ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

By

R. Doak Bishop
King & Spalding

Elaine Martin
Hughes & Luce, L.L.P.
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Most arbitral awards are voluntarily complied with and do not require judicial enforcement. It is only if an arbitral award can be adequately enforced, however, that a successful claimant can ensure that it will actually recover the damages awarded it.\(^1\) Fortunately, as the courts have noted, there is an “oft-stated federal policy, embodied in the Federal Arbitration Act, 9 U.S.C. §1 et. seq., favoring the enforcement of arbitration agreements and the confirmation of arbitration awards.”\(^2\) Courts in the United States pursue a consistent, well-articulated policy of recognizing and enforcing awards in both domestic and foreign arbitrations; in fact, arbitral proceedings are recognized and enforced in U.S. courts more readily than are foreign judgments.\(^3\)

The principal sources of authority in the United States for the recognition of foreign awards are the 1975 Inter-American Convention on International Commercial Arbitration (the

\* Partner, King & Spalding, Houston, Texas; member of the Texas Bar; Vice-Chairman, Institute of Transnational Arbitration; Editor, International Litigation Quarterly.

\** Member of the Texas Bar and Law Society of Ireland.

\(^1\) Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES at 460 (1994).


“Panama Convention”),\textsuperscript{4} the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”),\textsuperscript{5} and the ‘domestic’ U.S. Federal Arbitration Act (the “FAA”).\textsuperscript{6} As a result, an action to confirm an arbitral award can be brought under Sections 304, 207 or 9 of the Federal Arbitration Act. An action to vacate an award can be brought under Section 10 of the FAA. In addition to the New York and Panama Conventions and the FAA, other enforcement mechanisms are available, including multilateral treaties, bilateral Friendship, Commerce and Navigation treaties and traditional principles of comity among nations.\textsuperscript{7}

It is possible in some circumstances that both the New York and Panama Conventions could apply to an arbitral award. Section 305 of the FAA addresses this issue by providing that, if a majority of parties to an arbitration agreement are from countries that have ratified the Panama Convention and are members of the Organization of American States (“OAS”), then the Panama Convention will apply.\textsuperscript{8} In all other cases, the New York Convention applies.\textsuperscript{9} In Progressive Casualty Insurance Co. v. C.A. Reaseguradora Nacional de Venezuela,\textsuperscript{10} the plaintiffs were U.S. companies, the defendants were Venezuelan, and both countries had ratified both the Panama and New York Conventions and were members of the OAS. The court applied

\textsuperscript{5}  9 U.S.C. §§ 201-208 (U.S. enabling legislation).
\textsuperscript{6}  9 U.S.C. §§ 1-16.
\textsuperscript{7}  McLaughlin, \textit{Enforcement of Arbitral Awards} at 278.
\textsuperscript{8}  9 U.S.C. §305(1).
\textsuperscript{9}  9 U.S.C. §305(2).
\textsuperscript{10}  802 F.Supp 1069 (S.D.N.Y. 1992), rev'd, 991 F.2d 42 (2d Cir. 1993).
Section 305 and held that the Panama Convention, rather than the New York Convention, controlled.\textsuperscript{11}

1. THE PANAMA CONVENTION

The Panama Convention entered into force for the United States on October 27, 1990. Fifteen nations have ratified the Convention; in addition to the United States, these include Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. Four other governments have signed the Convention but have not yet ratified it: Bolivia, Brazil, the Dominican Republic and Nicaragua.

Under the Convention, a non-appealable arbitral award is given the same force as a final judicial judgment.\textsuperscript{12} An arbitral award is to be recognized and enforced in the same manner and according to the same procedure as that provided for local court judgments as modified by the provisions of any applicable international treaties. Unlike the New York Convention, the Panama Convention does not distinguish between foreign and domestic arbitral awards. An award is enforceable, however, only if “made in the territory of a foreign state” that has ratified the Convention.\textsuperscript{13}

The Panama Convention’s implementing legislation\textsuperscript{14} incorporates by reference Sections 202, 203, 204, 205 and 207 of the New York Convention’s implementing legislation, thus subjecting enforcement under both conventions to the same general procedural regime.\textsuperscript{15} In

\textsuperscript{11} Id. at 1074.

\textsuperscript{12} Panama Convention art. 4.

\textsuperscript{13} 9 U.S.C. § 304.

\textsuperscript{14} 9 U.S.C. § 302.

\textsuperscript{15} Born, supra note 1, at 321.
addition, Section 307 provides for the application of the domestic FAA to the extent it “is not in conflict” with the Panama Convention or its implementing legislation (Chapter 3 of the FAA).\textsuperscript{16}

The most important provision of the Panama Convention is Article 5, which is almost identical to Article V of the New York Convention. It provides the bases for refusing to recognize and execute an arbitral award. The Convention expressly says that the party against whom an award is made has the burden of proving one of the grounds for refusing recognition.\textsuperscript{17}

The grounds set out in the Panama Convention for non-recognition include the following:

a. the parties to the arbitral agreement are suffering from some incapacity, or the agreement is invalid under applicable law;

b. the complaining party was not duly notified of the appointment of the arbitrator or of the applicable arbitration procedure or was unable to present his defense;

c. a decided issue is not within the scope of the arbitral agreement;

d. the constitution of the arbitral tribunal, or the procedure followed, was not in accordance with the parties’ agreement or applicable law; or

e. the award is not yet binding or has been annulled or suspended by a competent authority of the state where the award was made.\textsuperscript{18}

Two additional grounds for non-recognition arise if the state where recognition is sought finds:

a. that the subject of the dispute cannot be settled by arbitration under the law of the recognizing state; or

b. recognition would be contrary to the public policy of the recognizing state.\textsuperscript{19}

\textsuperscript{16} Id.

\textsuperscript{17} Panama Convention art. 5.

\textsuperscript{18} Panama Convention art. 5.1.

\textsuperscript{19} Panama Convention art. 5.2.
In general, the standards of non-arbitrability applicable under U.S. law are defined by separate federal statutes and should be the same under the Panama Convention as under the New York Convention. Some issues that the courts have held to be non-arbitrable include claims under the federal RICO, securities, patent, antitrust, bankruptcy and COGSA laws.

The final substantive provision of the Convention was taken verbatim from the New York Convention and allows a competent authority of the country where the award is rendered to postpone a decision on the execution of the award. Upon the request of the party seeking execution, the country may also require the party against whom the award was made to provide appropriate guaranties.

In a recent U.S. case, the Second Circuit Court of Appeals addressed the applicability of the Panama Convention. In Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., Productos Mercantiles E Industriales, S.A. (“Prome”), a Guatemalan corporation, entered into an exclusive licensing agreement with Faberge USA, Inc. (“Faberge”), allowing Prome to use Faberge’s trademarks on Prome products manufactured in Central America. Later, Faberge’s business was acquired by Unilever, and the Central American business was assigned to Industrialas Unisola, S.A., an El Salvadoran corporation partly owned by Unilever. Prome was then informed that its licensing agreement would not be renewed.

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20 Born, supra note 1, at 321.
21 Id. at 324-25. See id. at 322-82 for a comprehensive discussion of the non-arbitrability doctrine.
22 Convention art. 6.
23 Id.
24 23 F.3d 41 (2d Cir. 1994).
Prome sought arbitration before the American Arbitration Association. The arbitrators rendered an award for certain amounts in favor of Prome. In one part of the award, the arbitrators modified the amount awarded Prome on its principal claim from $58,949.94 to $158,949.94, but did not modify this same amount in another part of the award. Prome brought a lawsuit to modify the award and confirm it, while Faberge, Unilever and Unisola moved to dismiss the action for lack of subject matter jurisdiction.

Faberge claimed that the court did not have subject matter jurisdiction because the award was rendered in the United States, and the Panama Convention only applies to arbitral awards rendered in foreign countries that are parties to the Convention. Faberge pointed to the United States’ enabling legislation and the U.S. Senate’s third reservation to the ratification of the Convention, which provides that the U.S. will apply the Convention on the basis of reciprocity to the recognition and enforcement of awards made in the territory of another contracting state.

The court read the reservation and enabling legislation differently. It decided that these statements were intended only to bar enforcement of arbitral awards rendered in nations that are not signatories to the Convention. If Congress had intended to exclude awards rendered in the U.S., the court noted, it could have done so expressly, but did not. The court analogized to the case of Bergesen v. Joseph Muller Corp. in which the Second Circuit held that the New York Convention gave a U.S. court jurisdiction to confirm an award rendered in New York in a dispute between two foreign parties. That award was held to be a non-domestic award, under the terms of the New York Convention, because it involved foreign parties. The court in Faberge noted the absence in the Panama Convention of any “strict territorial” language, like that found in the New York Convention, and pointed to the implementing legislation that U.S. courts should
strive for uniformity in interpreting the two conventions. The court did so by applying the Panama Convention in the same manner as the New York Convention -- to awards rendered in the United States involving foreign parties.

U.S. courts have held that the Panama Convention applies retroactively to contracts signed before the U.S. ratified the Convention, takes precedence over the New York Convention when a majority of the parties to the arbitration agreement are citizens of countries that have ratified the Panama Convention and are members of the OAS, that the standard for enforceability of arbitration agreements is the same for both the Panama and New York Conventions, that the Panama Convention applies to confirmation proceedings in the U.S. even though the award was entered in the U.S. (as long as it involved foreign parties), and that the Panama Convention (supplemented by the FAA) allows U.S. courts to modify arbitral awards. These holdings form the beginnings of a jurisprudence of the Panama Convention. Due to the relative youth of the Convention, the interpretation of the exceptions to the enforceability of international arbitration agreements under the New York Convention will be an important precedent for interpreting the exceptions to enforceability under the Panama Convention.

2. THE NEW YORK CONVENTION

The U.S. Supreme Court has said:

the goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and 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.\textsuperscript{26}

\textsuperscript{25} 710 F.2d 928 (2d Cir. 1983).

The United States acceded to the New York Convention in 1970, and today a total of 96 countries have ratified it (together with two others who have signed but not yet ratified). Article I of the Convention provides that it shall apply to awards made in the territory of a state other than that where recognition and enforcement is sought; it shall also apply to arbitral awards not considered as domestic in the state where their recognition and enforcement are sought. This means that an award can be enforced in the country in which it was made, as decided in Bergesen v. Joseph Muller Corp., discussed earlier. The court in Bergesen reviewed the legislative history of the Convention and concluded that:

awards “not considered as domestic” denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g. pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. We prefer this broader construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards.

The Convention provides that countries which ratify it may do so with either one or both of two reservations offered in Article I(3). The first so-called reciprocity reservation limits recognition and enforcement of awards to those made in a convention country. The second so-called commercial reservation limits recognition and enforcement to differences that are considered commercial under the national law of the forum in which enforcement is sought. The United States ratified the Convention with both reservations, as have most contracting countries.

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27 710 F.2d 928 (2d Cir. 1983). See supra at 6-7.
28 Id. at 932.
30 Id.
31 Id.
countries, including in the Western Hemisphere: Antigua and Barbuda, Argentina, Canada, Cuba, Ecuador, Guatemala, Trinidad and Tobago.

Each contracting state is required to recognize a written arbitration agreement, whether contained in a contractual clause or letters or telegrams, and the courts of each contracting country are instructed to refer the parties in dispute to arbitration unless they find such agreements to be invalid (Article II).

Contracting states are also required to recognize arbitral awards as binding and enforce them in accordance with their own procedural rules, which cannot be more onerous than those applicable to domestic awards (Article III). The New York Convention thus remits the parties to domestic laws already in place with respect to enforcing awards. If domestic awards are difficult to enforce, the New York Convention does not make the enforcement of foreign awards any easier.

One important provision of the Convention is that it presumes the validity of awards and places the burden of proving invalidity on the party opposing enforcement (Article V). Moreover, awards are not subject to the “double exequatur” and need not be confirmed in the arbitral situs before enforcement can be sought abroad.

In the United States, Articles III and V of the New York Convention are implemented by Section 207 of the Federal Arbitration Act, which provides that a court “shall confirm” awards subject to the Convention “unless it finds one of the grounds for refusal” specified in the

33 Id.
34 Born, supra note 1, at 465.
Convention to exist. Application for confirmation must be made within three years after the award is made, which means within three years of when the award is decided by the arbitrators, not when it becomes final.\(^{35}\) To obtain recognition and enforcement, the applicant shall supply the original or a duly certified copy of the award and the original or a duly certified copy of the arbitration agreement, both of which shall be translated if necessary.\(^{36}\)

Article V of the Convention sets forth limited grounds for refusing to recognize and enforce an award. These include:

a. the parties were suffering under some incapacity or the arbitral agreement was invalid;

b. the party against whom the award is invoked was not given proper notice of the arbitrator’s appointment or the arbitration proceedings or was unable to present his case;

c. the award decides matters not within the scope of the arbitration agreement;

d. the composition of the arbitral tribunal or the procedure used did not accord with the parties’ agreement or applicable law; or

e. the award has not yet become binding or has been set aside or suspended by a competent authority of the country where the award was rendered.

Article V(2) provides two further grounds for refusing to enforce an award:

a. nonarbitrability of the subject matter;

b. the recognition or enforcement of the award would be contrary to public policy.

The New York Convention (e.g., Articles IV, V, VI) refers only to an application for recognition and enforcement of an award. The only allusion to setting aside an award occurs in Article V(1)(e), which states that one ground for refusal of recognition is that the award “has


\(^{36}\) New York Convention, art. IV; 9 U.S.C. § 201.
been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.” Courts in the United States and elsewhere have held that the language of the Convention provides that an application to set aside or suspend an award can only be made in the country where the arbitral proceeding was held and the country whose arbitral procedural, rather than substantive, law is applied (usually the same).37

In International Standard Electric Corp. ("ISEC") v. Bridas Sociedad Anonima Petrolera Industrial y Comercial,38 an award was rendered in Mexico City in favor of Bridas. ISEC filed a petition in U.S. court to vacate the award and to refuse it recognition. Bridas claimed the court lacked jurisdiction to vacate the award, but petitioned to enforce it under the New York Convention. ISEC argued that both the courts of Mexico, where the arbitration proceeding was held, and the courts of the U.S., whose substantive law was applied pursuant to the terms of the contract, had authority to vacate the award under the New York Convention. Bridas argued that only the courts of Mexico could vacate. The U.S. court agreed with Bridas and held that the country whose substantive law is applied does not, because of that fact alone, have authority to vacate an arbitral award. The court held that the language of Article VI(e)

refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law of the contract which was applied in the case.39

39 Id. at 178.
One commentator has suggested that, since vacatur can take place only in the country in which the award was made, an award may be set aside in its country of origin on grounds other than those mentioned in the Convention. A modification to the Convention could be considered providing that the grounds for vacatur in the country where awards are made should be limited to those mentioned as grounds for refusal under Article V(1)(a)-(d).

A. Article V Defenses to Enforcement of an Arbitral Award

(1) Incapacity of a party or invalidity of the arbitration agreement

One ground for refusing to recognize or enforce an arbitral award, contained in Article V(1)(a), is:

where the parties were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

This ground for refusing to enforce an arbitral award, like the others, has rarely been successful.

No reported U.S. judicial decision has vacated an arbitral award because of either lack of capacity of one or both of the contracting parties or invalidity of the agreement to arbitrate under the applicable law. There have, in fact, been relatively few U.S. decisions concerning the application of Article V(1)(a). These include Buques Centroamericanos, S.A. v. Refinadora Costarricense de Petroleos, S.A., in which the respondent in an action to confirm an award raised the issue that the arbitration agreement was invalid because it was not approved by the legislature of Costa Rica, who owned the company at the time of entering the agreement.


41 Id.
court noted that this argument was rejected when raised during the arbitration, agreed with the arbitrators’ findings, and confirmed the award. In American Construction Machinery & Equipment Corp. v. Mechanized Construction of Pakistan Ltd., an argument that the award could not be enforced as it was invalid under the laws of Pakistan failed because the parties did not validly designate Pakistani law as applying to their agreement.

The New York Convention allows the enforcing states to examine the validity of the award under “the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.” This Article also permits a national court to deny recognition to an award if the parties to the arbitration agreement “were, under the law applicable to them, under some incapacity.” Article V(1)(a) does not decide the question of “applicable” law, leaving it to national courts to apply their own conflict-of-law rules.

Article II of the Convention requires that the agreement to be recognized by contracting states be “in writing.” This is deemed to include “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” The agreement’s validity is to be judged against the law governing the contract or, absent this indication, the law of the country where enforcement is sought. Even when the arbitration
agreement is validly concluded under national law, the New York Convention cannot be applied when the conditions of “in writing” described in Article II(2) are not met.\textsuperscript{49} As a result, in cases in which the arbitration agreement does not meet the requirement of a “writing” as prescribed by Article II, it may be advisable to seek enforcement under national arbitration law or a more favorable treaty (as provided for in Article VII of the New York Convention), instead of relying on the Convention.\textsuperscript{50}

A Swiss court has refused to enforce an award on the basis that Article II(2) was not satisfied when a Dutch seller sent a Swiss buyer a sales confirmation containing an arbitration clause, but the buyer did not react further.\textsuperscript{51} It was held that there had been no exchange of documents under Article II and recognition was not possible.

Difficulties with the “writing” requirement in Article II may also arise when the arbitration agreement is only contained in a contract by reference to another document such as general conditions of sale.\textsuperscript{52} In most countries, however, this method of agreeing to arbitrate has so far always been recognized, provided that the contract itself has been signed by the parties or has been concluded by an exchange of letters, telegrams or teleprinter.\textsuperscript{53} The U.S. Second Circuit Court of Appeals has extended the doctrine of incorporation to bind alleged non-parties

\begin{flushleft}
\textsuperscript{50} Id.
\textsuperscript{53} Id.
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by the arbitration clause. "[A] broadly-worded arbitration clause, which is not restricted to the
immediate parties, may be effectively incorporated by reference into another agreement."54

(2) **Lack of Due Process**

Article V(1)(b) provides for refusal of recognition or enforcement of an award if the
“party against whom the award is invoked was not given proper notice of the appointment of the
arbitrator or of the arbitration proceedings or was otherwise unable to present his case”. This
defense “essentially sanctions the application of the forum state’s standard of due process” as one
court has noted.55

In the leading case of Parsons & Whittemore Overseas Co. v. Societe Generale de
l’Industrie du Papier,56 the Second Circuit Court of Appeals held that the arbitral tribunal did not
violate United States’ constitutional standards of due process by refusing to reschedule a hearing
because one witness had a prior speaking engagement. The witness provided the arbitrators with
an affidavit containing most of his proposed testimony, and therefore, Overseas could not claim
that it was unable to present evidence. The court stated that by “agreeing to submit disputes to
arbitration, the party relinquishes his courtroom rights - including that to subpoena witnesses - in
favor of arbitration ‘with all of its well known advantages and drawbacks.’”57

The defense of denial of due process, like other defenses, has rarely been successful. In
the U.S., courts have narrowly construed Article V(1)(b) in favor of looking at the overall result
and determining whether the defendant got a fair hearing. In the case of Laminoirs-Trefileries-

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55 Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (“RAKTA”), 508 F.2d
969, 975 (2d Cir. 1974).
56 Id.
57 Id. at 975.
Cableries de Lens, S.A. v. Southwire Co., 58 the court recognized an award despite the defense that Southwire was prevented from offering pertinent evidence. The court decided that “arbitrators are charged with the duty of determining what evidence is relevant and what is irrelevant and that absent a clear showing of abuse of discretion, the court will not vacate an award based on improper evidence or the lack of proper evidence.” 59

The fact that a party refuses to participate in arbitration proceedings does not constitute a reason to deny recognition and enforcement of an award based on a denial of due process. See, e.g., Libyan American Oil Co. (“LIAMCO”) v. Socialist People’s Libyan Arab Jamahirya, 60 in which Libya refused to participate in the arbitration based upon a sovereign immunity theory; the court held that immunity had been waived. 61 Furthermore, a party cannot fail to appear at a proceeding, offer no satisfactory explanation for its absence, and then expect to prevent enforcement of the resulting award on the grounds that it was unable to present its case. 62

The courts have held that the intent of the due process exception is to guarantee notice and an opportunity to be heard. 63 In Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co., the court held that neither of these protections was denied

59 Id. at 1067.
when the party opposing enforcement argued that its rights and liabilities under the disputed agreement had not matured. The party did not contend that it received inadequate notice or was otherwise prevented from participating. Rather, it argued that it was unable to present its case because its rights and liabilities under an agreement could not be calculated until the agreement expired.

In International Standard Electric Corp. ("ISEC") v. Bridas Sociedad Anonima Petrolera Industrial Y Comercial, ISEC asserted that it was unable to present its case, within the meaning of the Convention, because it was not informed of the identity of the panel’s independent expert or given an opportunity to rebut that expert’s opinion. It further argued that this contravened the public policy of the U.S. by violating due process standards under the U.S. Constitution. The court rejected this argument because ISEC was informed in advance of the panel’s procedure for appointing its independent expert, yet ISEC voiced no objection to that procedure.

An unusual refusal to enforce an award on due process grounds is contained in Iran Aircraft Industries v. Avco Corp. Following a request from Avco’s counsel at a pre-hearing conference, the tribunal stated that the appropriate method of proving some claims, which were based on voluminous invoices, was by affidavit. In issuing the award, however, the tribunal disallowed claims which were based solely on the affidavit and a list of invoices. The court held

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64 Id. at 140-41.
65 Id. at 140.
67 Id. at 180.
68 980 F.2d 141 (2d Cir. 1992).
that the arbitral tribunal misled Avco regarding the evidence it was required to submit, thereby denying Avco “the opportunity to present its claim in a meaningful manner.”

In Italy, a decision of the Milan Court of Appeals enforcing an award was reversed based on a finding that Article V(1)(b) had been violated because the reasons given by the lower court for its decision were insufficient and illogical. In Spain, recognition of an award was refused because the respondent had died before being notified of the request for arbitration, and proceedings were not conducted against his heirs.

Section 10(c) of the Federal Arbitration Act permits arbitral awards to be vacated for the arbitrator’s procedural misconduct. U.S. courts have frequently relied on Section 10(c) precedent in applying Article V(1)(b).

The courts tend to accord wide discretion to the arbitrators in managing the case and have refused to deny confirmation of an award based on, for example, the following grounds: late notice when the defendant was not prejudiced; lack of consideration of all arguments by the arbitral tribunal; and expiration of time limits for rendering an award.

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69 Id. at 146.


72 9 U.S.C. § 10; see infra pp. 43-44.

73 Born, supra note 1, at 553.


(3) **The Award, or a Non-Severable Part of it, Exceeds the Submission to Arbitration**

Article V(1)(c) of the New York Convention provides for refusal when:

the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

This defense, like the others available under Article V, has been unsuccessful in most cases. The general view is that arbitration agreements should be interpreted broadly.\(^{77}\)

In Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier ("RAKTA"),\(^{78}\) the court held that the Convention “does not sanction second guessing the arbitrator’s construction of the parties’ agreement.” This landmark case provided a comprehensive interpretation of this defense, reading Article V(1)(c) very narrowly. The court enforced an arbitrator’s award for loss of production even though the contract provided that the parties would not be liable for such loss.

In International Standard Electric Corp. ("ISEC") v. Bridas Sociedad Anonima Petrolera Industrial Y Comercial,\(^{79}\) ISEC argued that the panel exceeded its authority and acted beyond the scope of the parties’ agreement by deciding the damage issue based on equitable grounds, rather than on the law, and therefore, acted as *amiables compositeurs* without the parties’ consent. It

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78 508 F.2d 969, 977 (2d Cir. 1974).

also argued that this amounted to a manifest disregard of the law. The court noted that the “manifest disregard” test is a domestic defense, and held that it does not amount to a contravention of public policy, and is not a defense under the Convention.\textsuperscript{80} The court held it had no authority to reconsider the panel’s fact findings, nor could it undertake a \textit{de novo} inquiry into whether the arbitrators properly applied the substantive law.

In \textit{Comprehensive Accounting Corp. v. Rudell},\textsuperscript{81} the court refused to overturn an order enforcing an award based on the defense that the defendant did not actually know about the arbitration clause. The court held that the defendants were barred from challenging the validity of the original agreement to arbitrate by delaying their challenge until the person in whose favor the award was made sued to enforce it.

In a Canadian decision, the court recognized an award, holding that the fact that the arbitrators did not take into account a particular defense was not a violation of Article V(1)(c).\textsuperscript{82}

When a case involves a true jurisdictional challenge (rather than a challenge to the arbitrator’s substantive contract interpretation), for example to the existence, the validity or the scope of an arbitration agreement, courts have been less willing to defer entirely to the arbitral

\textsuperscript{80} \textit{Id.} at 181-82.

\textsuperscript{81} 760 F.2d 138 (7th Cir. 1985).

tribunal.\textsuperscript{83} There is a powerful presumption, however, that the arbitral body acted within its powers.\textsuperscript{84}

A rare case in which the court held that the requirements of Article V(1)(c) were satisfied and refused to confirm an award occurred in Fiat S.p.A. v. Ministry of Finance & Planning of Suriname.\textsuperscript{85} In that case, the court found that the tribunal exceeded its authority when it purported to bind a non-signatory not expressly covered by the arbitration agreement when the issue was submitted to arbitration.\textsuperscript{86} The court vacated part of an award against one party, while confirming the remainder against a second party.\textsuperscript{87} This case is also a rare example of a court dividing an award into permissible and impermissible sections; Article V(1)(c) is the only defense in which this is possible, reflecting the pro-enforcement policy of the Convention.\textsuperscript{88}

\textbf{4) Improper Arbitral Procedure or Composition of the Arbitral Tribunal}

Article V(1)(d) provides a fourth defense to the recognition and enforcement of awards when:

the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

\begin{itemize}
\item \textsuperscript{83} Born, \textit{supra} note 1, at 568.
\item \textsuperscript{84} Judgment of 7 July 1989, Court of Appeal of Bermuda, summarized in XV Y.B. COM. ARB. 384 (1990) (International Council for Commercial Arbitration), \textit{citing} Parsons & Whittemore Overseas, Inc. v. RAKTA, 508 F.2d 969, 976 (2d Cir. 1974).
\item \textsuperscript{86} \textit{Id.} at *14.
\item \textsuperscript{87} \textit{Id.} at *18.
\end{itemize}
This defense has frequently been used to argue that the arbitrators were biased in violation of the parties’ agreement.\(^8^9\) This argument is unpopular because

[f]irst, one of the benefits of arbitration is the ability of the parties to choose panel members who are experts in the field of the dispute. Because of the tremendous demand for a small number of renowned experts, many of these experts may jointly serve on many arbitration panels, possibly in other disputes surrounding one or both of the parties now in disagreement. Secondly, in an effort to advance the goals of the convention, courts will often be very skeptical of broad-based assertions of bias, not raised before the arbitral panel itself, and subsequently raised to block enforcement of the award. Courts may even characterize these attempts as made in bad faith.\(^9^0\)

The most important U.S. decision on the question of arbitrator bias is Commonwealth Coatings Corp. v. Continental Casualty Co.,\(^9^1\) which concerned a review of an award under 9 U.S.C. § 10. There, the presiding arbitrator conducted business in Puerto Rico where one of his customers was the respondent in the case. The relationship was sporadic, and there had been no dealings between them for about a year prior to the arbitration. The business connection between the arbitrator and the respondent were unknown to the petitioner and were never revealed by the arbitrator, the respondent, or anyone else until after an award had been made. The petitioner did not charge that the arbitrator was actually guilty of fraud or bias, but challenged the award on Section 10 grounds. The court held that arbitrators should be required to disclose to the parties any dealings that might create an impression of possible bias, but that this would not automatically lead to disqualification.\(^9^2\) The court noted that “any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of

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\(^{90}\) Id.

\(^{91}\) 393 U.S. 145 (1968).

\(^{92}\) Id. at 150.
Because the tribunal might reasonably have been thought biased against one party and favorable to another, the Supreme Court set aside the award.\textsuperscript{94}

The principles of \textit{Commonwealth Coatings} were applied in \textit{Andros Compania Maritima, S.A. v. Marc Rich & Co. A.G.},\textsuperscript{95} which refused to overturn an award when the primary basis of an alleged “close personal and professional relationship” between the arbitrator and a connected party was serving together on nineteen arbitration panels - with no other connection.

Numerous court cases have discussed the question of arbitrator misconduct pursuant to Section 10 of the Federal Arbitration Act,\textsuperscript{96} which permits non-enforcement when the award was procured by corruption, fraud or undue means,\textsuperscript{97} when there was evident partiality or corruption in the arbitrators,\textsuperscript{98} and when “the arbitrators were guilty of misconduct in refusing to postpone the hearing ... or of any other misbehavior by which the rights of any party have been prejudiced.”\textsuperscript{99} Only two U.S. decisions have addressed the question of the improper composition of the arbitral tribunal based on the New York Convention.

In \textit{Imperial Ethiopian Government v. Baruch-Foster Corp.},\textsuperscript{100} the losing party discovered, after the award was made, that the third arbitrator had previously drafted the civil code for the

\begin{thebibliography}{9}
\bibitem{93} \textit{Id.}
\bibitem{94} \textit{Id.} at 340.
\bibitem{95} 579 F.2d 691 (2d Cir. 1978).
\bibitem{96} See infra at 42-45.
\bibitem{97} 9 U.S.C. § 10(a).
\bibitem{98} 9 U.S.C. § 10(b).
\bibitem{99} 9 U.S.C. § 10(c).
\bibitem{100} 535 F.2d 334 (5th Cir. 1976).
\end{thebibliography}
Ethiopian government, the prevailing party. Baruch-Foster claimed this action violated the arbitration agreement, which provided that the third arbitrator should have no direct or indirect connection with either party. The Fifth Circuit Court of Appeals affirmed the enforcement of the award on the grounds that Baruch-Foster’s allegations were unsubstantiated and agreed that the district court correctly denied any discovery on the issue.

In Al Haddad Bros. Enterprises, Inc. v. M/S Agapi, the court stated that the fact that the award was not rendered in accordance with the parties’ agreement was not fatal. The agreement of the parties provided for three arbitrators, but the award was made by a sole arbitrator. The Convention allows recognition of an award that complies with the laws of the country where the arbitration occurred. Under British law, a sole arbitrator may decide a dispute. Therefore, the award was not invalid.

Article V(1)(d) was successfully invoked in a 1976 case before the court of appeals in Florence. As in Al Haddad, the arbitral tribunal did not comply with the agreement of the parties, which stated that an award would be made by three arbitrators. In fact, the award was made by two arbitrators in London, which was in accordance with the English Arbitration Act of 1950. In contrast to Al Haddad, however, enforcement of the award was refused. The court held that the English Arbitration Act would only apply, according to the New York Convention, “failing agreement of the parties”, and the parties had agreed on an arbitral tribunal of three persons.

The Award is Not Yet Binding or Has Been Set Aside or Suspended by a Court

Article V(1)(e) provides for refusal of recognition when “the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”

This subsection essentially provides two grounds for refusal of recognition:

a. when the award has not yet become binding; and
b. when it has been set aside or suspended.

Under the Convention, “binding” means that no further arbitral appeals are available.\(^{103}\) The exhaustion of all court appeals in the country in which an arbitral award was rendered is not required for enforcement of the award in an another Convention company.\(^{104}\)

In Fertilizer Corp. of India v. IDI Management, Inc.\(^{105}\) IDI argued that the award was not binding because it was under review by an Indian court for errors of law. The award was under review for, among other things, a ruling on whether the arbitrators could award consequential damages despite an express contract clause to the contrary. The court found that the award was final and binding for the purposes of the Convention and noted the comments of Professor Gerald Aksen, former General Counsel of the American Arbitration Association:

The award will be considered “binding” for the purposes of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact

\(^{103}\) McLaughlin, *Enforcement of Arbitral Awards* at 300.


that recourse may be had to a court of law does not prevent the award from being “binding”....\textsuperscript{106}

Binding, in short, is today universally recognized to mean that the award, in the rendering country, is not open to arbitral or ordinary judicial review, regardless of the admissibility of an action to set aside.\textsuperscript{107} Appeals within the arbitration machinery are rare and so is the number of countries which permit ordinary recourse from an award.\textsuperscript{108} The effect of this and the reversal of the burden of proof, therefore, make it extremely difficult for losing parties to oppose enforcement with evidence that the award is not binding in the rendering country.\textsuperscript{109}

So far as extraordinary recourse (nullity appeals, actions to set aside, etc.) are concerned, they are, therefore, largely removed from the standard Article V defenses to enforcement, and opponents of the award are relegated to discretionary, and often not very palatable, relief under Article VI.\textsuperscript{110}

In the United States, whether or not an award is “binding” has generally been thought to require consideration of the law of judicial review of arbitral awards of the place where the award was made.\textsuperscript{111} Thus, lower U.S. courts have usually made some reference to the law of the place where the award was made in determining whether or not it is binding.\textsuperscript{112} In \textit{Spier v.}

\begin{footnotesize}
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\item\textsuperscript{107} Hans Harnik, \textit{Recognition and Enforcement of Foreign Arbitral Awards}, 31 AM. J. COMP. L. 703, 709 (1983).
\item\textsuperscript{108} \textit{Id.}
\item\textsuperscript{109} \textit{Id.}
\item\textsuperscript{110} \textit{Id.}
\item\textsuperscript{111} Born, \textit{supra} note 1, at 493.
\item\textsuperscript{112} \textit{Id.}
\end{enumerate}
\end{footnotesize}
the court considered the “esoteric” difference between two
types of arbitration under Italian law. Whether the award fell within the Convention as
enforceable implicated the distinction between the two types of arbitration. The court found a
conflict of authority as to whether such an award fell within the Convention, and adjourned the
enforcement proceedings under Article VI of the Convention. 114

Courts generally consider that an award becomes binding within the meaning of Article
V(1)(e) at the moment when the award becomes inchoate for enforcement under the law
governing the award or at the moment when the award fulfills the conditions of a term under the
applicable law equivalent to the term “binding”. 115 In deciding whether an award has become
“binding” under the applicable law, the law may require that an award be declared enforceable by
a competent court, for example as is required in Germany 116 or Italy. 117

This attitude of U.S. courts has not found favor with all commentators, one of whom
states:

I doubt whether we have to fall back on the arbitration law of the country where the
award was made for the interpretation of binding in the New York Convention. The
Convention contains a reference to the arbitration law of the home country of the award
only in connection with the next item of ground e, the setting aside...Application of
national arbitration law even in those countries which require an exequatur in order for
domestic awards to become binding, would lead to the double exequatur, a situation the
New York Convention expressly sought to avoid. 118

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114 Id. at 874-75.
116 Id. at 339 n.286.
117 Id. at 339 n.283, citing Corte Di Appello of Naples, February 20, 1975, Cortez (Merchants) Limited v.
Francesco Ferraro (Italy No. 21).
118 Pieter Sanders, A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign
The second leg of Article V(1)(e), providing for refusal of recognition when the award has been set aside or suspended by a court in the country of origin, has rarely been successful. It does mean, however, that an award may be set aside on grounds other than those mentioned in the Convention.\textsuperscript{119} In order for the suspension of the award to be a ground for refusal of enforcement, the respondent must prove that the suspension was ordered by a court.\textsuperscript{120} The automatic suspension of the award by operation of law in the country of origin, therefore, is not sufficient.\textsuperscript{121}

(6) \textbf{Non-Arbitrability}

Article V(2)(a) contains one of the two provisions for refusal of enforcement that may be invoked by the court \textit{sua sponte}. According to this subsection, recognition may be refused “if the competent authority in the country where recognition and enforcement is sought finds that... the subject matter of the difference is not capable of settlement by arbitration under the law of that country.”

If the grounds of a dispute cannot be settled by arbitration under the domestic law of the enforcing nation, a court may refuse to enforce an award granted through a foreign arbitration panel.\textsuperscript{122} To be successful with this defense, a party must prove that the enforcing nation attaches a special national interest to the dispute that makes it incapable of being settled by

\textsuperscript{119} \textit{See supra} at 12.

\textsuperscript{120} van den Berg, \textit{supra} note 115, at 352.

\textsuperscript{121} \textit{Id.}

arbitration. The special national interest must be more than “incidentally” involved in the

dispute for the court to find the matter is non-arbitrable.

In Parsons & Whittemore Overseas Co. v. Societe Generale de l’Industrie du Papier, Parsons argued against enforcing an arbitral award on the grounds that the dispute significantly affected U.S. foreign policy, specifically with Egypt with whom the U.S. had severed relations. The court refused to reverse confirmation of the award, holding that “simply because acts of the United States are somehow implicated in a case one cannot conclude that the United States is rightly interested in its outcome....there is no special national interest in judicial, rather than arbitral, resolution of the breach of contract claim.”

The court referred to Supreme Court’s decision in favor of arbitrability in Scherk v. Alberto-Culver Co., a case far more prominently displaying public features than Parsons. In Scherk, the Supreme Court held that, although disputes arising out of securities transactions cannot be submitted to arbitration if the contract is domestic, disputes arising out of such transactions are arbitrable if the contract is international.

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123 Parsons & Whittemore Overseas Co. v. RAKTA, 508 F.2d 969, 975 (2d Cir. 1974).
124 Id.
125 508 F.2d 969 (2d Cir. 1974).
126 Id. at 975.
128 This decision has now been overruled with respect to the arbitrability of domestic securities claims. Quitao v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).
129 Id. at 515-18.
As noted above,\textsuperscript{130} certain issues have been held to be non-arbitrable by the courts. In \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.},\textsuperscript{131} Soler argued that its antitrust claims were non-arbitrable even though it had agreed to arbitrate them. The Second Circuit below had reasoned that “the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make...antitrust claims...inappropriate for arbitration.”\textsuperscript{132} The U.S. Supreme Court disagreed, concluding that “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.”\textsuperscript{133} The court noted that the national courts of the United States would have an opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws had been addressed.\textsuperscript{134} “While the efficacy of the arbitral process requires that substantive review at the award enforcement stage remain minimum, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.”\textsuperscript{135}

The defense of nonarbitrability was successfully invoked in the United States to deny enforcement of an award against Libya in \textit{Libyan American Oil Co. (“LIAMCO”) v. Socialist

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\textsuperscript{130} See supra at 5.
\textsuperscript{131} 473 U.S. 614 (1985).
\textsuperscript{132} 723 F.2d 155, 162 (1st Cir. 1983).
\textsuperscript{133} 473 U.S. 614, 629 (1985).
\textsuperscript{134} Id. at 637.
\textsuperscript{135} Id. at 638.
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Peoples Libyan Arab Jamahirya. In 1973, Libya nationalized LIAMCO’s assets in that country. Following this, LIAMCO commenced an arbitration in accordance with the arbitral clause contained in the concession agreements. The district court refused to enforce the award on the grounds that Libya’s nationalization, being an act of state, is a subject matter not capable of settlement by arbitration. The court noted that:

Had this question been brought before this court initially, the court could not have ordered the parties to submit to arbitration because in so doing it would have been compelled to rule on the validity of the Libyan nationalization law.... [and therefore violate] the act of state doctrine.

The various non-arbitrable subject matters differ from country to country. In spite of this divergence, it is remarkable that the question of a non-arbitrable subject matter has been raised in relatively few cases under the Convention. A court in Italy decided that the question of the validity of trade marks that were being used in Italy was non-arbitrable, requiring the public prosecutor’s intervention. The Belgian Supreme Court refused to enforce an award under the Convention on the ground of non-arbitrable subject matter in view of the need for protection of a 'weaker' party (i.e., an exclusive distributor of cars in Belgium).

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137 Id. at 1178-79.
138 Id. at 1178.
139 van den Berg, supra note 113, at 369.
140 Id. at 369-70.
141 Id. at 370 n.378, citing Corte di Cassazione (Sez. Un.), May 12, 1977, no. 3989, Scherk Enterprises A.G. v. Societe des Grandes Marques (Italy No. 28).
142 Id. at 370 n.379, citing Cour de Cassation (1st Chamber), June 28, 1979, Audi-NSU Auto Union A.G. v. S. A. Adelin Petit & Cie. (Belgium no. 2), affirming Cour d’Appel Liege, May 12, 1977 (Belgium no. 1).
(7) Public Policy

The final Article V ground for refusing to recognize an award is based on the ground that the “recognition or enforcement of the award would be contrary to the public policy of [the country where recognition and enforcement is sought].”

This ground has generated the most discussion and litigation, and often overlaps with other grounds such as Article V(1)(b) (due process), Article V(1)(d) (improper procedure or composition of tribunal), and Article V(2)(a) (non-arbitrability).

One of the leading U.S. cases discussing this defense is Parsons & Whittemore Overseas Co. v. RAKTA. There, Parsons sought to have the U.S. courts refuse enforcement on the ground that the award was contrary to U.S. public policy. The court reviewed the history of the Convention, noting that “extensive construction of this defense would vitiate the Convention’s basic effort to remove pre-existing obstacles to enforcement.” The court concluded that the Convention’s public policy defense should be construed narrowly and that enforcement of foreign arbitral awards may be denied on this basis only when enforcement would violate the forum state’s most basic notions of morality and justice. The argument of public policy was raised in defense of a decision to abandon construction of a project in Egypt when U.S.-Egyptian relations were severed. The court rejected this, viewing the appellant’s equation of national policy with United States’ “public” policy as misguided.

143 Article V(2)(b).
144 508 F.2d. 969 (2d Cir. 1974).
145 Id. at 973.
146 Id.
147 Id.
In [*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*](#), the defense of public policy (in addition to non-arbitrability) was raised to enforcement of the award in an antitrust case. As noted above, the court rejected this argument holding that the antitrust claims were arbitrable.

One commentator has said there is an important distinction between domestic and international public policy. According to this distinction what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. It means that the number of matters considered to fall under public policy in international cases is smaller than that in domestic cases. The distinction is justified by the differing purposes of domestic and international relations.

In Germany, the courts have repeatedly held that, in the case of a foreign award, not every infringement of mandatory provisions of German law constitutes a violation of public policy; what is required is an infringement of international public policy. There is a similar distinction between domestic and international public policy in Mexico, Switzerland and England, as noted in a 1988 Indian decision.

The presumption in favor of arbitration and reluctance to overturn arbitral awards on the basis of public policy has led to a rejection of the public policy defense in cases in which the awards were based on inconsistent sworn testimony by the prevailing party’s witnesses.

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149 See *supra* at 30-31.

150 [van den Berg, supra note 113, at 360.](#)


existence of an alleged restrictive trade clause contained in contracts in violation of the public policy of the U.S.,\textsuperscript{154} when the award did not contain reasons for the award\textsuperscript{155} and when the tribunal granted extensions of time without consulting with the respondent.\textsuperscript{156}

The public policy defense was successfully used in Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.\textsuperscript{157} In that case, Southwire alleged that the arbitrators adopted a French legal rate of interest on the amounts due that violated the enforcing forum’s public policy because the interest rate was excessive.\textsuperscript{158} The court agreed and refused to enforce that part of the award, holding that an award of interest that is penal in nature clearly violates public policy.\textsuperscript{159}

Examples of the few other cases in which enforcement of an award on account of public policy has been refused include a German decision that the arbitrators violated due process by not forwarding to the respondent a letter submitted by the claimant to the arbitrators,\textsuperscript{160} another German decision in which the names of the arbitrators were not made known to the parties,\textsuperscript{161}

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\textsuperscript{158} Id. at 1066.
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\textsuperscript{159} Id. at 1069.
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\textsuperscript{160} van den Berg, supra note 113, at 366, citing Oberlandesgericht of Hamburg, April 3, 1975 (F.R.Germ. no. 11).
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\textsuperscript{161} Id. at 367, citing Oberlandesgericht of Cologne, June 10, 1976 (F.R.Germ. No. 14).
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and a U.S. case which held that a dispute concerning the salvage of a U.S. war ship could not be submitted to arbitration in London.\textsuperscript{162}

Article V(2)(b) has frequently been used in connection with allegations of arbitrator bias. The question of an arbitrator’s impartiality has already been discussed in connection with a refusal of recognition under Article V(1)(d) (improper arbitral procedure or composition of the arbitral tribunal).\textsuperscript{163} One recent U.S. case, which specifically raised the defense of public policy in the context of arbitrator bias, is \textit{Fitzrov Engineering Ltd. v. Flame Engineering Ltd.}\textsuperscript{164} Flame opposed confirmation of the award in this case on the ground that its New Zealand counsel had a conflict of interest in that the counsel acted for a party adverse to Flame. The court rejected the argument, finding that “Flame has failed to convincingly show how the potential conflict of interest it has identified would render recognition of the arbitration award violative of this nation’s ‘most basic notions of morality and justice.’”\textsuperscript{165} The court found that Flame had submitted no evidence suggesting that the counsel had ever represented the adverse party and, in any event, the adverse party’s connection to the underlying dispute was tenuous.\textsuperscript{166} Additionally, Flame’s claim that parties were involved in settlement negotiations that may have adversely affected Flame’s defenses against Fitzroy found no support.\textsuperscript{167}

\textsuperscript{162} \textit{B.V. Bureau Wijsmuller v. United States}, 1976 A.M.C. 2514 (not officially reported).

\textsuperscript{163} \textit{See supra} at 22-25.


\textsuperscript{165} \textit{Id.} at *10.

\textsuperscript{166} \textit{Id.} at *13.

\textsuperscript{167} \textit{Id.} at *14.
The court in Fitzroy viewed Transmarine Seaways Corp. v. Marc Rich & Co., A.G.\textsuperscript{168} and Imperial Ethiopian Government v. Baruch-Foster Corp.,\textsuperscript{169} both of which concerned allegations of bias, as instructive. In Transmarine Seaways, the court held that the alleged conflict, which involved the arbitrator’s employer representing another company, which in turn asserted a claim against the respondent, was too tenuous to support a finding of bias.\textsuperscript{170} In Baruch-Foster, the president of the arbitration panel had assisted in drafting a civil code for the Ethiopian government (the prevailing party) 15-20 years earlier. The court could find no substance or good faith in the allegations of bias.\textsuperscript{171}

B. Other Defenses to Enforcement of Awards

(1) Lack of Reciprocity

As has been mentioned above,\textsuperscript{172} many countries that have ratified the Convention have done so with the reservation (offered in Article I(3)) that it shall only apply to awards made in other contracting countries. Article I(3) provides that contracting states may declare that they “will apply the Convention on the basis of reciprocity to the recognition and enforcement of only those awards made in the territory of another contracting state.” The United States’ reservation mirrors this wording, which means that the place when the award is made will decide its enforceability. This may be relevant where an award is made in a South American country, as relatively few have ratified the Convention.


\textsuperscript{169} 535 F.2d 334 (5th Cir. 1976).


\textsuperscript{171} 535 F.2d. 334, 337 (5th Cir. 1976).

\textsuperscript{172} See supra at 8-9.
U.S. courts have construed the reservation narrowly and, consequently, its application has not provided a formula for the parties to subvert the broader goals underlying the Convention.\textsuperscript{173} In 	extit{Fertilizer Corp. of India v. IDI Management, Inc.},\textsuperscript{174} an award was rendered against IDI in India. IDI argued against enforcement in U.S. courts on the basis that India would not have enforced the award had it been rendered in the United States against Fertilizer Corp. The court examined the reciprocity defense and held that reciprocity contemplated by the Convention only required that India be a signatory to the Convention; reciprocity does not extend to the judicial interpretation and enforcement policies of the contracting state in which the award was rendered.\textsuperscript{175}

The principle of reciprocity is concerned with the country where the arbitral award is made, not whether both parties to the dispute are nationals of signatory states.\textsuperscript{176} In 	extit{Iran Aircraft Industries, v. Avco Corp.},\textsuperscript{177} the New York Convention was held to be applicable to an award made in the Netherlands against a U.S. company in favor of an Iranian company, although Iran has not ratified the Convention.

(2) Dispute Not “Commercial”

Article I(3) provides that parties ratifying the Convention may reserve its application “only to differences arising out of legal relationships, whether contractual or not, which are

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\item \textsuperscript{173} McLaughlin, 	extit{Enforcement of Arbitral Awards} at 284.
\item \textsuperscript{174} 517 F. Supp. 948 (S.D. Ohio 1981).
\item \textsuperscript{175} Id. at 952-53.
\item \textsuperscript{177} 980 F.2d 141 (2d Cir. 1992).
\end{itemize}
considered as commercial under the national law of the State making such declaration.” As with the reciprocity reservation, most states have adopted this restriction. Article I(3) of the Convention leaves it to individual signatories to define “commercial” under national law, without imposing any express, external limits on national definitions.\(^\text{178}\) Despite this, the Convention’s “commercial” requirement has produced few difficulties, at least in U.S. courts.\(^\text{179}\) Like U.S. courts, foreign courts have generally interpreted the “commercial” relationship requirement broadly.\(^\text{180}\)

One of the first cases in the United States to define “commercial” relationship was Island Territory of Curacao v. Solitron Devices, Inc.\(^\text{181}\) In this case, Solitron objected to confirmation of the award on the grounds that the dispute was not “commercial” because the contract obligations involved performing a governmental act.\(^\text{182}\) The district court ruled against Solitron, holding that the purpose of the “commercial” limitation was probably “to exclude matrimonial and other domestic relations awards, political awards and the like.”\(^\text{183}\)

It is clear that in the United States, the term “commercial relationship” includes employee-employer relations, fiduciary relationships, relationships giving rise to antitrust and other public law disputes, cases involving claims by foreign regulatory authorities, insurance and

\(^{178}\) Born, supra note 1, at 287.

\(^{179}\) Id. at 287-88.

\(^{180}\) Id. at 288 n.189.


\(^{182}\) Id. at 13.

\(^{183}\) Id.
reinsurance contracts and maritime agreements.\footnote{Born, supra note 1, at 288.} The general trend is to give the broadest possible application to the Convention by defining the word “commercial”, for purposes of the reservation, as referring to any legal relationship that has a business purpose.\footnote{Hans Harnik, Recognition and Enforcement of Foreign Arbitral Awards, 31 AM. J. COMP. L. 703, 706 (1983).}

It is worth mentioning that the Andean Pact countries, of which Colombia and Ecuador are New York Convention countries, seem not to allow arbitration in the field of transfer of technology.\footnote{van den Berg, supra note 113, at 54 n.128.}

C. Adjourning Enforcement Proceedings

Article VI of the New York Convention provides:

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

This Article may be used to stay a decision on enforcement of award, and avoid a ruling on the confusing issue of whether the award is “binding”. The court’s authority to delay enforcement pursuant to Article VI is discretionary. In conformity with the division made between the second part of Article V(1)(e) and Article VI, it is likely that the court before which the enforcement is sought will adjourn its decision on enforcement if it is prima facie convinced that the request for the setting aside or a suspension of the award in the country of origin is not made on account of dilatory tactics, but is based on reasonable grounds.\footnote{Id. at 353.}
U.S. courts have found adjourning enforcement proceedings pending the resolution of actions to set aside an award in its country of origin attractive in, for example, *Spier v. Calzaturificio Tecnica S.p.A.*,\(^{188}\) in which the award was being tested under Italian law by Italian courts, and *Fertilizer Corp. of India v. IDI Management, Inc.*,\(^ {189}\) in which the court decided, in order to avoid the possibility of inconsistent results, to adjourn its decision on enforcement of the award until the Indian courts decided whether the award was correct under Indian law.

In the United States, the First Circuit Court of Appeals has very recently suggested extending the grounds for staying enforcement of a proceeding beyond those listed in Article VI. In *Hewlett-Packard Inc. v. Berg*,\(^ {190}\) the plaintiffs had requested the district court to refuse confirmation of an award on the ground that the amount awarded did take into account a set-off to which the plaintiffs claimed they were entitled (and which was the subject of a second arbitration proceeding). The district court refused to stay confirmation proceedings, holding that the Convention only authorized a stay under the narrow provisions of Article VI.\(^ {191}\) The court of appeals, however, disagreed with the lower court’s holding that, because the Convention lists a single ground for a stay, all other grounds are excluded.\(^ {192}\) The court of appeals vacated the confirmation order and remanded to the district court, noting that “the risk that the power to stay


\(^{190}\) 61 F.3d 101 (1st Cir. 1995).


\(^{192}\) 61 F.3d 101 (1st Cir. 1995).
could be abused by disgruntled litigants... argues more for a cautious and prudent exercise of the power than for its elimination."\textsuperscript{193}

\textbf{3. THE ‘DOMESTIC’ FEDERAL ARBITRATION ACT}

It is worth briefly mentioning the 'domestic' Federal Arbitration Act,\textsuperscript{194} which may be invoked in enforcing a foreign award in the United States. The implementing legislation of both the New York Convention\textsuperscript{195} and the Panama Convention\textsuperscript{196} provides that the ‘domestic’ FAA will apply to the enforcement of foreign awards under each Convention, except to the extent that the FAA conflicts with the relevant Convention. Section 1 of the FAA extends the Act to the enforcement of awards affecting interstate or “foreign commerce.”\textsuperscript{197} This means that when an award does not come within either the New York or Panama Conventions (for example, if not made in another contracting state or if not based on a “commercial” transaction) the domestic FAA will often apply.

Section 9 of the FAA provides that, within one year after the award is made, any party may apply to court for an order confirming the award, and the court must grant such an order unless the award is vacated, modified or corrected as prescribed in Sections 10 and 11.\textsuperscript{198} This section is usually applied to international awards not subject to the New York or Panama

\begin{flushleft}
\textsuperscript{193} Id. at *15.
\textsuperscript{194} 9 U.S.C. §§ 1-16.
\textsuperscript{195} 9 U.S.C. § 208.
\textsuperscript{197} 9 U.S. C. § 1.
\textsuperscript{198} 9 U.S.C. § 9.
\end{flushleft}
Conventions, but it is available as an alternative means of confirming awards that are subject to the Conventions.\textsuperscript{199}

Section 10 of the FAA provides that a party may apply to have an arbitral award vacated on the following grounds:

a. where the award was procured by corruption, fraud, or undue means;

b. where there was evident partiality or corruption in the arbitrator;

c. where the arbitrators were guilty of misconduct where the rights of a party were prejudiced;

d. where the arbitrators exceeded their powers or imperfectly executed them.\textsuperscript{200}

In addition to these statutory grounds, it is well settled that a court may vacate an award when the arbitrators ‘manifestly disregarded’ the law in reaching their decision.\textsuperscript{201}

The showing required to avoid confirmation of an arbitration award is very high.\textsuperscript{202} This limited judicial review reflects the desire to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.\textsuperscript{203}

The defense of manifest disregard of the law is not a license to review the record of arbitral proceedings for errors of fact or law.\textsuperscript{204} In most U.S. jurisdictions, the manifest disregard standard requires a showing either that the arbitrator simply ignored the applicable law, or was

\textsuperscript{199} See Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983).

\textsuperscript{200} 9 U.S.C. § 10.


\textsuperscript{202} Id. at 206, citing Otley v. Schwartzberg, 819 F.2d 373, 376 (2d Cir. 1987).

\textsuperscript{203} Id., at 209, citing Folkways, 989 F.2d at 111.

\textsuperscript{204} Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (“RAKTA”), 508 F.2d 969, 975 (2d Cir. 1974).
aware of the content of governing law, but refused to apply it.\textsuperscript{205} When arbitrators do not issue a reason for their decision, “if any ground for the arbitrators’ decision can be inferred from the facts of the case, the award should be confirmed.”\textsuperscript{206}

The statutory grounds outlined in Section 10 have been equally unsuccessful. Courts have refused to set aside awards despite the following allegations: evident partiality (unless “a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration”);\textsuperscript{207} misconduct based on an ex parte conversation;\textsuperscript{208} misinterpreting law or the contract or committing errors of law;\textsuperscript{209} discovery of new evidence;\textsuperscript{210} refusal to hear evidence when the hearing gave the parties a fundamentally fair hearing;\textsuperscript{211} and refusal to adjourn proceedings.\textsuperscript{212}

At least one commentator has noted that there is some ambiguity as to whether the defenses of the FAA apply to the New York Convention (and presumably the Panama Convention).\textsuperscript{213} In the case of \textit{International Standard Electric Corp. v. Bridas Sociedad Anonima}

\begin{thebibliography}{9}
\bibitem{205} Born, \textit{supra} note 1, at 520.
\bibitem{207} \textit{Id.}, at 209, citing \textit{Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefits Fund}, 748 F.2d 79, 84 (2d Cir. 1984).
\bibitem{208} \textit{Id.} (the conversation was merely on a peripheral matter).
\bibitem{212} \textit{Agrawal v. Agrawal,} 775 F.Supp. 588 (E.D.N.Y. 1991), aff’d, 969 F.2d 1041 (2d Cir 1992).
\end{thebibliography}
Petrolera Industrial Y Comercial,\textsuperscript{214} referred to earlier, the court declined to hold that “manifest disregard” of the law was a defense under the New York Convention.\textsuperscript{215} In Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (“RAKTA”),\textsuperscript{216} Overseas attempted to apply the defense of manifest disregard in the international arbitration context. The court held that the facts did not establish the defense and, therefore, the issue of whether the defense was applicable under the New York Convention was avoided.\textsuperscript{217} This result was repeated in York Hannover Holding, A.G. v. American Arbitration Association, in which the court decided that it was unnecessary to determine whether allegations of bias fell within Article V of the Convention as the court did not find that sufficient partiality under 9 U.S.C. §10 had been shown.\textsuperscript{218}

It has been suggested that, in keeping with the pro-enforcement policy of the New York Convention and Congress, Section 208 should be amended or a new section added which clearly states that no defenses outside of those enumerated in the Convention are available in a foreign arbitration enforcement proceeding.\textsuperscript{219} Another commentator has noted, however, that, as the Convention provides that courts “shall confirm” awards unless one of the bases for non-recognition specified in the Convention is present, and since Section 10 of the FAA only applies when it does not conflict with the Convention, only the Convention’s exceptions to enforceability

\begin{thebibliography}{9}
\bibitem{215} See supra at 20.
\bibitem{216} 508 F.2d 969 (2d Cir. 1974).
\bibitem{217} Id. at 977.
\end{thebibliography}
should be permitted. It is also noted, however, that if an action to vacate a “non-domestic” award made in the United States is brought under Section 10, the Convention would arguably not preempt the domestic FAA’s requirements because the Convention arguably does not impose limits on a nation’s power to vacate an arbitral award made within its territory.

4. MISCELLANEOUS ENFORCEMENT MECHANISMS

As has already been mentioned, there may be any number of reasons why an award will not be enforceable under the New York Convention, the Panama Convention or the FAA. In those situations, parties wishing to enforce a foreign award in United States' courts may be able to rely on other avenues such as multilateral treaties, Friendship, Commerce and Navigation treaties and general common law.

A. Multilateral Treaties

The United States is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"). This obligates contracting states to enforce awards rendered pursuant to arbitrations administered by the International Centre for the Settlement of Investment Disputes ("ICSID").

The Convention is limited in that it applies only to disputes arising from investments between a contracting state and nationals of other states. In addition, both parties must agree in writing to be governed by the Convention and to have their disputes settled by ICSID.

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220 Born, supra note 1, at 503 n.102.
221 Id. at 503-04.
222 ICSID Convention art. 54.
223 Id. art. 25(1).
224 Id.
None of the 31 cases handled by ICSID has involved Central or South American
governments or companies. The U.S. has enforced awards involving other countries (e.g.,
Liberia) in Liberian Eastern Timber Corporation v. Liberia.”

B. Bilateral Treaties

A number of nations have entered into bilateral treaties dealing principally or incidentally
with international arbitration.\footnote{Born, supra note 1, at 23.} The United States has included an article relating to arbitration
in many of its bilateral Friendship, Commerce and Navigation ("FCN") treaties.\footnote{Id.} Typically, the
party seeking enforcement must satisfy three conditions: first, the other party must be a citizen of
a signatory country; second, the award must be “final and enforceable” according to the laws of
the country where it was made; and third, enforcement procedures must be brought before the
proper court.\footnote{McLaughlin, Enforcement of Arbitral Awards at 302-03 and n.138, citing Note, Enforcing International
Commercial Arbitration Agreements and Awards Not Subject to the New York Convention, 23 VA. J. INT’L. L. 75, 98 (1982).}
A typical FCN treaty provides for enforcement of an arbitral award unless the
award contravenes the public policy of the forum.\footnote{Id.} U.S. courts have enforced such provisions

The bilateral treaties in force, or those contemplated, should not be permitted to interfere
with the goals of the 1958 U.N. Convention or other multilateral conventions, which is to create
one system for the effective implementation of a harmonized, if not uniform, process for arbitration in international transactions and other relations of a transactional nature.230

C. Other Award Enforcement Mechanisms

In the absence of any specific enforcement provision in the contract, U.S. courts have long honored valid foreign arbitral awards even when no convention or treaty exists, without reference to the concept of reciprocity. Over the years, the practice of liberally enforcing foreign awards has been followed in cases in which jurisdiction over the U.S. party was properly obtained abroad.231 Generally stated, a U.S. court will enforce a foreign arbitral award if it is rendered in compliance with the law of the state where awarded.232 In one Latin American case, however, the court refused to enforce an award made in El Salvador on the basis that notice was insufficient under El Salvadorean law.233

D. Enforcement Abroad of U.S. Awards

In civil law countries, the legal climate has been favorable to the recognition and enforcement of U.S. awards.234 In three instances in which the enforcement of New York judgments entered upon awards was considered by the highest courts of several Latin American countries, such enforcement was granted.235 Execution of a New York judgment was granted by the Supreme Court of Colombia since the procedural requirements of the Colombian Judicial

230 DOMKE on COMMERCIAL ARBITRATION, § 45:04 at 604 (Rev. ed. 1993).
231 Id. at §§ 45:02 at 574.
232 McLaughlin, Enforcement of Arbitral Awards at 303-04.
234 DOMKE on COMMERCIAL ARBITRATION, § 46:02 at 612 (Rev. ed. 1993).
235 Id. at 615.
Code for enforcement of foreign judgments had been met.\textsuperscript{236} In Brazil, a New York judgment entered upon an award was enforced since it did not offend the principles of public order existing in Brazil.\textsuperscript{237} However, an award rendered under the rules of the Inter-American Commercial Arbitration Commission was not enforced in Brazil because no judgment on the award had been entered in the country where it was rendered.\textsuperscript{238}

\textbf{CONCLUSION}

This paper has concentrated primarily on the enforcement of foreign arbitral awards in United States’ courts. Some reference has been made, however, to enforcement of awards in other jurisdictions.

Parties typically contract to arbitrate disputes in order to avoid the courts and to maintain amicable and confidential relationships with their commercial partners.\textsuperscript{239} As noted at the outset, however, successful claimants must be certain that an award can be adequately enforced. The clear pro-enforcement policy underlying the various conventions, treaties and judicial decisions referred to in this article should provide comfort to commercial contracting parties and ensure that arbitration continues to gain in popularity as a method of dispute resolution.

\textsuperscript{236} Id. at 616, citing Hide Trading Corp. v. Field Echenique Compania, Gaceta Judicial, vol. 68, p. 139, Transl. in 6 ARB. J. 159 (1951).


\textsuperscript{239} McLaughlin, Enforcement of Arbitral Awards at 304.