice."

6. Does the statute of limitations preclude INPROTSA from opposing the cross-petition to confirm?

Del Monte raises the argument that the statute of limitations precludes INPROTSA from opposing the

cross-petition to confirm the arbitral award. Petitioner filed the petition within the three-month window, but Del Monte claims it was not served within that time-frame. 9 U.S.C. § 12 provides that "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." In this case, INPROTSA says it provided notice to the attorney of record, which is sufficient under the Federal Arbitration Act.

The service requirements for a petition to vacate an arbitral award will differ depending on whether the prevailing party is a resident of the district or a non-resident. 9 U.S.C. § 12. Del Monte is a Swiss corporation, with a principal place of business in Monaco. INPROTSA does not dispute that it failed to serve its petition to vacate pursuant to Rule 4, Fed. R. Civ. P., as required by this Court for a "nonresident." *Americatel El Salvador, S.A. de C. V. v. Compania de Telecomunicaciones de El Salvador, S.A. de C.V.,* No. 07-21940-CIV-MORENO, 2007 WL 2781057, *1-2 (S.D. Fla. Sept. 19, 2007) (holding service by FedEx and without a summons was insufficient under 9 U.S.C. § 12 and Rule 4, Fed. R. Civ. P.).

INPROTSA argues that Del Monte, a Swiss corporation with its headquarters in Monaco, is deemed a "resident" under 9 U.S.C. § 12 because it participated in an arbitration final hearing in Miami, Florida, citing *Possehl, Inc. v. Shanghai Hia Xing Shipping,* No. 00-CV-5157, 2001 WL 214234 (S.D.N.Y. Mar. 1, 2001), and *Escobar v. Shearson Lehman Hutton, Inc.,* 762 F. Supp. 461 (D.P.R. 1991).

The Court declines to follow *Possehl* and *Escobar*.[2] *See Americatel El Salvador, S.A.,* 2007 WL 2781057 at *1-2; *Technologists, Inc. v. Mir's Ltd.,* 725 F. Supp. 2d 120, 122, 125-27 (D.D.C. 2010) (despite arbitration being conducted in Washington, D.C., holding that petition to vacate international arbitral award must be served pursuant to Rule 4 to comply with the nonresident provision of 9 U.S.C. § 12); *see also Belz v. Morgan Stanley Smith Barney, LLC,* No. 13-CV-636, 2014 WL 897048, *4-7 (M.D. Fla. Mar. 6, 2014) (holding in a removed case from state court that motion to vacate arbitral award was time-barred due to failure to strictly comply with service requirements under 9 U.S.C. § 12, and that actual notice through email to counsel was insufficient to cure the defect).

In this case, INPROTSA filed the petition to vacate within the three-month limitations period, but did not timely serve the petition. Having found that INPROTSA failed to effect timely service, the question then is whether the failure to timely serve bars INPROTSA now "from raising the alleged invalidity of the awards as a defense in opposition to a motion . . . to confirm the award." *Cullen v. Paine, Webber, Jackson & Curtis, Inc.,* 863 F.2d 851, 854 (11th Cir. 1989). In *Cullen,* the Eleventh Circuit barred a party opposing confirmation of an arbitral agreement from raising affirmative defenses, where that party failed to move to vacate the award within the limitations period. *Id.* Although INPROTSA

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[2] Moreover, unlike the adverse party in *Escobar*, which had a subsidiary that conducted regular business in the district, Del Monte does not have a subsidiary in Florida. *Escobar* is, therefore, inapposite.

filed the petition to vacate within the three-month period limitations period, *Cullen's* reasoning applies to bar INPROTSA from raising affirmative defenses to the cross-petition for confirmation of the arbitral award.

To summarize the Court's conclusions, INPROTSA's affirmative defenses to confirmation of the arbitral award do not overcome the legal presumption in favor of confirming arbitral awards. Even if the Court were to find INPROTSA's objections meritorious, this Court finds the objections untimely.

DONE AND ORDERED in Chambers at Miami, Florida, this 1st of May 2017.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of record

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO.:_____

INVERSIONES Y PROCESADORA TROPICAL INPROTSA, S.A., a Costa Rican Corporation,

Petitioner,

vs.

DEL MONTE INTERNATIONAL GMBH, a Swiss Corporation,

Respondent.
_____/

NOTICE OF REMOVAL

Respondent, DEL MONTE INTERNATIONAL GMBH (hereinafter, "Del Monte"), files this Notice of Removal pursuant to 9 U.S.C. § 203, 9 U.S.C. § 205, 28 U.S.C. § 1331 and 28 U.S.C. § 1441 and removes to this Court the civil action captioned *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte International GmbH*, Case No. 2016-23517 CA 01 (25), originally filed in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. The grounds for removal are as follows:

The State Court Action

1. Petitioner, INVERSIONES Y PROCESADORA TROPICAL INPROTSA, S.A. (hereinafter, "INPROTSA"), filed a civil action captioned *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte International GmbH*, Case No. 2016-23517 CA 01 (25), in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, on September 9, 2016 (hereinafter, the "State Court Action"), which is embraced by this district and division. Pursuant to 28 U.S.C. §1446(a), attached as Exhibit "A" to this Notice of Removal is a copy of the Petition to Vacate Final Arbitral Award filed in the State Court Action (together with all exhibits), which constitutes all of the process, pleadings, and orders filed in the State Court Action. Del Monte has not been served with a summons or copy of the Petition to Vacate Final Arbitral Award in accordance with 9 U.S.C. § 12 or Rule 4, Fed. R. Civ. P., as of the date of this Notice of Removal.

2. The State Court Action concerns INPROTSA's petition to vacate a final international arbitral award falling under, and governed by, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, the "New York Convention"), 9 U.S.C. § 201, *et seq*.[1] The Eleventh Circuit has held that international arbitral awards falling under the New York Convention are governed by federal law and that federal courts have subject matter jurisdiction to enforce such awards:

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[1] A copy of the Final Arbitral Award is attached as Ex. 6 to the Petition to Vacate Final Arbitral Award.

> The New York Convention is incorporated into federal law by the [Federal Arbitration Act], which governs the enforcement of arbitration agreements, and of arbitral awards made pursuant to such agreements, in federal and state courts. *See Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 269-73, 115 S.Ct. 834, 837-39, 130 L.Ed.2d 753 (1995). *Chapter 2 of the Act, 9 U.S.C. §§ 201-208, mandates the enforcement of the New York Convention in United States courts*. *See* 9 U.S.C. § 201.

Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1440 (11th Cir. 1998) (emphasis supplied).

Removal Jurisdiction

3. "[A] federal district court must have both removal jurisdiction [under 9 U.S.C. § 205] and subject matter jurisdiction [under 9 U.S.C. § 203] in order to preside over a case removed from state court" under the New York Convention. *Holzer v. Mondadori*, 2013 WL 1104269, *6 (S.D.N.Y. Mar. 14, 2013); *accord Infuturia Global Ltd. v. Sequus Pharm., Inc.*, 631 F.3d 1133, 1135 n. 1 (9th Cir. 2011) (same).

4. Removal of the State Court Action is proper under 9 U.S.C. § 205, which provides that a state court action or proceeding relating to an arbitration award falling under the New York Convention may be removed at any time to federal court:

> Where the subject matter of an action or proceeding pending in a State court

> relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding....

The State Court Action filed by INPROTSA indisputably relates to an arbitral award falling under the New York Convention. The arbitral award is between citizens of foreign states[2] and "envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202; *Industrial Risk Insurers*, 141 F.3d at 1441 ("arbitral awards not 'entirely between citizens of the United States' [are] "non-domestic" for purposes of Article I of the Convention" and are governed by the New York Convention). State court actions which seek to vacate an arbitral award governed by the New York Convention are properly removed under 9 U.S.C. § 205. *E.g., Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 863 F. Supp. 2d 351, 356 (S.D.N.Y. 2012) (removal of state court action that "attempt[s] to vacate the Arbitration Decision" was proper under 9 U.S.C. § 205).

Removal of the State Court Action is also proper under 28 U.S.C. § 1441, which provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States

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[2] INPROTSA is a Costa Rican corporation with its principal place of business in Costa Rica. Del Monte is a Swiss corporation with its principal place of business in Switzerland.

for the district and division embracing the place where such action is pending." A U.S. district court would have original jurisdiction over the Petition to Vacate Final Arbitral Award because such claim "fall[s] under the [New York] Convention," 9 U.S.C. § 203, and "aris[es] under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331. *See discussion infra* ¶ 5.

Subject Matter Jurisdiction

5. This Court has subject matter jurisdiction over the Petition to Vacate Final Arbitral Award pursuant to 9 U.S.C. § 203. Section 203 states that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States... shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203.

An action to vacate an arbitral award is deemed to be an action or proceeding falling under the New York Convention over which a federal district court has subject matter jurisdiction pursuant to 9 U.S.C. § 203. *Costa v. Celebrity Cruises, Inc.*, 768 F. Supp. 2d 1237, 1240 (S.D. Fla. 2011) (holding that district court has jurisdiction under 9 U.S.C. § 203 to consider petition to vacate arbitral award governed by New York Convention), *aff'd*, 470 F. App'x 726 (11th Cir. 2012); *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71 (2d Cir. 2012) ("the district court had subject-matter jurisdiction under 9 U.S.C. § 203, which provides federal jurisdiction over actions *to confirm or vacate an arbitral award* that is governed by the Convention on the Recognition and Enforcement of

Foreign Arbitral Awards (the 'New York Convention')") (emphasis supplied); *Zurich Am. Ins. Co. v. Team Tankers A.S.*, 2014 WL 2945803 (S.D.N.Y. Jun. 30, 2014), *aff'd*, 811 F.3d 584 (2d Cir. 2016) (district court had subject matter jurisdiction pursuant to 9 U.S.C. § 203 over action filed in district court to vacate arbitral award governed by New York Convention); *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*, 659 F. Supp. 2d 631, 634-35 (E.D. Pa. 2009) (district court has subject matter jurisdiction under 9 U.S.C. § 203 to hear action to vacate arbitral award governed by New York Convention), *aff'd*, 400 F. App'x 654 (3d Cir. 2010); *Spector v. Torenberg*, 852 F. Supp. 201, 205-06 (S.D.N.Y. 1994) (in action filed in district court to vacate arbitral award governed by New York Convention, district court held that it had jurisdiction under 9 U.S.C. § 203); *Kolel Beth Yechiel Mechil of Tartikov*, 863 F. Supp. at 356 ("Since federal courts have subject matter jurisdiction over actions seeking to vacate arbitral awards entered in the United States and within the scope of the Convention, *see Scandinavian*, 668 F.3d at 71, the Court would have had subject matter jurisdiction over the Trust Defendants' suit had it initially been filed in federal court."); *Holzer*, 2013 WL 1104269, at *6 ("section 203 of the FAA provides the requisite statutory grant of jurisdiction ... to actions to compel, confirm, or vacate an arbitral award"). *See also Gonsalvez v. Celebrity Cruises, Inc.*, 750 F.3d 1195, 1197 n.1 (11th Cir. 2013) ("we assume without deciding that the Convention permits" actions to vacate arbitration awards); *Industrial Risk Insurers*, 141 F.3d at 1440 ("Chapter 2 of the Act, 9 U.S.C. §§ 201-208,

mandates the enforcement of the New York Convention in United States courts.").[3]

Facts Supporting Jurisdiction

6. The following facts existed at the time of the filing of this Notice of Removal and when the State Court Action was commenced in the Florida state court:

a. A Final Arbitral Award dated June 10, 2016 was issued by the International

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[3] The district court in *Ingaseosas Int'l Co. v. Aconcagua Investing Ltd*., 2011 WL 500042 (S.D. Fla. Feb. 10, 2011), *aff'd on other grounds*, 479 F. App'x 955 (11th Cir. 2012), held that a federal district court does not have subject matter jurisdiction over an action originally filed in federal district court to vacate an arbitral award governed by the New York Convention. *Id*. at *5. The Eleventh Circuit affirmed the district court's dismissal in *Ingaseosas*, not because it found an absence of subject matter jurisdiction, but "upon a different ground" that rendered "the case [as] moot." *Ingaseosas Int'l Co. v. Aconcagua Investing Ltd*., 479 F. App'x 955, 959 (11th Cir. 2012). Moreover, the district court decision in *Ingaseosas* was decided before *Costa v. Celebrity Cruises, Inc*., 768 F. Supp. 2d 1237, 1240 (S.D. Fla. 2011), *aff'd*, 470 F. App'x 726 (11th Cir. 2012), in which the district court held that it had jurisdiction under 9 U.S.C. § 203 to consider a petition to vacate arbitral award governed by New York Convention. The district court decision in *Ingaseosas* was also decided before the Second Circuit's holding in *Scandinavian Reinsurance, Co. Ltd. v. Saint Paul Fire & Marine Ins. Co*., 668 F.3d 60, 71 (2d Cir. 2012), which expressly held that a federal district court has subject matter jurisdiction over "actions to confirm or vacate an arbitral award that is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention')." *Id.* at 71. *See also Gonsalvez v. Celebrity Cruises, Inc*., 750 F.3d 1195 (11th Cir. 2013) (the Eleventh Circuit holding that "we assume without deciding that the Convention permits" actions to vacate arbitration awards).

Court of Arbitration of the International Chamber of Commerce in Case No. 20097/RD in favor of Del Monte and against INPROTSA. A copy of the Final Arbitral Award is attached as Ex. 6 to the Petition to Vacate Final Arbitral Award. The arbitration was conducted in Miami, Florida. *See* Final Arbitral Award, at 5, § I(aa). INPROTSA moved for correction and clarification of the Final Arbitral Award, which was denied in its entirety by the Arbitral Tribunal on August 6, 2016. *See* Decision, attached as Ex. 12 to Petition to Vacate. Both INPROTSA and Del Monte are foreign corporations.

b. Pursuant to Paragraph 122 of the Final Arbitral Award, the Arbitral Tribunal ordered INPROTSA to pay Del Monte damages in the sum of US $26,133,000.00, arbitral costs of US $650,000.00, and legal representation costs and fees of US $2,507,440.54, for a total amount of US $29,290,440.54, plus pre-award and post-award interest. The Arbitral Tribunal also awarded Del Monte permanent injunctive relief and ordered INPROTSA to specifically perform certain covenants in the parties' agreement. *Id*.

Removal Is Timely

7. This Notice of Removal is timely filed in accordance with 9 U.S.C. § 205, which provides that "an action or proceeding pending in a State court

[that] relates to an arbitration agreement or award falling under the Convention" may be removed to federal court "at any time" before the trial of the underlying state court action. Since no trial of the State Court Action has been set or taken place, this Notice of Removal is timely under 9 U.S.C. § 205.

The Notice of Removal is also timely under 28 U.S.C. §1446(b)(1) since it was filed "within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." Because the State Court action was filed on September 9, 2016, this Notice of Removal is timely under 28 U.S.C. §1446(b)(1).

8. As of the date of this Notice of Removal, Del Monte has not been served with a summons or copy of the Petition to Vacate Final Arbitral Award.

Compliance with 28 U.S.C. §1446(d)

9. Pursuant to 28 U.S.C. §1446(d), this Notice of Removal was served upon counsel for Plaintiff, and a copy of this Notice of Removal will be concurrently filed with the Clerk of Court of the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. The giving of such notice to the State Court "shall effect the removal and the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d).

10. Del Monte reserves the right to amend, supplement or correct this Notice of Removal as permitted by law.

Dated: October 7, 2016

Respectfully submitted,

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Attorneys for Respondent, Del Monte International GmbH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of October 2016 I electronically filed the foregoing document with the Clerk of Court by using the CM/ECF system. I further certify that the foregoing is being served this day upon all counsel of record or pro se parties identified in the following Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ Brian J. Stack
Brian J. Stack, Esq.

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[*Via email and U.S. mail*]

APPENDIX F

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(New York, 1958)

UNITED NATIONS

The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the General Assembly. It plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. UNCITRAL legislative texts address international sale of goods; international commercial dispute resolution, including both arbitration and conciliation; electronic commerce; insolvency, including cross-border insolvency; international transport of goods; international payments; procurement and infrastructure development; and security interests. Non-legislative texts include rules for conduct of arbitration and conciliation proceedings; notes on organizing and conducting arbitral proceedings; and legal guides on industrial construction contracts and countertrade.

Further information may be obtained from:

UNCITRAL secretariat, Vienna International Centre,
P.O. Box 500, 1400 Vienna, Austria

Telephone: (+43-1) 26060-4060
Telefax: (+43-1) 26060-5813

Internet: www.uncitral.org
E-mail: uncitral@uncitral.org

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UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(New York, 1958)

UNITED NATIONS
New York, 2015

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The publication reproduced here is a revised version in which part three of the original publication of 2009 has been removed.

Contents

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Introduction

Objectives

Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings, e.g. another State's procedural laws are applied.

The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

Key provisions

The Convention applies to awards made in any State other than the State in which recognition and enforcement is sought. It also applies to awards "not considered as domestic awards". When consenting to be bound by the Convention, a State may declare that it will apply the Convention *(a)* in respect to

awards made only in the territory of another Party and *(b)* only to legal relationships that are considered "commercial" under its domestic law.

The Convention contains provisions on arbitration agreements. This aspect was covered in recognition of the fact that an award could be refused enforcement on the grounds that the agreement upon which it was based might not be recognized. Article II (1) provides that Parties shall recognize written arbitration agreements. In that respect, UNCITRAL adopted, at its thirty-ninth session in 2006, a Recommendation that seeks to provide guidance to Parties on the interpretation of the requirement in article II (2) that an arbitration agreement be in writing and to encourage application of article VII (1) to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

The central obligation imposed upon Parties is to recognize all arbitral awards within the scheme as binding and enforce them, if requested to do so, under the lex fori. Each Party may determine the procedural mechanisms that may be followed where the Convention does not prescribe any requirement.

The Convention defines five grounds upon which recognition and enforcement may be refused at the request of the party against whom it is invoked. The grounds include incapacity of the parties, invalidity of the arbitration agreement, due process, scope of the arbitration agreement, jurisdiction of the arbitral tribunal, setting aside or suspension of an award in the country in which, or under the law of which, that

award was made. The Convention defines two additional grounds upon which the court may, on its own motion, refuse recognition and enforcement of an award. Those grounds relate to arbitrability and public policy.

The Convention seeks to encourage recognition and enforcement of awards in the greatest number of cases as possible. That purpose is achieved through article VII (1) of the Convention by removing conditions for recognition and enforcement in national laws that are more stringent than the conditions in the Convention, while allowing the continued application of any national provisions that give special or more favourable rights to a party seeking to enforce an award. That article recognizes the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention.

Entry into force

The Convention entered into force on 7 June 1959 (article XII).

How to become a party

The Convention is closed for signature. It is subject to ratification, and is open to accession by any Member State of the United Nations, any other State which is a member of any specialized agency of the United Nations, or is a Party to the Statute of the International Court of Justice (articles VIII and IX).

Optional and / or mandatory declarations and notifications

When signing, ratifying or acceding to the Convention, or notifying a territorial extension under article X, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Party to the Convention. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration (article I).

Denunciation / Withdrawal

Any Party may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of the receipt of the notification by the Secretary-General (article XIII).

Part one

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION, NEW YORK, 20 MAY–10 JUNE 1958

Excerpts from the Final Act of the United Nations Conference on International Commercial Arbitration[1]

"1. The Economic and Social Council of the United Nations, by resolution 604 (XXI) adopted on 3 May 1956, decided to convene a Conference of Plenipotentiaries for the purpose of concluding a convention on the recognition and enforcement of foreign arbitral awards, and to consider other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes.

[...]

"12. The Economic and Social Council, by its resolution convening the Conference, requested it to conclude a convention on the basis of the draft convention prepared by the Committee on the Enforcement of International Arbitral Awards, taking into account the comments and suggestions made by Governments and non-governmental organizations, as well as the discussion at the twenty-first session of the Council.

"13. On the basis of the deliberations, as recorded in the reports of the working parties and in the records of the plenary meetings, the Conference prepared and opened for signature the Convention

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[1]The full text of the Final Act of the United Nations Conference on International Commercial Arbitration (E/CONF.26/8Rev.1) is available at http://www.uncitral.org

on the Recognition and Enforcement of Foreign Arbitral Awards which is annexed to this Final Act.

[...]

"16. In addition the Conference adopted, on the basis of proposals made by the Committee on Other Measures as recorded in its report, the following resolution:

"*The Conference*,

"*Believing* that, in addition to the convention on the recognition and enforcement of foreign arbitral awards just concluded, which would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measures should be taken in this field,

"*Having considered* the able survey and analysis of possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes prepared by the Secretary-General (document E/CoNF.26/6),

"*Having given particular attention* to the suggestions made therein for possible ways in which interested governmental and other organizations may make practical contributions to the more effective use of arbitration,

"*Expresses the following views* with respect to the principal matters dealt with in the note of the Secretary-General:

"1. It considers that wider diffusion of information on arbitration laws, practices and facilities contributes materially to progress in commercial arbitration; recognizes that work has already been

done in this field by interested organizations,[2] and expresses the wish that such organizations, so far as they have not concluded them, continue their activities in this regard, with particular attention to coordinating their respective efforts;

"2. It recognizes the desirability of encouraging where necessary the establishment of new arbitration facilities and the improvement of existing facilities, particularly in some geographic regions and branches of trade; and believes that useful work may be done in this field by appropriate governmental and other organizations, which may be active in arbitration matters, due regard being given to the need to avoid duplication of effort and to concentrate upon those measures of greatest practical benefit to the regions and branches of trade concerned;

"3. It recognizes the value of technical assistance in the development of effective arbitral legislation and institutions; and suggests that interested Governments and other organizations endeavour to furnish such assistance, within the means available, to those seeking it;

"4. It recognizes that regional study groups, seminars or working parties may in appropriate circumstances have productive results; believes that consideration should be given to the advisability of the convening of such meetings by the appropriate regional commissions of the United Nations and other bodies, but regards it as important that any such action be taken with careful regard to avoiding

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[2]For example, the Economic Commission for Europe and the Inter-American Council of Jurists.

duplication and assuring economy of effort and of resources;

"5. It considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, notes the work already done in this field by various existing organizations,[3] and suggests that by way of supplementing the efforts of these bodies appropriate attention be given to defining suitable subject matter for model arbitration statutes and other appropriate measures for encouraging the development of such legislation;

"*Expresses the wish* that the United Nations, through its appropriate organs, take such steps as it deems feasible to encourage further study of measures for increasing the effectiveness of arbitration in the settlement of private law disputes through the facilities of existing regional bodies and non-governmental organizations and through such other institutions as may be established in the future;

"*Suggests* that any such steps be taken in a manner that will assure proper coordination of effort, avoidance of duplication and due observance of budgetary considerations;

"*Requests* that the Secretary-General submit this resolution to the appropriate organs of the United Nations."

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[3]For example, the International Institute for the Unification of Private Law and the Inter-American Council of Jurists.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. 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 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.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise

between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

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.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

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

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

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

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

not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

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

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

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

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

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

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) *(e)*, the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the

same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations.

Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Part two

RECOMMENDATION REGARDING THE INTERPRETATION OF ARTICLE II, PARAGRAPH 2, AND ARTICLE VII, PARAGRAPH 1, OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

General Assembly resolution 61/33 of 4 December 2006

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

Recalling its resolution 40/72 of 11 December 1985 regarding the Model Law on International Commercial Arbitration,[1]

Recognizing the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures,

Believing that revised articles of the Model Law on the form of the arbitration agreement and interim measures reflecting those current practices will significantly enhance the operation of the Model Law,

Noting that the preparation of the revised articles of the Model Law on the form of the arbitration agreement and interim measures was the subject of

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[1]*Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

Believing that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,[2] is particularly timely,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the revised articles of its Model Law on International Commercial Arbitration on the form of the arbitration agreement and interim measures, the text of which is contained in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session,[3] and recommends that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

2. *Also expresses its appreciation* to the United Nations Commission on International Trade Law for

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[2]United Nations, *Treaty Series*, vol. 330, No. 4739.

[3] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17).

formulating and adopting the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,[2] the text of which is contained in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;[3]

3. *Requests* the Secretary-General to make all efforts to ensure that the revised articles of the Model Law and the recommendation become generally known and available.

64th plenary meeting
4 December 2006

RECOMMENDATION REGARDING THE INTERPRETATION OF ARTICLE II, PARAGRAPH 2, AND ARTICLE VII, PARAGRAPH 1, OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, DONE IN NEW YORK, 10 JUNE 1958, ADOPTED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON 7 JULY 2006 AT ITS THIRTY-NINTH SESSION

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways

and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,[4] has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the

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[4]United Nations, *Treaty Series*, vol. 330, No. 4739.

enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,[5] as subsequently revised, particularly with respect to article 7,[6] the UNCITRAL Model Law on Electronic Commerce, [7] the UNCITRAL Model Law on Electronic Signatures [8] and the United Nations Convention on the Use of Electronic Communications in International Contracts,[9]

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement

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[5]*Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18.

[6] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

[7] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

[8] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

[9] General Assembly resolution 60/21, annex.

governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

APPENDIX G

United States Code
Title 9. Arbitration
Chapter 1. General Provisions

9 U.S.C.A. § 1

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

(July 30, 1947, c. 392, 61 Stat. 670.)

9 U.S.C.A. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

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.

(July 30, 1947, c. 392, 61 Stat. 670.)

9 U.S.C.A. § 3

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for

the stay is not in default in proceeding with such arbitration.

(July 30, 1947, c. 392, 61 Stat. 670.)

9 U.S.C.A. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure,

neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.)

9 U.S.C.A. § 5

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be

provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

(July 30, 1947, c. 392, 61 Stat. 671.)

9 U.S.C.A. § 6

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

(July 30, 1947, c. 392, 61 Stat. 671.)

9 U.S.C.A. § 7

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this

title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

(July 30, 1947, c. 392, 61 Stat. 672; Oct. 31, 1951, c. 655, § 14, 65 Stat. 715.)

9 U.S.C.A. § 8

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

(July 30, 1947, c. 392, 61 Stat. 672.)

9 U.S.C.A. § 9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10

and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, c. 392, 61 Stat. 672.)

9 U.S.C.A. § 10

§ 10. Same; vacation; grounds; rehearing
Effective: May 7, 2002

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or

corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, c. 392, 61 Stat. 672; Pub.L. 101-552, § 5, Nov. 15, 1990, 104 Stat. 2745; Pub.L. 102-354, § 5(b)(4), Aug. 26, 1992, 106 Stat. 946; Pub.L. 107-169, § 1, May 7, 2002, 116 Stat. 132.)

9 U.S.C.A. § 11

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, c. 392, 61 Stat. 673.)

9 U.S.C.A. § 12

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

(July 30, 1947, c. 392, 61 Stat. 673.)

9 U.S.C.A. § 13

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment

thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

(July 30, 1947, c. 392, 61 Stat. 673.)

9 U.S.C.A. § 14

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

(July 30, 1947, c. 392, 61 Stat. 674.)

9 U.S.C.A. § 15

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

(Added Pub.L. 100-669, § 1, Nov. 16, 1988, 102 Stat. 3969.)

9 U.S.C.A. § 16

§ 16. Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub.L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4670, § 15; renumbered § 16, Pub.L. 101-650, Title III, § 325(a)(1), Dec. 1, 1990, 104 Stat. 5120.)

United States Code
Title 9. Arbitration
Chapter 2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards

9 U.S.C.A. § 201

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

(Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692.)

9 U.S.C.A. § 202

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable

relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

(Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692.)

9 U.S.C.A. § 203

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

(Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692.)

9 U.S.C.A. § 204

§ 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or

proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

(Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692.)

9 U.S.C.A. § 205

§ 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

(Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692.)

9 U.S.C.A. § 206

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

(Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 693.)

9 U.S.C.A. § 207

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. 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.

(Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 693.)

9 U.S.C.A. § 208

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

(Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 693.)