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# Everybody Loves Arbitration: The Second Circuit Sets Pro-Arbitration Precedent in International Commercial Arbitration Cases

*Phoenix Aktiengesellschaft v. Ecoplas, Inc.*<sup>1</sup>

## I. INTRODUCTION

*Phoenix Aktiengesellschaft v. Ecoplas, Inc.* presented the Second Circuit with an unresolved question of preemption in international arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention).<sup>2</sup> The court specifically addressed the issue of whether the consent-to-confirmation requirement of section 9 of the Federal Arbitration Act (FAA) conflicted with section 207 of the FAA which does not require such consent.<sup>3</sup> Section 208 incorporates Chapter 1 provisions to the extent that such provisions are not in conflict with Chapter 2.<sup>4</sup> *Phoenix* held that the two provisions were in conflict, and consent-to-confirmation is not incorporated into Chapter 2.<sup>5</sup> This casenote examines the *Phoenix* decision in light of the history and goals of the convention and its domestic adoption, and precedent both within and outside the Second Circuit, as well as discussing its potential impact on cases under the Convention.

## II. FACTS AND HOLDING

Phoenix Aktiengesellschaft (Phoenix)<sup>6</sup> entered into a licensing agreement with Ecoplas, Inc. (Ecoplas)<sup>7</sup> in which Phoenix granted an exclusive license to produce and sell “Phoenix polyester-(UP)-moulding compounds” to Ecoplas, in exchange for royalties and an annual licensing fee.<sup>8</sup> The relevant portion of the licensing agreement provided:

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1. 391 F.3d 433 (2nd Cir. 2004).

2. *Id.* at 435.

3. *Id.* at 436. Section 9 is a Chapter 1, non-Convention, provision. *Id.* Section 207 is a Chapter 2, Convention provision. *Id.*

4. 9 U.S.C. § 208 (2000).

5. *Phoenix*, 391 F.3d at 436.

6. Phoenix is a German industrial company whose principal areas of production are rubber products, acoustic systems and conveyor belts. Phoenix Aktiengesellschaft Profile, available at [http://www.business.com/directory/automotive/parts\\_and\\_accessories/phoenix\\_aktiengesellschaft/profile](http://www.business.com/directory/automotive/parts_and_accessories/phoenix_aktiengesellschaft/profile) (last visited Sept. 19, 2005).

7. *Phoenix*, 391 F.3d at 434. Ecoplas is an American plastics manufacturer. See also U.S. Patent and Trademark Office Trademark Electronic Search System, <http://www.uspto.gov/index.html> (search under “Trademarks” frame, then select “New User Form Search (Basic),” then enter “Ecoplas” into search field).

8. *Phoenix*, 391 F.3d at 434. In addition to the license, Phoenix also agreed to “provide Ecoplas with ‘secret knowledge and technical know-how relative to the manufacture’ of those compounds.” *Id.*

The parties shall make a diligent effort to settle amicably all disagreements in conjunction with this contract. If an amicable agreement is not reached the arbitration court of the International Chamber of Commerce in Zurich shall have jurisdiction at the exclusion of regular courts. This agreement is subject to Swiss law.<sup>9</sup>

In August 1997, Phoenix sold a business portfolio to Bakelite AG at which time Phoenix requested that Ecoplas agree to transfer its licensing contract to Bakelite AG.<sup>10</sup> Ecoplas would not agree to transfer the agreement and informed Phoenix that it considered the agreement terminated.<sup>11</sup> Phoenix disputed the termination of the agreement claiming that although Ecoplas refused the transfer, its contractual obligations to Phoenix remained in place.<sup>12</sup> Ecoplas continued to maintain that the contract was terminated in August 1997 and refused to pay the license fees for 1997 and 1998.<sup>13</sup>

Pursuant to the arbitration clause contained in the licensing agreement, Phoenix filed a complaint with the International Court of Arbitration of the International Chamber of Commerce (ICC).<sup>14</sup> During the arbitration, Ecoplas defended its refusal to pay the license fees by arguing that Phoenix's sale of its business portfolio dissolved the licensing agreement.<sup>15</sup> Additionally, Ecoplas argued that even if the licensing agreement had not been dissolved by Phoenix's sale of its business portfolio, Phoenix breached the agreement by failing to provide the required useable technical advice.<sup>16</sup> The court rejected both of Ecoplas's defenses and entered a decision in favor of Phoenix.<sup>17</sup>

In response to Ecoplas's failure to pay the arbitration award, Phoenix sought to confirm the award in the Federal Court for the Western District of New York pursuant to the Convention.<sup>18</sup> Ecoplas challenged the district court's jurisdiction on the grounds that it was not the Convention (which does not require both parties consent for judicial confirmation) that was controlling on the issue; rather, it was section 9 of the FAA (which requires both parties consent for judicial confirmation).<sup>19</sup> Ecoplas contended the arbitration agreement did not reflect the section 9 requirement of the parties' consent to judicial confirmation of the award.<sup>20</sup>

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* The arbitrator's award in favor of Phoenix was approximately \$100,000 U.S., plus \$5,751 U.S. in arbitration costs along with 40,000 Swiss Francs in legal fees. *Id.*

18. *Id.* The relevant section of the Convention was adopted by Congress in 1970 and is embodied in the FAA at 9 U.S.C. § 207 (2000). *Id.* at 435.

19. *Id.* at 434.

20. *Id.* Ecoplas also raised the argument that the court should not confirm the award because the arbitrator refused to hear some of its evidence regarding the adequacy of the technical advice provided by Phoenix, as required by Article (V)(1)(b) of the Convention. *Id.* at 435.

The district court confirmed the arbitral award for Phoenix.<sup>21</sup> The court declared that the licensing agreement did reflect the parties intent to consent to judicial confirmation of the award.<sup>22</sup> By determining there was consent by the parties, the district court avoided having to address whether the Convention or section 9 of the FAA controlled in deciding the issue of confirmation of foreign arbitration awards.<sup>23</sup> Ecoplas appealed to the Federal Court of Appeals for the Second Circuit.<sup>24</sup>

On appeal Ecoplas reiterated its argument that section 9 controlled, and that the licensing agreement did not reflect the requisite consent of the parties.<sup>25</sup> The Second Circuit was not moved by Ecoplas's arguments.<sup>26</sup> After a *de novo* review of the legal issues in the district court's confirmation, the Second Circuit held that where a Chapter one provision of the FAA is more restrictive than a corresponding provision in the Convention, the two provisions are in conflict and the Convention provision controls.<sup>27</sup>

### III. LEGAL BACKGROUND

Throughout the 19th century and into the early 20th century, American courts were very reluctant to enforce contractual arbitration agreements.<sup>28</sup> In 1925, Congress enacted the FAA to "reverse the longstanding hostility to arbitration agreements ... that had been adopted by American courts."<sup>29</sup> The first four provisions of the FAA clearly indicate Congress's intent to implement a broad federal policy favoring arbitration agreements.<sup>30</sup> To this end, the FAA has been largely successful as federal courts routinely enforce arbitration agreements as they would any other contractual provision.<sup>31</sup>

The favorable policy toward the enforcement of arbitration agreements subsequent to the enactment of the FAA has not necessarily been extended to arbitral awards.<sup>32</sup> In order to obtain judicial enforcement of an award under the FAA, both parties must consent within one year of the award, to have judgment entered

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21. *Id.* The district court confirmed the award by adopting the confirmation recommendation of Magistrate Judge Hugh B. Scott. *Id.*

22. *Id.* In support of this conclusion, the court stated that the licensing agreement "sufficiently demonstrates the parties' intent that the result of the ICC arbitration be final and binding, such that the claims would not be heard *de novo* in any court." *Id.*

23. *Id.* The district court also implicitly rejected Ecoplas's Article (V)(1)(b) claim that the award should not be confirmed because the arbitrator refused to hear some of its evidence regarding the adequacy of the technical advice provided by Phoenix. *Id.*

24. *Id.*

25. *Id.* at 436. Ecoplas also raised its previous Article (V)(1)(b) claim on appeal. *Id.* at 438. The court of appeals dismissed this claim as meritless. *Id.*

26. *Id.* at 433-34.

27. *Id.* at 436. While the circuit court noted that there was some evidence to support the district court's finding that there was mutual consent to the confirmation, it found it unnecessary to decide the issue given its holding that such consent is not required. *Id.* at 436 n.2.

28. See Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 267-69 (1988).

29. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

30. *Id.* at 25.

31. *Supra* note 28, at 269-70.

32. See 9 U.S.C. § 9 (2000).

upon the award pursuant to the arbitration.<sup>33</sup> This consent to confirmation requirement is applicable to domestic arbitration awards.<sup>34</sup>

Lack of a favorable policy toward the enforcement of arbitral awards is even more apparent in the field of foreign arbitral awards.<sup>35</sup> In response to this gap, in 1958 forty-five nations participated in the creation of the Convention on the Recognition and Enforcement of Arbitration Awards held in New York.<sup>36</sup> The purpose of the Convention, as indicated by its title, was to “encourage the enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”<sup>37</sup> The United States was not one of the initial parties to ratify the Convention.<sup>38</sup> Adoption of the Convention in the United States came in 1970, when it was codified as chapter 2 of the FAA.<sup>39</sup>

The Convention differentiates between the recognition of arbitral awards and the enforcement of arbitral awards.<sup>40</sup> Article III of the Convention dictates that member states “shall recognize arbitral awards [under the Convention] as binding,” but allows the state in which the award is sought to set the rules of procedure for enforcement.<sup>41</sup> These rules of procedure for enforcement of foreign arbitral awards in a given state, need not be the same as the rules governing domestic awards.<sup>42</sup> The Convention requires only that the rules not be substantially more onerous for foreign awards than for domestic awards.<sup>43</sup>

The United States has adopted its own procedural rules for the enforcement of foreign arbitral awards in chapter 2 of the FAA.<sup>44</sup> This chapter applies to commercial arbitration agreements that are “not ‘entirely between citizens of the United States.’”<sup>45</sup> Section 208 of the FAA requires that where specific rules are set forth in chapter 2, they trump any contrary FAA rules when enforcing an arbitration award under chapter 2.<sup>46</sup> This section however, is a residual provision, allowing any gaps in chapter 2 to be filled by non-conflicting chapter 1 rules.<sup>47</sup>

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33. *Id.*

34. *Id.*

35. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974).

36. *Phoenix*, 391 F.3d at 435. Twenty-six of the nations participating adopted the convention in 1958. *Id.*

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

38. *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 973 (2nd Cir. 1974).

39. *Id.* Chapter 2 of the FAA is contained in 9 U.S.C. § 201-08 (2000).

40. *International Commercial Arbitration: The New York Convention*, *Georgio Gaja*, Binder 1, Booklet 1, Part I.B.2., Oceana Publications, Inc. (1984) [hereinafter *International*].

41. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Art.III, 330 U.N.T.S. 38, 39 (1958) (emphasis added).[hereinafter *Convention*].

42. *International*, *supra* note 40, at Part I.B.2. “A proposal that the rules for recognizing and enforcing foreign arbitral awards should become identical, or analogous, to the rules applicable to domestic awards was rejected by the New York Convention.” *Id.*

43. *Convention*, *supra* note 41, at Art. III.

44. *See* 9 U.S.C. §§ 201-08 (2000).

45. *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 49 (2nd Cir. 1978).

46. 9 U.S.C. § 208 (2000).

47. *Id.*

The issue of conflicting rules between chapters 1 and 2 has been addressed by several district court opinions within the Second Circuit.<sup>48</sup> One such opinion came in *Hartford Accident & Indemnity Co. v. Equitas Reinsurance Ltd.* in the United States District Court for the District of Connecticut.<sup>49</sup> The *Hartford* Court looked specifically at sections 4 and 206 of the FAA.<sup>50</sup> The court held the section 4 requirement that a party must be aggrieved to compel arbitration did not conflict with section 206 which lacked such a requirement.<sup>51</sup> The court found that judicial involvement only arises after one party refuses to arbitrate because a petition to compel arbitration before the adverse party refused to arbitrate would not be justiciable.<sup>52</sup> Therefore, section 4 did not place any additional requirements on cases under the Convention that were not already placed on them by the justiciability requirement of Article III courts. Thus, the court found that section 4 was not in conflict with either section 206 or the goals of the Convention.<sup>53</sup>

Another example is *Atlas Chartering Services, Inc. v. World Trade Group, Inc.*, where the Southern District of New York examined section 8 of the FAA which permits attachment of assets in maritime disputes.<sup>54</sup> The Convention does not specifically provide for any pre-arbitration attachment.<sup>55</sup> The court in *Atlas* allowed the use of section 8 attachment in an action under the Convention because it furthers the pro-arbitration goals of the Convention.<sup>56</sup>

While the specific issue of whether or not FAA sections 9 and 207 are in conflict had not been directly addressed in any court within the Second Circuit prior to *Phoenix*,<sup>57</sup> two courts outside the circuit have ruled on the issue with conflicting results.<sup>58</sup>

In *McDermott International, Inc. v. Orion Insurance Co.*, the United States Court of Appeals for the Fifth Circuit held that the section 9 consent-to-confirmation requirement conflicted with section 207.<sup>59</sup> The court provided little

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48. See, e.g., *The Shaw Group, Inc. v. Triplefine Int'l Corp.*, 2003 WL 22077332 at \*1 n.4 (S.D.N.Y. 2003); *Phoenix Bulk Carriers Ltd. v. Oldendorff Carriers GmbH & Co.*, 2002 WL 31478198 (S.D. N.Y. 2002); *Hartford Accident & Indem. Co. v. Equitas Reins Ltd.*, 200 F. Supp. 2d 102 (D. Conn. 2002); *Daye Nonferrous Metals Co. v. Trafigura Beheer B.V.*, 1997 WL 375680 (S.D.N.Y. 1997); *Belship Navigation, Inc. v. Sealift, Inc.*, 1995 WL 447656 (S.D.N.Y. 1995); *Evans & Sutherland Computer Corp. v. Thomson Training & Simulation Ltd.*, 1994 WL 593808 (S.D.N.Y. 1994); *Atlas Chartering Servs., Inc. v. World Trade Group, Inc.*, 453 F. Supp. 861, 863 (S.D.N.Y. 1978). *Hartford* and *Atlas* discussed in Part III of this casenote are the only two cases on point which have published opinions.

49. 200 F. Supp. 2d 102 (D. Conn. 2002).

50. *Id.* at 108.

51. *Id.*

52. *Id.* at 108 n.8.

53. *Id.*

54. 453 F.Supp. 861, 863 (S.D.N.Y. 1978).

55. *Id.*

56. *Id.*

57. *Phoenix*, 391 F.3d at 438. In an unpublished opinion, the Southern District of New York had indicated in dicta that the court believed section 9 and section 207 conflicted, but it was not forced to decide the issue. *The Shaw Group, Inc. v. Triplefine Int'l Corp.*, 2003 WL 22077332, at \*1 n.4 (S.D.N.Y. 2003).

58. See *McDermott Int'l, Inc. v. Orion Ins. Co.*, 120 F.3d 583 (5th Cir. 1997) (holding that the two provisions did conflict); *Daihatsu Motor Co., Inc. v. Terrain Vehicles, Inc.*, 1992 WL 133036 (N.D. Ill. June 1, 1992), *aff'd on other grounds*, 13 F.3d 196 (7th Cir. 1993) (holding that the two provisions did not conflict).

59. 120 F.3d at 588.

explanation of why the two provisions conflicted, stating only “[s]ection 9 clearly does so conflict [with section 207].”<sup>60</sup> As additional support for their decision, the court explained that judicial confirmation (without the consent requirement) plainly furthered the Convention’s “twin goals of uniformity and ‘summary and speedy’ judicial enforcement of the arbitration decision.”<sup>61</sup>

In contrast, the United States District Court for the Northern District of Illinois earlier held (in an unpublished opinion) that the two provisions were not inconsistent.<sup>62</sup> The court found the consent-to-confirmation requirement of section 9 was merely an “additional limitation not otherwise in chapter 2.”<sup>63</sup> Since there was not an express provision in chapter 2 to the contrary, the court stated that this ‘additional limitation’ should be incorporated into chapter 2 through the residual provision of section 208.<sup>64</sup>

#### IV. INSTANT DECISION

In *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*<sup>65</sup>, the Second Circuit was faced with the unresolved issue of preemption under the FAA.<sup>66</sup> Principally, whether Section 208 required that the Convention’s provisions (chapter 2) preempted other FAA provisions (chapter 1), when the non-Convention provision was more restrictive but did not directly conflict with corresponding Convention provisions in enforcing a foreign arbitral award.<sup>67</sup> The court declared the less restrictive Convention provisions were controlling due to the fact that the Convention’s objective was to promote the enforcement of foreign arbitral awards.<sup>68</sup> The increased restrictions of section 9 made it more difficult to enforce a foreign arbitral award than it would otherwise be under section 207.<sup>69</sup> The restraint on judicial confirmation under section 9, therefore conflicted with the more enforcement-friendly Convention section.<sup>70</sup> The court held that since the two conflicted, section 208 required that the Convention provision control in a case brought under the Convention.

In deciding the issue, the court distinguished the three cases *Ecoplas* relied upon in support of their argument that the two chapters were not in conflict.<sup>71</sup> The court first dismissed *Ecoplas*’s reliance on *Hartford* because it believed that the

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60. *Id.* Although it did not explain why the two provisions so *clearly* conflicted, the court did provide four reasons for their decision in the instant case: 1) the suit was governed by the Convention; 2) the Convention incorporates the FAA except where it conflicts with Convention provisions; 3) the goals of both the Convention and its American adoption in the FAA were to “unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries”; and 4) consistent with federal policy favoring arbitration, judicial enforcement of arbitral awards should be “summary and speedy.” *Id.*

61. *Id.* at 589.

62. *Daihatsu*, 1992 WL 133036 at \*3.

63. *Id.*

64. *Id.*

65. 391 F.3d 433.

66. *Id.* at 435-36.

67. *Id.*

68. *Id.* at 436.

69. *Id.*

70. *Id.*

71. *Id.* at 437-38.

restriction examined in *Hartford* did not impose any requirements that were not “already imposed by basic Article III principles of standing.”<sup>72</sup> In the instant case, the court reasoned that the section 9 requirement of consent by all parties to judicial enforcement of the arbitral award was significantly more restrictive than section 207 (allowing any party to seek judicial enforcement of the arbitral award).<sup>73</sup>

The court also dismissed Ecoplas’s reliance on *Atlas Chartering Servs., Inc. v. World Trade Group, Inc.*<sup>74</sup> because the chapter 1 provision at issue in *Atlas* was even more pro-arbitration than the corresponding chapter 2 provision. Therefore the chapter 1 provision did not conflict with the Convention because it furthered the Convention’s goals of recognition and enforcement of foreign arbitral awards.<sup>75</sup> The court concluded *Atlas* was inapplicable to the case at bar since section 9 was not similarly pro-arbitration.<sup>76</sup> It reasoned that section 9 creates an obstacle to the availability of judicial enforcement of arbitration awards by requiring the consent of both parties, thus posing a direct conflict with the Convention’s goal of “encouraging the recognition and enforcement of commercial arbitration agreements in international contracts.”<sup>77</sup>

The court did not distinguish the final case Ecoplas cited, *Daihatsu Motor Co., Inc. v. Terrain Vehicles, Inc.*<sup>78</sup> which held specifically that section 9 did not conflict with section 207 even though it placed an “additional limitation” not included in section 207.<sup>79</sup> The court simply disagreed, instead insisting section 9’s “additional limitation” created a conflict with section 207 and chose not to follow *Daihatsu*.<sup>80</sup>

The court also found Ecoplas’s argument that enforcement of the award should be refused because it was denied the opportunity to present its defense during the arbitration in violation of Article V(1)(b) of the Convention to be without merit.<sup>81</sup> The court believed that Ecoplas was given the opportunity to present its defense during the arbitration, and the defense was rejected on the merits.<sup>82</sup>

## V. COMMENT

The narrow issue of whether the FAA section 9 consent-to-confirmation requirement is in conflict with FAA section 207, which does not require consent, was an issue of first impression for the United States Court of Appeals for the Second Circuit.<sup>83</sup> In deciding that the two provisions were in conflict, the court

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72. *Id.* at 437.

73. *Id.*

74. 453 F. Supp. 861 (S.D.N.Y. 1978).

75. *Phoenix*, 391 F.3d at 438.

76. *Id.*

77. *Id.*

78. 1992 WL 133036, at \*3.

79. *Phoenix*, 391 F.3d at 438.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 435. *Phoenix* represents the first time the Court of Appeals has considered the issue, however this issue was addressed in dicta in an case before the United States District Court for the Southern District of New York (located in the Second Circuit). *Shaw Group, Inc. v. Triplefine Int’l Corp.*, 2003 WL 22077332, at \*1 n.4 (S.D.N.Y. Sept. 8, 2003), *enforced sub nom.* *Stone & Webster, Inc. v. Triplefine Int’l Corp.*, 118 F.App’x. 546 (2d Cir. 2004). The court stated that although the issue



settled the issue for the Second Circuit in a manner that is consistent with: 1) the history and goals of the Convention, 2) the reasoning of other cases within the circuit addressing other potential conflicts between Convention provisions and chapter 1 provisions, and 3) the decision in *McDermott*,<sup>84</sup> the only other circuit court opinion to rule on the issue. At the same time, *Phoenix* avoided the flawed logic used by the Northern District of Illinois in *Daihatsu*,<sup>85</sup> the only case reaching the opposite conclusion on the issue of incorporation of consent-to-confirmation into the Convention. The *Phoenix* decision will help to further the pro-arbitration goals of the Convention in the Second Circuit in a manner consistent with both the purpose and letter of its domestic adoption in chapter 2 of the FAA.

### A. History and Goals of the Convention

The U.S. Supreme Court has recognized that the primary goal of the Convention, as well as its adoption in the United States, was “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts . . . .”<sup>86</sup> To this end, the Convention liberalized enforcement of foreign arbitral awards in signatory countries.<sup>87</sup> By holding that consent of the parties is not required for judicial confirmation, the *Phoenix* court makes enforcement of a foreign arbitral award substantially less rigorous than domestic awards furthering the aforementioned goal of the convention.

Article III of the convention purports to leave the rules of procedure for enforcement of foreign awards up to the territory in which the award is sought to be enforced.<sup>88</sup> This provision places the limitation that the rules “not impose substantially more onerous conditions or higher fees or charges” than are imposed on domestic awards; however, these rules do not have to be the same.<sup>89</sup> The United States adopted the Convention in chapter 2 of the FAA, including section 207 which sets forth the procedure for judicial confirmation of foreign arbitral awards.<sup>90</sup> The rules in section 207 are different from the rules for confirmation of a domestic arbitral awards found in section 9 of the FAA in three respects.<sup>91</sup> First and foremost to the case at bar, is the consent-to-confirmation requirement of section 9.<sup>92</sup> Section 207 does not explicitly contain such a requirement.<sup>93</sup> Second, section 9 requires that the parties specify the court in which confirmation is to be

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need not be addressed because the consent to confirmation requirement was satisfied, “the court agrees with Triplefine that Section 207 trumps Section 9 because the two provisions conflict.” *Id.* The decision was appealed by the plaintiff, and the issue was addressed again by the Second Circuit Court of Appeals in an unreported opinion delivered 10 days after *Phoenix*. *See id.* (reiterating that section 207 trumped section 9 because the two provision conflict).

84. 120 F.3d 583 (5th Cir. 1997).

85. 1992 WL 133036 at \*3 (N.D.Ill. Jun. 1, 1992).

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

87. *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974).

88. Convention, *supra* note 41, at Art. III. *But see* Convention, *supra* note 41, at Art. IV-V (placing additional limitations on the procedure for enforcing foreign arbitral awards).

89. *International*, *supra* note 40, Part I.B.2.

90. *See* 9 U.S.C. §§ 201-08 (2000).

91. *See* 9 U.S.C. §§ 9, 207 (2000).

92. 9 U.S.C. § 9.

93. 9 U.S.C. § 207.

sought, while section 207 allows confirmation to be sought in any court of competent jurisdiction.<sup>94</sup> And finally, section 9 requires confirmation be sought within one year after the award is made, and section 207 allows three years.<sup>95</sup> In all three instances, section 207 (on its face) complies with the Article III requirement that the rules for foreign awards not be substantially more onerous than for domestic awards. In fact, section 207 seems to be even more arbitration friendly than section 9.<sup>96</sup>

A plain language reading of the two provisions indicates that the court specification and time limitation requirements directly conflict, so the only issue unresolved by the two provisions themselves is the possible incorporation of the consent-to-confirmation requirement, since section 207 is silent on the issue.<sup>97</sup> Incorporation of the requirement would not violate Article III of the convention as it would only require the same standard for confirmation of foreign awards as it does for domestic awards.<sup>98</sup> Nevertheless, by holding that this requirement conflicted with chapter 2, and was consequently not incorporated through section 208, *Phoenix* furthered the pro-arbitration goals of the Convention.<sup>99</sup> the *Phoenix* decision actually loosens the requirements for enforcing a foreign arbitration award, making enforcement of foreign awards easier than enforcing a domestic arbitration award.

### B. *Prior District Court Cases within the Second Circuit*

As discussed *supra*, a number of district court cases within the Second Circuit had considered whether FAA provisions conflict with Convention provisions prior to *Phoenix*.<sup>100</sup> While not all of the decisions are entirely consistent,<sup>101</sup> one overarching trend is clear. Any chapter 1 provision which creates an obstacle to enforcement of either an arbitration agreement or an arbitral award has been considered to conflict with the Convention, while all chapter 1 provisions which are more favorable to arbitration have been incorporated through section 208.<sup>102</sup>

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94. 9 U.S.C. §§ 9, 207.

95. *Id.*

96. *See* Convention, *supra* note 41, at Art. III; 9 U.S.C. §§ 9, 207.

97. *See* 9 U.S.C. §§ 9, 207.

98. *See* Convention, *supra* note 41, at Art. III.

99. 391 F.3d at 438.

100. *See supra* note 48.

101. *Compare* Hartford Accident & Indem. Co. v. Equitas Reins. Ltd, 200 F. Supp. 2d 102 (D. Conn. 2002) (holding the section 4 requirement that a party must be aggrieved in order to compel arbitration does not conflict with section 206 which does not impose such a requirement since a party must be aggrieved in order to have standing in an Article III court in the first place), *with* Daye Nonferrous Metals Co. v. Trafigura Beheer B.V., 1997 WL 375680 (S.D.N.Y. Jul. 7, 1997) (finding a conflict between the plain language of section 206 and section 4).

102. *See, e.g.,* Shaw Group, Inc. v. Triplefine Int'l Corp., 2003 WL 22077332, at \*1 n.4 (S.D.N.Y. 2003) (suggesting that if section 9's consent-to-confirmation requirement was not incorporated into the Convention it would conflict with the Convention's goal of favoring arbitration); Hartford Accident & Indem. Co. v. Equitas Reinsurance Ltd, 200 F. Supp. 2d 102 (D. Conn. 2002) (finding section 4 and section 206 not in conflict because section 4 did not add any additional requirements to compel arbitration); Daye Nonferrous Metals Co. v. Trafigura Beheer B.V., 1997 WL 375680 (S.D.N.Y., Jul. 7, 1997) (finding section 4 should not be incorporated into the Convention as its requirement that a party be aggrieved conflicted with the conventions goal of favoring arbitration); Belship Navigation, Inc. v. Sealift, Inc. 1995 WL 447656 (S.D.N.Y. 1995) (incorporating severability of a valid arbitration

The aforementioned trend certainly seems to be in line with the often cited goals of the Convention recognized in *Scherk*.<sup>103</sup> The decision in *Phoenix* follows closely both the district court trend and the goals of the Convention.<sup>104</sup> By declaring the section 9 consent-to-confirmation requirement as conflicting with section 206, the Second Circuit refused to incorporate a chapter 1 provision into the Convention which was unfavorable to arbitration.<sup>105</sup> The court specifically noted that “application of the consent-to-confirmation requirement . . . would restrict the availability of judicial confirmation, posing a direct conflict with the Convention’s goal of ‘encouraging the recognition and enforcement of commercial arbitration agreements in international contracts.’”<sup>106</sup> In other words, the court recognized that requiring consent for judicial confirmation was unfavorable to promoting arbitration, and thus refused to incorporate it into the Convention.

To further illustrate that the *Phoenix* decision follows the district court trend, one can see the court quite successfully distinguished *Atlas* and *Hartford*, the two cases which have incorporated chapter 1 provisions when the Convention is silent.<sup>107</sup> The court contrasted the situation in *Atlas*, where pre-arbitration attachment was incorporated into the Convention, to the situation at bar. The court in *Phoenix* noted that use of pre-arbitration attachment is “merely a security device in aid of arbitration” that when incorporated into the Convention “furthered its goals and posed no conflict.”<sup>108</sup> Once again, the court demonstrated the dichotomy where a chapter 1 provision will be incorporated into the Convention if favorable to arbitration and where it will be excluded where the provision creates an obstacle to arbitration.<sup>109</sup>

Distinguishing the *Hartford* court’s incorporation of the aggrievement requirement of section 4 into the Convention would seem a bit more difficult, but the *Phoenix* court does an adequate job here as well.<sup>110</sup> Section 4 requires that a party must first be aggrieved before a court can compel arbitration.<sup>111</sup> The *Hartford* court interprets this to mean that a party must first refuse to arbitrate before arbitration may be compelled.<sup>112</sup> By incorporating this requirement into section 206, *Hartford*’s holding appears, on its surface, to create an obstacle to arbitration not imposed by the Convention, which could be construed as running counter to

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agreement from a invalid contract (which had allowed in several circuits under chapter 1 of the FAA) into the Convention because it promoted the Convention’s goal of promoting the enforcement of arbitration agreements); *Atlas Chartering Services, Inc. v. World Trade Group, Inc.*, 453 F. Supp. 861, 863 (S.D.N.Y. 1978) (incorporating section 8 into the Convention because pre-arbitration attachment is favorable to arbitration, and therefore furthers the goals of the Convention).

103. 417 U.S. 506 (1974). The goal of the Convention is to “encourage the enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.” *Id.* at 519 n.15.

104. See *supra* Part V(A) for a detailed discussion of how *Phoenix* is consistent with the goals of the convention.

105. *Phoenix*, 391 F.3d at 438.

106. *Id.*

107. *Id.* at 437-38.

108. *Id.*

109. *Id.*

110. See *id.* at 437.

111. 9 U.S.C. § 4 (2000).

112. 200 F. Supp. 2d at 108.

the district court trend.<sup>113</sup> To distinguish this holding from the issue at bar, the *Phoenix* court cites *Hartford's* reasoning behind its holding.<sup>114</sup> The court in *Phoenix* explains that requiring a party to be aggrieved in order to compel arbitration is not an additional obstacle to arbitration, in that it is necessary in order for a party to have standing to bring a motion to compel arbitration before the court.<sup>115</sup> Although such a requirement is not specifically mentioned in chapter 2, it is impliedly required to “present an Article III court with a justiciable case or controversy in the first instance.”<sup>116</sup> Thus, the *Hartford* decision did not really add any additional requirement to chapter 2, and is not inconsistent with the trend.

It is clear that the court in *Phoenix* recognized the district court trend of only incorporating chapter 1 provisions where favorable to arbitration, and followed in step by refusing to incorporate the consent-to-confirmation requirement of section 9 into the Convention.

### C. *McDermott and Daihatsu Decisions*

Prior to the *Phoenix* decision, the Fifth Circuit in *McDermott Int'l, Inc. v. Orion Ins. Co.* was the only other United States Court of Appeals to address this specific issue.<sup>117</sup> The Fifth Circuit in *McDermott*, like the court in *Phoenix*, concluded that the two provisions conflicted and consent-to-confirmation should not be incorporated into the Convention.<sup>118</sup>

While the *McDermott* court's reasoning behind the conclusion was not well explained, it is clear that the court had the Convention's pro-arbitration goals in mind.<sup>119</sup> The *Phoenix* court, on the other hand, did a much better job of explaining why incorporating the consent-to-confirmation requirement conflicted with the pro-arbitration goals of the Convention—the same reasons the *McDermott* court most likely considered, but failed to articulate.<sup>120</sup>

In contrast to the lack of reasoning in *McDermott*, the Northern District of Illinois articulated improper reasoning therefore reaching the opposite conclusion in *Daihatsu Motor Co., Inc. v. Terrain Vehicles, Inc.*<sup>121</sup> Instead of focusing on the text of the domestic embodiment of the Convention in Chapter 2 of the FAA,<sup>122</sup> *Daihatsu* focused on misinterpreting Articles III and IV of the original Convention document itself.<sup>123</sup> In its unpublished opinion, *Daihatsu* quotes Article III

113. See *Daye Nonferrous Metals Co. v. Trafigura Beheer B.V.*, 1997 WL 375680 at \*8 (S.D.N.Y. Jul. 7, 1997) (finding section 4 should not be incorporated into the Convention, noting that a requirement that a party be aggrieved conflicted with the Convention's goal of favoring arbitration).

114. *Phoenix*, 391 F.3d at 437.

115. *Id.*

116. *Id.* (quoting *PaineWebber, Inc. v. Paragalli*, 61 F.3d 1063 (3d Cir. 1995)).

117. 120 F.3d 583 (5th Cir. 1997).

118. *Id.* at 588.

119. It appears that in *Phoenix*, the Second Circuit recognized the inadequacy of the *McDermott* opinion in this respect, as it did not cite *McDermott* in the explanation of its reasons for holding the two provisions conflicted. See *Phoenix*, 391 F.3d 433. The court cited *McDermott* only in mentioning that it was the only circuit court opinion to address the issue. *Id.* at 437. See *McDermott*, 120 F.3d at 588-89. See discussion *supra* Part III.

120. See *Phoenix*, 391 F.3d at 438.

121. 13 F.3d 196 (7th Cir. 1993).

122. 9 U.S.C. §§ 207-08 (2000).

123. *Daihatsu*, 13 F.3d at 199.

and Article IV (Article IV appears to have little relevance to the court's conclusion), then states quite conclusively, "Thus, consistent with the Convention, United States courts should apply the same procedural rules for enforcing foreign arbitration awards that it applies in enforcing domestic arbitration awards."<sup>124</sup>

This statement is incorrect. The plain text of Article III states:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is 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 award.<sup>125</sup>

Nowhere does Article III direct that the rules for foreign awards be the *same* as the rules for domestic awards, as *Daihatsu* suggests.<sup>126</sup> In fact, by specifically requiring that rules for foreign awards not be substantially more onerous, the implication is clearly the opposite.<sup>127</sup> Not only does the plain language of Article III indicate that the rules need not be the same, a proposal for such a requirement was specifically rejected by the Convention.<sup>128</sup> *Daihatsu's* conclusion that the rules of procedure for enforcement of foreign arbitral awards must be the same as domestic arbitral award is clearly not consistent with the Convention.

This improper conclusion in *Daihatsu* contributed greatly to its holding that section 9 and section 207 did not conflict.<sup>129</sup> The court reasoned that since section 9 represented the domestic rule for confirmation of an arbitral award it should be applicable to foreign awards as well.<sup>130</sup> With its decision seemingly already made, the court (only as an afterthought) addressed the section 208 language—stating that Chapter 1 applied to actions under the Convention only to the extent that such provisions are not in conflict with Chapter 2.<sup>131</sup> *Daihatsu* held that consent-to-confirmation represented only an "additional limitation" not otherwise included in Chapter 2, and this "additional limitation" did not conflict with section 207 and should be incorporated into Chapter 2 through section 208.<sup>132</sup>

The court in *Phoenix* recognized *Daihatsu's* holding as incorrect.<sup>133</sup> It correctly dismissed *Daihatsu's* 'additional limitation' as being precisely what created the conflict.<sup>134</sup> This dismissal follows closely the other pro-arbitration reasons given by the court in support of its conclusion.<sup>135</sup>

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124. *Daihatsu Motor Co., Inc., v. Terrain Vehicles, Inc.*, 1992 WL 133036, \*2-3 (N.D. Ill. June 1, 1992).

125. Convention, *supra* note 41, at Art. III.

126. *Daihatsu*, 13 F.3d at 198.

127. Convention, *supra* note 41, at Art. III.

128. *International*, *supra* note 40, Part I.B.2.

129. *Daihatsu*, 13 F.3d at 199.

130. *Id.* at 198.

131. *Id.*

132. *Id.* at 199.

133. See *Phoenix*, 391 F.3d at 436-37.

134. *Id.*

135. *Id.* at 437-38.

#### D. Impact of *Phoenix*

The decision in *Phoenix* could have a far-reaching, positive impact on the recognition of international commercial arbitral awards in the United States. Prior to *Phoenix*, there was little authority on potential conflict between section 207 and section 9: only one circuit court opinion, *McDermott*, and one unpublished district court opinion, *Daihatsu*.<sup>136</sup> Additionally, these two cases were not very helpful, as *McDermott* did not explain why the two provisions conflicted, and *Daihatsu* interpreted the convention provisions incorrectly.<sup>137</sup> In contrast, the *Phoenix* decision explains in detail why the two provisions conflict, and why this decision furthers the goals of the Convention.<sup>138</sup> In doing so, the *Phoenix* court lays out logical reasoning that other jurisdictions can look to when faced with this issue in the future. Given that currently only the Fifth Circuit and now the Second Circuit, have decided the issue, it is inevitable that the other circuits will have the issue in front of them in the not too distant future. When they do, the *Phoenix* decision should serve as a welcome beacon to guide their decisions.

Furthermore, the *Phoenix* holding can, and should be, applied by courts in the future when confronted with any situation where Chapter 2 is silent on an issue and the Chapter 1 provision on point is not favorable to arbitration. The *Phoenix* decision, as well as the goals and history of the convention and prior district court decisions, make it clear that the Chapter 1 provisions should not be incorporated into the convention in such a situation.

Although the decision in *Phoenix* is well-reasoned, drafted and consistent with both the history and goals of the Convention and its domestic implementation in Chapter 2 of the FAA, it is not entirely free of danger. The *Phoenix* decision represents yet another step forward in the strong policy in favor of arbitration in American courts, both in domestic and foreign areas. Perhaps at some point this policy may become so strong that it serves to unfairly bind a party to arbitrate when it did not agree to do so.

At its best, arbitration can be a fair, cost effective, and efficient means of resolving certain disputes without resorting to an overcrowded court system.<sup>139</sup> At its worst, arbitration can be an unfair result of adhesion that discourages parties to a contract who have little or no bargaining power from bringing legitimate claims.<sup>140</sup> While it is clear that the *Phoenix* decision is correct in determining that the consent-to-confirmation requirement of section 9 is not incorporated into the Convention through section 208, one should certainly not conclude that requiring consent-to-confirmation is necessarily a bad policy.

The section 9 consent-to-confirmation requirement can serve as a safeguard by making certain all parties agree to be bound by an arbitral decision before the

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136. *McDermott Int'l Inc. v. Orion Ins. Co.*, 120 F.3d 583, 588 (5th Cir. 1997); *Daihatsu*, 13 F.3d at 199.

137. *Id.*

138. See *Phoenix*, 391 F.3d at 437-38.

139. LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 570 (2d ed. 1997).

140. See Shirin Philipp, *Is the Supreme Court Bucking the Trend?: First Options v. Kaplan in Light of European Reform Initiatives in Arbitration Law*, 14 B.U. INT'L L.J. 119, 124-26 (1996) (discussing the potential unfairness of a high degree of arbitral autonomy).

award becomes final and binding.<sup>141</sup> Once a court confirms an arbitral award, it becomes a judgment entitled to full faith and credit.<sup>142</sup> The availability of judicial confirmation to enforce an award is a major reason for the popularity of arbitration as a form of alternative dispute resolution.<sup>143</sup> Nevertheless, elimination of the procedural safeguard of consent-to-confirmation in actions under the Convention may create a greater risk of binding parties who did not agree to arbitrate to an arbitral award.

For practical purposes, this would not seem to be a significant new danger in the Second Circuit, as this circuit has previously interpreted what constitutes consent for section 9 purposes very liberally in domestic cases as well.<sup>144</sup> The Second Circuit does not require express consent-to-confirmation; rather, a contractual provision stating that the arbitrator's decision shall be final is sufficient consent for section 9 purposes.<sup>145</sup> The interpretation of this consent requirement has varied widely among the circuits.<sup>146</sup> The Eighth Circuit has given the most stringent reading of section 9 to date, by requiring express consent within the arbitration agreement to allow judicial confirmation.<sup>147</sup> If the Eighth Circuit were faced with a consent-to-confirmation challenge in a case under the Convention, following the *Phoenix* decision, while correct under the law, it would represent a significant reduction in the procedural protections against unfairly binding parties to arbitral awards in that jurisdiction. Given the differences among the circuits, it remains to be seen exactly what impact *Phoenix* will have nationwide, but the Second Circuit undoubtedly made the correct decision based upon the current state of the law.

## VI. CONCLUSION

The court in *Phoenix* followed the purpose of the Convention, the trends of the district court decisions, and the Fifth Circuit's decision in *McDermott*. Given the pro-arbitration policy of the federal courts in both foreign and domestic arenas,<sup>148</sup> the decision is not unexpected. The *Phoenix* decision will not only settle the narrow issue of incorporation of consent-to-confirmation into the Convention in the Second Circuit, but should also serve as notice that Chapter 1 provisions which are unfavorable to arbitration, will not be incorporated into the Convention even where Chapter 2 is silent on the issue.

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141. See Erika Van Ausdall, *Confirmation of Arbitral Awards: The Confusion Surrounding Section 9 of the Federal Arbitration Act*, 49 DRAKE L. REV. 41, 70 (2000).

142. IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 38.1.1 (Supp. 1997).

143. Ausdall, *supra* note 141, at 43.

144. See *I/S Stravborg v. Nat'l Metal Converters, Inc.*, 500 F.2d 424 (2nd Cir. 1974).

145. *Id.* at 426-27.

146. See Ausdall, *supra* note 141 (discussing the many different interpretations of the consent-to-confirmation requirement of section 9).

147. See *PVI, Inc. v. Ratiopharm GmbH*, 135 F.3d 1252 (8th Cir. 1998).

148. See *McDermott Int'l Inc. v. Orion Ins. Co.*, 120 F.3d 583, 588-89 (5th Cir. 1997).