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Authority of United States Bankruptcy Courts to Stay International Arbitral Proceedings

Melinda J. Massoff*

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Melinda J. Massoff

Abstract

Part I analyzes the decision of a U.S. bankruptcy court in *Springer Penguin* that stayed an international arbitration proceeding. Part II examines the Tribunal's denial of the stay in the *Behring* award. Part III suggests that the Tribunal's reasoning in deying applicability of the stay is consistent with recent U.S. policy favoring international arbitration of commercial disputes. This Note concludes that the interests involved in fostering international commercial arbitration mandate that once an arbitration clause is found to be enforceable, the arbitration should not be stayed by a petition in a U.S. bankruptcy court.

AUTHORITY OF UNITED STATES BANKRUPTCY
COURTS TO STAY INTERNATIONAL
ARBITRAL PROCEEDINGS

INTRODUCTION

When a United States party files for bankruptcy all pending actions in which it is involved are stayed pursuant to the United States Bankruptcy Code¹ (the "Code"). This automatic stay vests exclusive jurisdiction over the debtor's financial affairs in the bankruptcy court.² There is no clear authority, however, as to whether a petition for bankruptcy by a U.S. party to an international arbitration stays the arbitration proceeding.³ The United States Supreme Court, recognizing the importance of arbitration to international commerce, has held that international arbitration agreements are to be enforced even if the underlying claim involves a matter of significant domestic policy.⁴ However, in *In re Springer-Penguin*,⁵ a U.S. bankruptcy court recently granted an order staying a foreign arbitration proceeding that was commenced before the U.S. debtor filed for bankruptcy.⁶ In contrast, in *Behring International, Inc. v. Islamic Republic Iranian Air Force*,⁷ the Iran-United States Claims

1. See *infra* note 33 and accompanying text.

2. See *infra* note 32 and accompanying text.

3. Enforcement of international arbitration agreements and awards is regulated by Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (accessed to by U.S. Sept. 1, 1970, entered into force Dec. 29, 1970) [hereinafter Convention] (codified at 9 U.S.C. §§ 201-208 (1982) [hereinafter Arbitration Act or Arbitration Statutes]). Article II provides for the enforcement of arbitration agreements by referring the parties to arbitration whenever a claim arises and they have agreed to arbitrate. The article contains no specific reference to the event of a petition in bankruptcy by one of the arbitrating parties, or any other public policy exception. Convention, *supra*, art. II, 21 U.S.T. 2517, 2519, T.I.A.S. No. 6997, at 3, 330 U.N.T.S. 3, 38-40.

Nor does the automatic stay provision indicate that it applies to international arbitration. The legislative history of 11 U.S.C.A. § 362 (West 1979 & Supp. 1987) indicates that "[a]ll proceedings are stayed, including arbitration." S. REP. NO. 989, 95th Cong., 2d Sess. 1, 50 [hereinafter SENATE REPORT], reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5836. However, no distinction is drawn between domestic and international arbitration. *Id.*

4. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *infra* notes 84-97 and accompanying text.

5. 74 Bankr. 879 (Bankr. S.D.N.Y. 1987).

6. *Id.* at 885.

7. No. ITM/ITL 52-382-3, slip op. (Iran-United States Claims Tribunal June 21,

Tribunal ("Tribunal") refused to stay its proceedings after the U.S. claimant filed for bankruptcy.⁸

This Note argues that assertion of jurisdiction by the bankruptcy court in the context of international arbitration would sabotage the intention of the parties who choose arbitration as an alternative means of dispute resolution. Part I analyzes the decision of a U.S. bankruptcy court in *Springer Penguin* that stayed an international arbitration proceeding. Part II examines the Tribunal's denial of the stay in the *Behring* award. Part III suggests that the Tribunal's reasoning in denying applicability of the stay is consistent with recent U.S. policy favoring international arbitration of commercial disputes. This Note concludes that the interests involved in fostering international commercial arbitration mandate that once an arbitration clause is found to be enforceable, the arbitration should not be stayed by a petition in a U.S. bankruptcy court.

I. THE SPRINGER-PENGUIN CASE

The conflict between U.S. bankruptcy policies and the federal policy favoring international arbitration recently was addressed by a U.S. bankruptcy court in *In re Springer-Penguin*. The case involved the bankruptcy court's power to stay an arbitration proceeding between Springer-Penguin, a New York office-furniture manufacturer, and Jugoexport-Beograd ("Jugo"), a Yugoslavian office-products exporter, following Springer-Penguin's filing of a petition under Chapter 11 of the Code.⁹

At issue was whether the Code's provisions, which mandate that all claims against the debtor in a Title 11 case be determined under the aegis of the bankruptcy court, includes arbitral claims between a U.S. party and a foreign party.¹⁰ The

1985) [hereinafter *Behring*] (on file with the offices of the *Fordham International Law Journal*).

8. *Behring*, *supra* note 7, at 29.

9. *Springer-Penguin*, 74 Bankr. at 880-81. Technically, Springer-Penguin lost the benefit of the automatic stay pursuant to 11 U.S.C. § 362(e) (Supp. III 1985) when it stipulated to adjourn a hearing for relief from the stay beyond thirty days from the request for such relief without obtaining consent from Jugo, or an order from the court. Springer-Penguin, therefore, sought to obtain a stay pursuant to 11 U.S.C. § 105(a) (Supp. III 1985), which grants the bankruptcy court broad equitable powers to protect its jurisdiction. *Springer-Penguin*, 74 Bankr. at 881.

10. *Springer-Penguin*, 74 Bankr. at 882.

bankruptcy court held that, although there is a strong federal policy favoring international arbitration, this policy is of secondary importance when compared to the policies embodied in the Code.¹¹

A. *The Springer-Penguin Decision: Bankruptcy Policies Override International Arbitration Policies*

The *Springer-Penguin* court conceded that the arbitration clause was valid and enforceable and that there was "no question" as to its effect notwithstanding the bankruptcy petition.¹² However, the court reasoned that the strong federal policy of "prompt, fair and efficient administration" embodied in the Code modified the parties contractual obligations to arbitrate.¹³ Therefore, the court stayed the arbitration proceeding.¹⁴

The court in *Springer-Penguin* distinguished the case from *Fotochrome, Inc. v. Copal Co.*, in which the Second Circuit enforced an award made by a Japanese arbitration panel despite a U.S. bankruptcy referee's order staying the arbitration proceeding.¹⁵ The court in *Fotochrome* reasoned that a bankruptcy court had authority to stay an international arbitration only if it had in personam¹⁶ jurisdiction over the foreign party.¹⁷ Be-

11. *Id.* at 883-84.

12. *Id.* at 881.

13. *Id.* at 882.

14. *Id.* at 885.

15. *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975), *aff'g* 377 F. Supp. 26 (E.D.N.Y. 1974). Copal, a Japanese corporation, contracted in 1966 to manufacture cameras for Fotochrome, a Delaware corporation. 517 F.2d at 514. The contract provided that any dispute arising therefrom would be submitted to the Japan Commercial Arbitration Association ("JCAA") in Tokyo for final settlement. *Id.* A dispute arose, and arbitral proceedings were initiated. *Id.* During the pendency of these proceedings, Fotochrome filed for bankruptcy and the bankruptcy court-ordered stay was submitted to the JCAA. *Id.* The JCAA held the stay to be ineffective and made an award in favor of Copal. *Id.* at 515. Initially, the bankruptcy judge, who was reversed by the district court, 377 F. Supp. at 34, refused to recognize the award, holding: 1) the restraining order had ousted the jurisdiction of the arbitral tribunal; 2) the bankruptcy referee was not bound by its decision; 3) the award could not be treated as a final judgment in the bankruptcy proceeding; and 4) the bankruptcy court could reconsider the merits of the underlying dispute. *Id.*

16. *See generally* *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (where a court bases jurisdiction over its authority over the defendant's person, the action and judgment are "in personam").

17. *Fotochrome*, 517 F.2d at 516-17.

cause the defendant, a Japanese company, did not have sufficient minimum contacts¹⁸ with the United States, the *Fotochrome* court held that it did not have jurisdiction to stay the arbitration or to void the award because it was rendered after notification of the stay.¹⁹ The opinion did not address the issue of whether a U.S. bankruptcy court could stay a foreign arbitration proceeding if the bankruptcy court did have in personam jurisdiction.²⁰ Indeed, it specifically skirted the issue.²¹ While *Fotochrome* recognized the importance of enforcing an arbitral award, it provided little insight into the distinction between the court's power to stay domestic arbitration and its authority to stay foreign arbitration. The *Springer-Penguin* court distinguished its facts from *Fotochrome* on the ground that the Yugoslavian arbitration proceeding at issue in *Springer-Penguin* had not yet commenced.²²

In holding that the arbitration should be stayed, *Springer-Penguin* cited the Third Circuit's decision in *Zimmerman v. Continental Airlines, Inc.*,²³ which interpreted the Code as overriding U.S. arbitration policies.²⁴ The *Zimmerman* court concluded that the bankruptcy court's power to stay an arbitral proceeding is discretionary.²⁵ In exercising its discretion, the *Springer-Penguin* court cited three factors: (1) the extent to which the character of the litigation and evidence of the dispute makes a judicial forum preferable to arbitration; (2) the degree to which any special expertise is necessary to resolve the dispute; (3) the arbitrators prior success or failure in settling disputes between these particular parties.²⁶ The court reasoned that because Springer-Penguin's counterclaim for damages would

18. *International Shoe* provides:

[D]ue process requires . . . that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citation omitted).

19. *Fotochrome*, 517 F.2d at 516.

20. *See id.* at 520.

21. *See id.*

22. *See Springer-Penguin*, 74 Bankr. at 883.

23. 712 F.2d 55 (3d Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984).

24. 712 F.2d at 59.

25. *Id.* at 56.

26. *Springer-Penguin*, 74 Bankr. at 884 (citing *In re Double TRL, Inc.*, 65 Bankr. 993, 998 (Bankr. E.D.N.Y. 1986) (enforcement of contractual arbitration agreement,

require United States witnesses to travel to Yugoslavia, Jugo's claim could be more conveniently determined in the bankruptcy court.²⁷ The court, therefore, granted Springer-Penguin's motion to enjoin Jugo from proceeding with the arbitration in Yugoslavia and asserted jurisdiction over Jugo's claims.²⁸ This holding is consistent with U.S. bankruptcy policies.

B. *U.S. Bankruptcy Policies*

The U.S. Bankruptcy Code provides procedures for the liquidation or reorganization of the debtor.²⁹ It seeks to en-

in the event of the bankruptcy of one of the parties, was left to the sound discretion of the bankruptcy judge)).

27. *Id.* at 884-85.

28. *Id.* at 885. In granting Springer-Penguin's motion, the court addressed Jugo's argument that the bankruptcy court permit the arbitration to proceed by abstention pursuant to 28 U.S.C. § 1334(c)(2) (Supp. III 1985), which provides:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

Id. The court held this statute inapplicable because, pursuant to 28 U.S.C. § 157(b)(2)(B) and (C) (1982), Jugo's claims and Springer-Penguin's counterclaim are classified as core matters and thus 28 U.S.C. § 1334(c)(2) did not apply. *Springer-Penguin*, 74 Bankr. at 882. Nor did the court hold that it could exercise its discretionary abstention under 28 U.S.C. § 1334(c)(1) (Supp. III 1985). *Id.*

The court also addressed Jugo's claim that a prior opinion and order entered in the district court, directing that the debtor's district court action against Jugo be stayed pending arbitration, compels denial of debtor's instant application under principles of res judicata and collateral estoppel. The court held that res judicata did not apply, as the issue of the bankruptcy court's jurisdiction to determine all claims against the debtor could not have been raised in the prior proceeding, since the Chapter 11 case had not yet been commenced. *Id.* at 882-83. Nor was Springer-Penguin collaterally estopped from seeking a stay, as the parties did not previously litigate the question of whether all claims against a debtor in a bankruptcy proceeding should require the enjoining of a foreign arbitration. *Id.* at 883.

29. Pursuant to the Code, a debtor may file for relief through liquidation under Chapter 7, 11 U.S.C.A. §§ 701-766 (West 1979 & Supp. 1987), or for reorganization under Chapter 11, 11 U.S.C.A. §§ 1101-1174 (West 1979 & Supp. 1987), or Chapter 13, 11 U.S.C.A. §§ 1301-1330 (West 1979 & Supp. 1987). Under Chapter 7, the debtor's nonexempt assets are collected and sold, and the proceeds are distributed to creditors. *See id.* §§ 701-766. The principal chapter for commercial purposes is Chapter 11, under which the debtor submits to the creditors a plan providing for the adjustment of the debtor's debts and the repayment of creditors, usually from the future income of the debtor's reconstituted business. *See id.* §§ 1101-1174.

sure not only that creditors receive maximum payment but also that distribution of payments is proportionate among creditors of similar status.³⁰

In reforming the Code in 1978, Congress intended that all bankruptcy disputes be centralized in the bankruptcy court.³¹ The bankruptcy statutes provide that when an entity files for bankruptcy, jurisdiction over the debtor's assets vests entirely in the bankruptcy court.³² Thus, any pending actions against the debtor are automatically stayed and transferred to the bankruptcy court.³³ The automatic stay applies to each outstanding litigation and serves to void any unapproved post-petition awards.³⁴ The bankruptcy court can enforce the stay by imposing contempt sanctions against recalcitrant creditors.³⁵

30. See SENATE REPORT, *supra* note 3, at 49, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5835; see also Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 MINN. L. REV. 595, 598 (1983).

31. See H.R. REP. NO. 595, 95th Cong., 2d. sess 1, 52 [hereinafter HOUSE REPORT], reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 5976-6000.

32. 28 U.S.C. § 1471 provides in relevant part:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

....

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all the jurisdiction conferred by this section on the district courts.

28 U.S.C. § 1471 (Supp. III 1985)

33. 11 U.S.C.A. §§ 101-1330 (West 1979 & Supp. 1987). Section 362, the automatic stay provision, reads in relevant part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . .

11 U.S.C. § 362 (1982).

34. See generally Westbrook, *supra* note 30, at 608.

35. See, e.g., *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1309 (11th Cir. 1982) (violations of automatic stay would make creditor in contempt of court and subject to fine); *In re Taco Ed's, Inc.*, 63 Bankr. 913, 930-31 (Bankr. N.D. Ohio 1986) (creditor found in contempt of automatic stay provision based on its knowledge of stay, even though it violated stay on advice of counsel); *In re Newman*, 53 Bankr. 7, 8 (Bankr. M.D. Tenn. 1985) (debtor entitled to damages, attorneys fees, and costs where creditor was in violation of automatic stay). See generally Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J.L. REF. 177, 259 (1978).

The automatic stay is considered one of the fundamental protections provided by the bankruptcy laws.³⁶ It relieves the debtor from creditor collection efforts and foreclosure actions, and permits the debtor to begin a repayment or reorganization plan.³⁷ The automatic stay protects creditor interests as well by prohibiting a creditor from racing to file a claim and obtaining payment ahead of other creditors.³⁸

The Bankruptcy Reform Act of 1978 expanded the scope of the automatic stay from staying all "actions" against the debtor to staying all entities of "a judicial, administrative, or other proceeding against the debtor."³⁹ The legislative history of the act indicates that the stay provision applies to arbitration proceedings.⁴⁰ However, the drafters drew no distinction between international arbitration and domestic arbitration.⁴¹ While some courts, such as in *Springer-Penguin*, have held that the power to stay a domestic arbitration is discretionary,⁴² others have respected international arbitration agreements and have stayed a bankruptcy proceeding pending arbitration.⁴³

36. SENATE REPORT, *supra* note 3, at 54-55, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5840-41.

37. *Id.*

38. *Id.* at 50-51, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5835.

39. See *Transmarittina Sarda Italnavi v. Foremost Ins. Co.*, 482 F.Supp. 110, 114 (Bankr. S.D.N.Y. 1979) (11 U.S.C. § 362 expanded the scope of Bankruptcy Rule 401, where plaintiff argued that an arbitration was not an "action" or "suit" within the meaning of Rule 401(a)).

40. See HOUSE REPORT, *supra* note 31, at 340, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6297.

41. See *id.*

42. See, e.g., *In re Frigitemp Corp.*, 8 Bankr. 284, 289-90 (S.D.N.Y. 1981) (bankruptcy court lifting automatic stay so as to permit arbitration was a proper exercise of its discretion); *In re Valley Kitchens, Inc.*, 58 Bankr. 6, 9-10 (Bankr. S.D. Ohio 1985) (bankruptcy court refused to lift automatic stay because Union failed to establish cause); *In re Smith Jones, Inc.*, 17 Bankr. 126, 128 (Bankr. D. Minn. 1981) (stay modified to permit continuation of arbitration).

43. See, e.g., *In re Mor-Ben Ins. Markets Corp.*, 73 Bankr. 644, 647 (Bankr. 9th Cir. 1987) (fact that bankruptcy court had jurisdiction did not preclude court from compelling arbitration in light of Arbitration Act); *In re Seawest Indus.*, 73 Bankr. 946, 948-49 (W.D. Wash. 1987) (where it would be contrary to express language of arbitration agreement, foreign creditor entitled to withdraw its claim and stay counterclaim pending arbitration); *Quinn v. CGR*, 48 Bankr. 367 (D. Colo. 1985) (granting French corporation's motion to compel arbitration of dispute with trustee of debtor); *Transmarittina Sarda Italnavi v. Foremost Ins. Co.*, 482 F. Supp. 110, 113-15 (S.D.N.Y. 1979) (involuntary bankruptcy proceedings against charterer did not divest an arbitration panel of jurisdiction to render award against charterer). *But cf.*

II. THE BEHRING CASE

In *Behring*,⁴⁴ the Iran-United States Claims Tribunal refused to stay arbitration proceedings between Behring International, Inc., a freight forwarding company, and the Imperial Iranian Air Force (Iranian Air Force) after Behring filed a petition in bankruptcy.⁴⁵ The Tribunal, pursuant to the Algiers Accords,⁴⁶ has jurisdiction over all disputes between the U.S. or U.S. nationals and Iran or Iranian nationals that arose as a result of the hostage crisis.⁴⁷ Thus, the Tribunal viewed the

Cunard Steamship Company v. Salen Reefer Serv., 773 F.2d 452 (2d Cir. 1985) (granting comity to Swedish bankruptcy court's stay by vacating English corporation's attachment of entity's assets in U.S.).

44. No. ITM/ITL 52-382-3, slip op. (Iran-United States Claims Tribunal June 21, 1985).

45. *Id.* at 28-30.

46. *See infra* note 47.

47. On November 3, 1979 Iranian militants seized control of the United States Embassy in Tehran, taking fifty-three American diplomatic and consular staff members hostage. This hostage crisis lasted for more than one year. *See generally* W. CHRISTOPHER, *AMERICAN HOSTAGES IN IRAN* (1985); Note, *Algerian Intervention in the Iranian Hostage Crisis*, 20 *STAN. J. INT'L L.* 259, 260 (1984).

During this time the Iranian government breached many contracts with private companies in the United States. *See* W. CHRISTOPHER, *supra*, at 174; Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 *VA. J. INT'L L.* 1, 2 (1983). Iran also announced that it was withdrawing all assets from the United States and that it was expropriating American investments in Iran. W. CHRISTOPHER, *supra*, at 176; Stewart & Sherman, *supra*, at 2. In response, the United States Government, by presidential order, froze all Iranian assets in the United States and abroad. Exec. Order No. 12,170, 44 *Fed. Reg.* 65,279 (1979); *see also* 50 *U.S.C.* § 1701 (1982); Iranian Assets Control Regulations, 31 *C.F.R.* § 535.101 (1986). A substantial number of these frozen Iranian assets were attached by United States judicial proceedings. *See* Note, *Prejudgment Attachment of Frozen Iranian Assets*, 69 *CALIF. L. REV.* 837 (1981).

Although the focus of United States negotiators was on the safe return of the hostages, resolution of these private contractual claims against Iran, and the return of frozen Iranian assets, became critical in resolving the crisis. Stewart & Sherman, *supra*, at 3. A solution was reached in January 1981 as a result of the Algiers Accords. 81 *DEP'T STATE BULL.* 1 (Feb. 1981), *reprinted in* 20 *I.L.M.* 223 (1981). The Accords consisted of two declarations, the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, 81 *DEP'T STATE BULL.* at 4, *reprinted in* 20 *I.L.M.* 223, 234 (1981), and the Technical Arrangement between the Banque Centrale d'Algerie, the Bank of England, and the Federal Reserve Bank of New York (1981). *Id.* The President's authority to enter into and carry out the agreements with Iran was upheld by the Supreme Court in *Dames & Moore v. Reagan*, 453 *U.S.* 654 (1981). The first General Declaration of the Government of the Democratic and Popular Republic of Algeria provided for the release of the hostages in return for, *inter alia*, nullification of United States attachment of Iranian assets and the transfer of these assets to a Security Account. *See*

stay as a violation of its own jurisdiction.⁴⁸

A. *Behring's Claim*

Behring had entered into a contract with the Iranian Air Force in August 1975.⁴⁹ Pursuant to the contract, Behring arranged to take delivery of goods purchased by the Iranian Air Force and store them at its warehouse in New Jersey.⁵⁰ Behring paid shipping and related expenses in moving the goods in preparation for shipment to Iran.⁵¹

In 1979, as a result of the political turmoil in Iran,⁵² the Iranian Air Force's representative left New York and Behring's representatives were forced to leave Iran.⁵³ The Iranian Air Force refused to make any payments for the shipments that remained uncollected at Behring's warehouse.⁵⁴ Behring commenced an action in the U.S. District Court for the District of New Jersey to recover warehousing charges,⁵⁵ but these proceedings were superseded by the establishment of the Tribunal.⁵⁶

While the arbitration was pending before the Tribunal, Behring filed for bankruptcy under Chapter 11 in a Texas bankruptcy court.⁵⁷ Behring then sent a communication to the Tribunal stating that all its proceedings were automatically

Stewart & Sherman, *supra*, at 4. Since Iranian assets had been attached, "a simple lifting of the freeze on Iranian assets would not have resulted in the return of those assets to Iran." *Id.* at 3. Therefore, the second Agreement, the Claims Settlement Agreement, Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 81 DEP'T STATE BULL. at 3, reprinted in 20 I.L.M. 223, 230 (1981), was drafted, which established a new international arbitral body, the Iran-United States Claims Tribunal, which divested United States courts of jurisdiction in claims between United States nationals and the government of Iran. It is before this Tribunal that these claims were to be resolved.

48. *Behring*, *supra* note 7, at 29.

49. *Id.* at 16.

50. *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383, 386 (D.N.J. 1979), *aff'd*, 699 F.2d 657 (3d Cir. 1983).

51. *Id.*

52. See *supra* note 47 and accompanying text.

53. *Behring*, 475 F. Supp. at 387.

54. *Id.* at 386.

55. *Id.* at 387.

56. *Behring*, 699 F.2d at 666.

57. See *In re Behring Int'l Inc.*, 61 Bankr. 896, 897 (Bankr. N.D. Tex. 1986).

stayed pursuant to the Code.⁵⁸

B. *The Tribunal's Ruling*

The Tribunal held that it was not bound by the Bankruptcy Code's automatic stay provision.⁵⁹ It noted that neither the Algiers Accords nor the Tribunal Rules⁶⁰ indicate that Tribunal proceedings can be regulated by the national law of either the United States or Iran.⁶¹

The thrust of the Tribunal's decision was that principles of neutrality would be violated if U.S. or Iranian national law intruded upon the arbitration proceeding.⁶² The Tribunal reasoned that, given the tenuous political situation from which the Tribunal was created, "the very purpose of establishing the Tribunal was to remove certain claims from the jurisdiction of the courts of the States Parties to this international forum."⁶³

The Tribunal also relied on the Second Circuit's decision in *Fotochrome*⁶⁴ in reasoning that, because Iran lacked current minimum contacts with the United States, the bankruptcy court did not have in personam jurisdiction over the foreign defendant.⁶⁵ However, the authority given to the Tribunal by the Algiers Accords renders a *Fotochrome* analysis irrelevant. The Tribunal was created specifically to divest the United States and Iranian courts of jurisdiction over claims that arose during the hostage crisis regardless of jurisdiction.⁶⁶ Thus any attempt to stay these proceedings violated the spirit of the Algiers Accords.⁶⁷

III INTERNATIONAL ARBITRATION SHOULD BE STATUTORILY EXCLUDED FROM THE AUTOMATIC STAY

The Tribunal premised its holding on the unique jurisdic-

58. *Behring*, *supra* note 7, at 28.

59. *Id.* at 29.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. 517 F.2d 512 (2d Cir. 1975).

65. *Behring*, *supra* note 7, at 29-30.

66. *See supra* note 47 and accompanying text.

67. *See Behring*, *supra* note 7, at 29.

tion granted to it by the Algiers Accords.⁶⁸ However, denial of the automatic stay should be universal to all international arbitration so as to warrant the exemption of international arbitration proceedings under the Bankruptcy Code.⁶⁹ The interests involved in promoting international commerce dictate that private agreements to arbitrate between international parties be enforced and accorded the same degree of independence as is maintained by the Tribunal.⁷⁰

A. *Neutrality of Arbitration Proceedings*

Despite the fact that advantages of speed and economy associated with domestic arbitration are lost in an international context,⁷¹ the growth in international trade and investment has led to a concurrent increase in the number of contracts that contain arbitration provisions.⁷² Arbitration clauses are a deliberate relinquishment by the parties of the potential advantage of litigating in their national courts.⁷³ Thus, arbitration serves to foster profitable relationships by resolving disputes in a way that both parties regard as fair.⁷⁴ Furthermore, in a situation where a national government is inextricably linked to the contract, arbitration avoids the possibility of favoritism in that state's courts.⁷⁵

It is a basic assumption that parties to an international contract who choose arbitration as a means of settling disputes rely on the neutrality of the arbitral forum.⁷⁶ The principle of neutrality is especially important with regard to international

68. *Id.*

69. See 11 U.S.C.A. § 362(b) (West 1979 & Supp. 1987) (enumerates proceedings that are not affected by the automatic stay).

70. Cf. *infra* notes 71-98 and accompanying text.

71. See A. REDFERN & M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 18 (1986); Higgins, Brown & Roach, *Pitfalls in International Commercial Arbitration*, 35 *BUS. LAW.* 1035, 1036 (1980).

72. See de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 *TUL. L. REV.* 42, 45-46 (1982).

73. Higgins, Brown & Roach, *supra* note 71, at 1036.

74. See Cloud, *Mitsubishi and the Arbitrability of Antitrust Claims: Did the Supreme Court Throw the Baby Out With the Bath Water?*, 18 *LAW & POL'Y INT'L BUS.* 341, 342 (1986).

75. A. REDFERN & M. HUNTER, *supra* note 71, at 20.

76. See generally Goekjian, *ICC Arbitration from a Practitioner's Perspective*, 14 *J. INT'L L. & ECON.* 407, 430-34 (1980); Goekjian, *The Conduct of International Arbitration*, 11 *LAW AM.* 409, 410-411 (1979).

transactions because inconsistencies among the laws of different countries are potentially much more prejudicial than in a domestic context.⁷⁷ Thus, the neutrality of the arbitration is always a major consideration. If the parties specify that particular substantive and procedural laws are to apply, they have expressed their intent to exclude all others from intruding on the proceeding.⁷⁸

B. *Recent U.S. Supreme Court Decisions*

United States recognition and enforcement of arbitration agreements has never been stronger.⁷⁹ The United States' accession to the United Nations Convention on the Recognition and Enforcement of Arbitral Awards ("Convention") in 1970,⁸⁰ as well as the 1970 revision of the United States Arbitration Act,⁸¹ began a trend in favor of enforcement of international arbitration agreements.⁸² The Supreme Court has upheld arbitration clauses in international contracts even when there is a strong conflicting domestic issue at stake.⁸³

This policy favoring arbitration was recently reinforced in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁸⁴ In this case the U.S. Supreme Court addressed the issue of whether a U.S. antitrust claim would be arbitrable between Soler Chrysler-Plymouth, a Puerto Rican corporation, and Mitsubishi, a Japanese corporation.⁸⁵ After finding that a valid agreement to arbitrate existed,⁸⁶ the Court held that the antitrust claim was a proper claim to arbitrate "even assuming that a contrary result would be forthcoming in a domestic context."⁸⁷ The Court noted that questions of arbitrability of a claim

77. See de Vries, *supra*, note 72 at 46-47.

78. See generally INTERNATIONAL COMMERCIAL ARBITRATION (C. Brower & L. Marks co-chairman 1983).

79. See *infra* notes 80-98 and accompanying text.

80. See Convention, *supra* note 3, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

81. 9 U.S.C. §§ 1-208 (1982).

82. See *infra* notes 84-98 and accompanying text; see also Note, *Application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 8 FORDHAM INT'L L. J. 194 (1985).

83. See *infra* notes 84-98.

84. 473 U.S. 614 (1985).

85. *Id.* at 616-17.

86. *Id.* at 626-28.

87. *Id.* at 629.

should be resolved in favor of arbitration.⁸⁸ Further, where a party has agreed to be bound by an arbitration clause, it will not be held unenforceable because the underlying claim is founded on a statutory right.⁸⁹ "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."⁹⁰ The Court found that the complexity of the claim would not be a sufficient reason to deny arbitration.⁹¹ Furthermore, absent express congressional intent to the contrary, the substantive protection afforded by the antitrust laws could not be read as a waiver of the right of the parties to choose a judicial forum.⁹² Thus, the *Mitsubishi* decision confirms an "emphatic federal policy" favoring arbitration.⁹³

The *Mitsubishi* Court relied on its previous decision in *Scherk v. Alberto-Culver Co.*,⁹⁴ which involved the arbitrability of a claim under U.S. federal securities laws.⁹⁵ The Court in *Scherk* held the claim was arbitrable in an international setting even though the subject matter would not have been arbitrable in a domestic context.⁹⁶ The Court noted that sufficient uncertainty as to the applicable law existed at the time of the making of the contract to warrant drafting an arbitration clause.⁹⁷ And, because such potential uncertainty will exist with regard to any international contract, the Court viewed the arbitration clause as an "almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."⁹⁸

Springer-Penguin's failure to follow the reasoning in *Mitsubishi* renders its analysis inaccurate. Although the *Springer-Penguin* court stressed the importance that the United States has placed on international arbitration,⁹⁹ it abandoned this line of

88. *Id.* at 626 (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

89. *Id.* at 626.

90. *Id.* at 629 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)).

91. *Id.* at 633.

92. *Id.* at 628.

93. *Id.* at 631.

94. 417 U.S. 506 (1973), *reh'g denied*, 419 U.S. 885 (1974).

95. *Id.* at 509-10.

96. *Id.* at 513-15.

97. *Id.* at 516.

98. *Id.* at 516.

99. *Springer-Penguin*, 74 *Bankr.* at 881-82.

reasoning in its analysis of the conflicting bankruptcy policies.¹⁰⁰

The *Springer-Penguin* court cited *Zimmerman* to support its contention that the Code impliedly modifies the Arbitration Act,¹⁰¹ thereby granting bankruptcy judges the discretion to stay arbitral proceedings.¹⁰² *Zimmerman*, however, involved a domestic arbitration clause.¹⁰³ In contrast, the Supreme Court in *Scherk* held that because of their importance to international commerce, international arbitration clauses would be enforced where domestic arbitration clauses would not.¹⁰⁴ Therefore, *Springer-Penguin's* reliance on the *Zimmerman* analysis is incorrect.

The only case that the *Springer-Penguin* court cited that involved an international arbitration clause is clearly distinguishable. The court relied on *In re Braniff*,¹⁰⁵ which denied a motion to compel arbitration between a debtor and a foreign defendant.¹⁰⁶ The bankruptcy court held that the issues sought to be arbitrated rendered arbitration unworkable from a practical standpoint.¹⁰⁷ Because the debtor, had tried unsuccessfully for a year to reorganize, the court reasoned that resorting to arbitration at this stage would result in such added delay that both the debtor and all of his creditors would be denied the fruits of a complete reorganization.¹⁰⁸ Given the Supreme Court's language in *Mitsubishi* that "[t]here is no reason to depart from [an agreement to arbitrate] where a party bound by an arbitration agreement raises claims founded on statutory rights,"¹⁰⁹ the substantive goal of reorganization of the Code¹¹⁰ would not have been a justification for the bankruptcy

100. *Id.* at 883-85.

101. *Id.* at 883-84.

102. *Id.*

103. *Zimmerman* 712 F.2d at 56.

104. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513-16 (1973), *reh'g denied*, 419 U.S. 885 (1974).

105. 33 Bankr. 33 (Bankr. N.D. Tex 1983)

106. *Id.*

107. *Id.* at 36.

108. *Id.*

109. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)

110. *See supra* note 29 and accompanying text.

court to stay the arbitration proceeding.¹¹¹ Additionally, pursuant to the U.N. Convention on the Recognition and Enforcement of Arbitral Awards,¹¹² the issues sought to be arbitrated in *Braniff* were beyond the scope of the arbitration clause because they would be determinative of which creditors would share in the debtor's estate.¹¹³ By contrast, in *Springer-Penguin*, the court clearly stated that the arbitration clause was enforceable.¹¹⁴

C. *Creditor Protection*

The Code does contain a provision that protects creditors from receiving a disproportionate payment because of a judgment rendered in a foreign proceeding.¹¹⁵ The statute provides that where a foreign creditor receives a judgment on a claim, he may not receive payment on that claim until each of the debtor's other creditors receives payment equal in value to that received by the foreign creditor.¹¹⁶ Therefore, allowing an arbitration to proceed cannot be viewed as giving an unfair advantage to foreign creditors.

D. *Debtor Protection*

Debtors should receive protection under the Convention on the Recognition and Enforcement of Arbitral Awards, which imposes a requirement of procedural due process as a prerequisite to enforcing an award.¹¹⁷ Article V(I)(b) of the

111. *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)

112. Convention, *supra* note 3.

113. *In re Braniff*, 33 Bankr. 33, 35-36 (N.D. Tex. 1983).

114. *Springer-Penguin*, at 881.

115. 11 U.S.C. § 508(a) (1982) provides:

If a creditor receives, in a foreign proceeding, payment of, or a transfer of property on account of, a claim that is allowed under this title, such creditor may not receive any payment under this title on account of such claim until each of the other holders of claims on account of which such holders are entitled to share equally with such creditor under this title has received payment under this title equal in value to the consideration received by such creditor in such foreign proceeding.

Id.

116. *Id.*

117. Convention, *supra* note 3, art. V(1)(b), 21 U.S.T. 2517, 2520, T.I.A.S. No. 6997, at 4, 330 U.N.T.S. 3, 42. "This provision essentially sanctions the application of the forum state's standards of due process." *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969, 975 (2d Cir. 1974).

Convention provides that an enforcing court may refuse to recognize an award under two circumstances: first, where the party did not receive proper notice of the proceeding; or, second, where the party lacked an opportunity to present his case.¹¹⁸ This second requirement would protect a debtor from having an award enforced against him, if, because of his bankruptcy, he lacks the resources to adequately represent himself in an arbitration. If such a situation were to occur, a debtor could contest the enforcement of a default award made against him under this provision of the Convention.¹¹⁹

118. Convention, *supra* note 3, art. V(1)(b), 21 U.S.T. 2517, 2520, T.I.A.S. No. 6997, at 4, 330 U.N.T.S. 3, 42.

119. This procedural due process defense has thus far been construed narrowly by U.S. courts. See generally McClendon, *Enforcement of Foreign Arbitral Awards in the United States*, 4 NW. J. INT'L L. & BUS. 58, 64 (1982); Note, *Enforcement of Foreign Arbitral Awards Under the United Nations Convention of 1958: A Survey of Recent Federal Case Law*, 11 MD. J. INT'L L. & TRADE 13, 29 (1987); Comment, *The Federal Courts and the Enforcement of Foreign Arbitral Awards*, 5 PACE L. REV. 151, 164 (1984).

In *Parsons & Whittemore*, the Second Circuit enforced an arbitral award over plaintiff's assertion that the arbitral tribunal's refusal to delay its proceedings to hear one witness was a violation of due process under art. V(1)(b) of the Convention. 508 F.2d at 975. The court reasoned that inability to produce one witness is a "risk inherent in an agreement to submit to arbitration." *Id.* Furthermore, because the witness was unable to testify due to a prior lecturing commitment, the *Parsons & Whittemore* court held that this was "hardly the type of obstacle . . . which would require the arbitral tribunal to postpone the hearing as a matter of fundamental fairness to [plaintiff]." *Id.* The court also noted that the arbitral tribunal did hear and consider other evidence and had the missing witness's affidavit which furnished much of the information to which he would have testified. *Id.* at 976.

In *Biotronik Mess-und Therapiege GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133 (D.N.J. 1976), the court held the due process provision of the Convention inapplicable where defendant offered no explanation for its failure to present its case other than the fact that it was waiting for an agreement to expire in order to determine its rights and liabilities thereunder. *Id.* at 140. The court stated that the defendant could have offered a copy of the agreement, or any other extrinsic evidence, to support its position. *Id.* at 141.

In *Parsons & Whittemore*, the art. V(1)(b) due process defense was not successful because the court held that the absence of one of plaintiff's witnesses did not constitute a failure of Plaintiff to adequately present his case. 508 F.2d at 975-76. If a debtor was unable to arbitrate, and it were more than a matter of one witness being unable to testify, the debtor should be able to contest enforcement of an award based on art. V(1)(b) due process grounds.

In *Biotronik* the court held that the defendant did not adequately explain its failure to participate in the arbitration. 415 F. Supp. at 140. Arguably, a debtor's petition in bankruptcy, coupled with the trustee in bankruptcy's testimony that it was financially unfeasible for the debtor to arbitrate, would seem to be an adequate explanation of the debtor's failure to participate in the arbitration so as to be sufficient to assert the art. V(1)(b) due process defense.

E. Legislative History of the Bankruptcy Reform Act

Allowing an international arbitration to proceed despite the filing of a bankruptcy petition by one of the parties would not contradict the intentions of the legislators who drafted the Bankruptcy Reform Act. The legislative history of the automatic stay provision indicates that its drafters believed that it will sometimes be more appropriate to continue an action where it was commenced "in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere."¹²⁰ However, the legislative history also suggests that the stay will still issue, and that the opposing party must seek relief from the stay in the bankruptcy court¹²¹ to provide the trustee an adequate opportunity to inventory the debtor's financial situation.¹²² Arguably, the trustee could take account of an arbitration in determining the debtor's financial status without having to stay the proceeding.

CONCLUSION

The Iran-United States Claims Tribunal, in *Behring*, correctly refused to stay its arbitration proceeding. In light of recent U.S. policy, as enunciated in *Mitsubishi*, which supports enforcement of arbitration clauses, allowing the arbitration to proceed comports with the intentions of the parties, and fosters international commerce. The interests in preserving the neutrality of international commercial arbitration should override the automatic stay provision of the U.S. Bankruptcy Code. U.S. debtors, as well as creditors, are sufficiently protected by other provisions of the Bankruptcy Code, as well as by the Article V(1)(b) of the U.N. Convention. Therefore, international arbitration should be excluded from the automatic stay provision of the U.S. Bankruptcy Code.

*Melinda J. Massoff**

120. HOUSE REPORT, *supra* note 31, at 341, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6297.

121. *Id.*

122. *Id.*

* J.D. candidate, 1988, Fordham University.