
Disagreements are as much a part of life as agreements. In the international business context, however, disagreements not only cause corporate headaches, they need fast, efficient, and effective settlement. International trade and investment are seriously inhibited when disputes are not resolved promptly in a manner that reconciles the interests of both parties. Litigation of disputes in the public forum of a court can be costly, lengthy, and bitter, and may end in such animosity that it destroys existing business relationships. In addition, the complexity of international litigation lacks the predictability that businesses desire; differences in procedural and substantive law between national courts may cause unfairness to one of the parties. Businesspersons, therefore, are turning increasingly to nonjudicial forums such as arbitration to settle their day-to-day disputes.

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Arbitration has many advantages. It sidesteps the problems of service of process, finding legal representation qualified to practice in a foreign court, and litigating in a foreign language. From a practical viewpoint, businesspersons prefer to have their disputes settled by someone with expertise in the field of the dispute. By agreeing to the appointment of a mutually acceptable arbitrator, knowledgeable and experienced in the area of the dispute, the parties can anticipate a confidential, reasonable, and prompt settlement.

Effective international arbitration, however, is dependent on the parties' success in enforcing arbitral awards. The United States has enacted treaties with foreign States to guarantee the international respect necessary for domestic courts of various nations to enforce private foreign arbitral awards. These treaties, however, have had a limited impact on the enforcement of the awards.

The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) represents the culmination of efforts by many international organizations to secure a multilateral treaty providing businesspersons with a unified, efficient, and trustworthy method of insuring that the manner they have chosen to resolve their transnational disputes will be effective. As the United States Supreme Court stated in a case involving the enforcement of an international arbitration agreement:

The goal of the 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.

I. Arbitration in the International Business World

A. Pre-New York Convention

Common law rejected the value of arbitration and made clauses to arbitrate revocable up until the time of the award. Beginning some sixty years ago,
however, a number of states recognized the importance of arbitration as an alternative to the judicial system and enacted legislation that rejected the common law in an effort to afford businesspersons the arbitration for which they had contracted.16

The awakening of the value of arbitration received assistance from the enactment of the Federal Arbitration Act in 1925.17 This Act provides for the specific enforcement of arbitration agreements in the federal courts18 and stay of litigation instituted in defiance of the arbitration agreement.19 It authorizes confirmation of the arbitral award by a federal court of the district in which the award is rendered.20 The scope of the Act is limited,21 however, and the litigants who desire to enlist the aid of the Federal Arbitration Act must satisfy all requirements of federal jurisdiction.22

public policy on the theory that they were designed to deprive the courts of jurisdiction to hear and determine controversies which would otherwise be within their cognizance. But see Burchell v. Marsh, 58 U.S. 344, 349 (1854), where the Supreme Court stated that "as a mode of settling disputes, [arbitration] should receive every encouragement from courts of equity." For a history of arbitration in the United States, see F. KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS (1948); Sayre, Development of Commercial Arbitration Law, 37 YALE L.J. 595 (1928).


19. Id. § 3.

20. Id. § 9.

21. The Act applies only if the arbitral agreement involves "commerce." The Act does not apply to contracts of employment of workers engaged in foreign commerce. See Kochery, The Enforcement of Arbitration Agreements in the Federal Courts: Erie v. Thompkins, 39 CORNELL L.Q. 74 (1953). The Act also has been construed as inapplicable to foreign awards. See McMahon, supra note 17. Consequently, foreign awards could be enforced only by a common lawsuit on the award or on a foreign judgment rendered on the award.

22. The Act does not create federal subject matter jurisdiction. Therefore, a party desiring to invoke the Act must satisfy the jurisdictional amount of $10,000 and allege either diversity of
Once the arbitration results in an award, the successful party desires to enforce it with minimal procedural delay. Unfortunately, the Federal Arbitration Act is of little use with regard to enforcement of a foreign award in a federal court. The arbitral agreement must specify a court in which an order confirming the award may be made.\textsuperscript{23} The successful party is forced, if it uses the federal courts, to bring a common law action upon the award, alleging some further basis of federal jurisdiction. Thus, the summary enforcement procedure cannot be used in seeking to enforce a foreign award in a federal court. Consequently, under the Act, the machinery for dealing with enforcement of foreign arbitral awards is highly deficient.

When it comes to international arbitration the United States has concentrated its efforts on the development of bilateral treaties of friendship, commerce, and navigation, which include provisions purporting to provide for judicial enforcement of international arbitration.\textsuperscript{24} These provisions are designed with limited goals. Rather than giving positive assurance that American courts will enforce foreign arbitration and recognize the awards from such arbitration, they simply indicate that such arbitration will not be unenforceable merely because of the presence of foreign elements.\textsuperscript{25} 

\begin{itemize}
\item \textbf{citizenship or some other basis of federal subject matter jurisdiction.} E.g., Krauss Bros. Lumber Co. v. Louis Bossert & Son Inc., 62 F.2d 1004 (2d Cir. 1933).
\item The language of the Act provides no basis for enforcement. It reads in part: "if no court is specified in the agreement of the parties, then such application may be made to the United States Court in and for the district within such award was made." 9 U.S.C. § 9 (1982).
\item The United States recognizes bilateral agreements between the United States and:
\begin{itemize}
\item \textbf{Italy:} March 8, 1961, T.I.A.S. No. 4685
\item \textbf{Denmark:} July 30, 1961, T.I.A.S. No. 4797
\item \textbf{Iran:} June 16, 1957, 8 U.S.T. 899, T.I.A.S. No. 3853, 284 U.N.T.S. 93
\item \textbf{Nicaragua:} May 24, 1958, 9 U.S.T. 449, T.I.A.S. No. 4024
\item \textbf{Korea:} Nov. 7, 1957, 8 U.S.T. 2217, T.I.A.S. No. 3942, 362 U.N.T.S. 231
\item \textbf{Pakistan:} Feb. 12, 1961, 12 U.S.T. 110, T.I.A.S. No. 4683
\item \textbf{France:} Dec. 31, 1960, 11 U.S.T. 2398, T.I.A.S. No. 4625
\item \textbf{Belgium:} Oct. 3, 1963, 14 U.S.T. 1284, T.I.A.S. No. 5432
\item \textbf{Luxembourg:} March 28, 1963, 4 U.S.T. 251, T.I.A.S. No. 5306
\item \textbf{Togo:} Feb. 8, 1966, 18 U.S.T. 1
\item \textbf{Thailand:} May 8, 1968, 9 U.S.T. 5843, T.I.A.S. No. 6540
\end{itemize}
\item A typical provision in such treaties is: "Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not such other Party. No award duly rendered pursuant to such [arbitration] contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid and denied effective means of enforcement.
\end{itemize}
The United States is also a party to a multilateral treaty governing one form of international arbitration: the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID).\textsuperscript{26} The application of the ICSID is limited in that it governs disputes arising from investments between a government of one country and citizens of another country.\textsuperscript{27} Furthermore, both parties must agree in writing that the ICSID governs and that their disputes shall be settled by the International Center for Settlement of Investment Disputes.\textsuperscript{28}

B. History of the New York Convention

The critical problem in international trade arbitration is to create a dependable system of laws in all trading nations under which enforcement of awards is obtained, regardless of the place of the hearing or the nationality of the arbitrators. The New York Convention provides such a solution.\textsuperscript{29} Due to an obsolete misunderstanding of arbitration, the United States remained largely in the background during the drafting of the Convention and the members of the U.S. delegation to the United Nations recommended against signing the New York Convention.\textsuperscript{30} They advanced four principal reasons for their refusal to sign the Convention: first, if the Convention were accepted in a manner that would avoid conflict with state laws, it would offer no meaningful advantages to the United States; second, if accepted in a manner that assured such advantages, it would override the arbitration laws of a majority of the states; third, the United States lacked a sufficient domestic legal basis for acceptance of the advanced international convention dealing with this subject matter; and fourth, the Convention embodied principles of arbitration law that the United States would
not find desirable to endorse.\textsuperscript{31} Not until 1970 did Congress recognize the practical benefits of the New York Convention,\textsuperscript{32} and adopt it by enacting chapter two of the Federal Arbitration Act, which gives extremely broad effect to arbitral remedies in most international transactions.\textsuperscript{33} As a result, a party with an agreement to arbitrate an international commercial dispute to which the new enactment applies can look to the federal courts and federal law for enforcement of an


\textsuperscript{32} Congress proposed this legislation thereby including the United States as a party to this Convention because "the people engaged in foreign trade consider arbitration [as] a very economical and speedy way to settle commercial disputes." S. REP. No. 702, 91st Cong., 2d Sess. (1970) (testimony of Richard Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law, before the Senate Committee on Foreign Relations). "The debate on the floor of the House of Representatives on July 6, 1970 reflects that Congress viewed this legislation as saving the time of federal courts and promoting judicial economy," Fuller Co. v. Compagnie des Bauxites de Guinee, 421 F. Supp. 938, 947 (W.D. Pa. 1976). Congressman Andrew Jacobs of Indiana made the following comment: "So far as the expense to the country generally is concerned, it is estimated a great deal of money will be saved, because [the New York Convention] will make possible the use of Federal courts here to order arbitration, rather than use of Federal courts here, which is the present practice, to have full blown trial. This in net effect would save money." 116 CONG. REC. 22,731 (daily ed. July 24, 1970). Congressman Hamilton Fish of New York made the following statement: "[I]t is important to note that arbitration is generally a less costly method of resolving disputes than is full-scale litigation in the courts. To the extent that arbitration agreements avoid litigation in the courts, they produce savings not only with the parties to the agreement but also for the taxpayers—who must bear the burden for maintaining our court system." 116 CONG. REC. 22,732-33 (daily ed. July 24, 1970). The President issued a proclamation on December 11, 1970, announcing the United States accession to the Convention. In fact, one of the reasons the United States acceded to the New York Convention was that the Convention had already been widely accepted throughout the world; furthermore, American businesses were having trouble enforcing arbitral awards in some countries which adhered to the reciprocity reservation of the Convention. See generally Aksen, supra note 31; McMahon, supra note 17.

\textsuperscript{33} Chapter Two was the implementing legislation necessary to make the terms of the New York Convention fit more easily into the framework of the American legal system. Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 692, enacting 9 U.S.C. §§ 201-208. Section 201 on enforcement of the Convention provides the general implementing language: "[t]he Convention on the recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in U.S. courts in accordance with this chapter." Section 202 states that a commercial arbitration agreement or arbitral award falls under the Convention, unless it arises out of a relationship entirely between U.S. citizens, and that relationship does not involve property located abroad, or does not envisage performance or enforcement abroad, or has no reasonable relationship with one or more foreign States. Section 203 grants original jurisdiction to district courts, regardless of the amount in controversy. Sections 204 and 205 discuss original jurisdiction to district courts, and the right to remove actions from state courts, respectively. Under section 206 the court may order an arbitration held, in accordance with an agreement, at any place within or outside the United States, and may appoint arbitrators in accordance with the terms of the agreement. Section 207 provides for judicial confirmation of an award, on the application of a party, except where the court finds the existence of one of the grounds specified in the Convention for refusal or deferral of recognition or enforcement of an award. Section 208 provides that the other chapters of the Federal Arbitration Act shall apply to actions brought under the United Nations Convention when such chapters do not conflict with the Convention or the implementing legislation.
agreement to arbitrate and for recognition of the award of the arbitrators, regardless of whether the arbitration is to take place in the United States or abroad.

The president of the United Nations Conference summarized the advantages of the New York Convention over prior arbitration treaties as follows:

[It] was already apparent that the document represented an improvement on the Geneva Convention of 1927. It gave a wider definition of the awards to which the Convention applied; it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked; it gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedures; it gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security.

Seventy-nine countries are now parties to the New York Convention. They comprise all major countries of the Western world and all of the Eastern European countries.

II. Enforcement of Arbitral Awards

Under the New York Convention

Despite the advantages of arbitration, it is valuable only to the extent that parties can enforce an agreement to arbitrate and a resulting award against one another. Absent some international agreement to recognize and enforce such an award, international law does not impose such an obligation. The New York Convention provides the structure to enforce awards. The Convention allows the direct enforcement of an award based on such an agreement by a judgment obtained in the court of any contracting State, subject to review by that court, not on the merits, but on grounds of fairness, nonarbitrability, public policy, and due process. One wishing to enforce an award in the United States under the New York Convention need only supply the authenticated original award or a certified

35. The following countries are parties to the New York Convention: Algeria, Antigua and Barbuda, Australia, Austria, Bahrain, Belgium, Benin, Botswana, Bulgaria, Burkina Faso, Byelorussian SSR, Cameroon, Canada, Central African Empire—Republic of, Chile, China—Peoples Republic of, Colombia, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Djibouti, Ecuador, Egypt, Finland, France, German Democratic Republic, Germany—Federal Republic of, Ghana, Greece, Guatemala, Haiti, Holy See, Hungary, India, Indonesia, Ireland—Republic of, Israel, Italy, Japan, Jordan, Kampuchea—Democratic, Korea, Kuwait, Luxembourg, Madagascar, Malaysia, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Peru, Philippines, Poland, Romania, San Marino, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tanzania—United Republic of, Thailand, Trinidad and Tobago, Tunisia, Ukrainian SSR, Union of Soviet Socialist Republics, United Kingdom, United States of America, Uruguay, Yugoslavia. See generally XIV YEARBOOK OF COMMERCIAL ARBITRATION 457 (1989) [hereinafter Y.B. COM. ARB.]
36. Supra note 25 and accompanying text; Comment, supra note 17, at 443-47.
copy, the original or certified copy of the arbitration agreement, and official or sworn translations, if appropriate, within three years after the award. Whether the award is the result of an institutional or ad hoc arbitration is immaterial. United States district courts have original jurisdiction to hear applications to confirm or challenge awards, which are tried as motions without a jury. The court may require the deposit of security if the award is challenged, and a judgment of confirmation has the same force and may be enforced as a judgment in an action.

The principal features and obligations of the New York Convention are set forth in articles I through VI. Article I establishes the limitations of the treaty’s scope. The treaty applies only to foreign (international) commercial agreements to arbitrate. Article I also permits States to limit their obligation to enforce awards to only those made in reciprocating nations. Article I provides that the arbitration clause must be in writing and requires the subject matter to be capable of arbitration. Article III requires each contracting State to recognize and

37. See infra notes 60 & 61 and accompanying text (article IV provision on proving the award).
38. 9 U.S.C. § 207 (1982) provides “within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.”
39. New York Convention, article I(2), states “[t]he ‘arbitral award’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.” New York Convention, supra note 13, art. I(2). Institutional arbitration allows a party to choose the rules of a particular organization experienced in administering arbitration, whereas, ad hoc arbitration requires the parties to agree on their own set of rules at the time of contract negotiations. See generally Rhodes & Sloan, The Pitfalls of International Commercial Arbitration, 17 VAND. J. TRANSNAT’L L. 19 (1984).
40. 9 U.S.C. § 203 (1976) provides “an action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such action or proceeding, regardless of the amount in controversy.”
43. “If an application for the setting aside or suspension of the award has been made to the competent authority referred to in article V paragraph (1)(e), the authority before which the award is sought to be relied upon, may, if it considers it proper, adjourn the decisions on the enforcement of the awards and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.” New York Convention, supra note 13, art. VI.
45. New York Convention, supra note 13.
46. New York Convention, article I(1), provides “[t]his Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered domestic awards in the State where their recognition and enforcement are sought,” New York Convention, supra note 13, art. I(1).
47. Id. art. I(3). This limitation does not mean that a nation will not recognize an award made in a State which has not ratified the Convention, but only that it may refuse to apply the provisions of the Convention in its recognition of the award.
48. Id. art. II.
enforce arbitral awards fairly. Article IV provides that a party may obtain recognition and enforcement of an arbitral award merely by supplying a certified copy of the contract containing the agreement to arbitrate and a certified copy of the arbitrator's award. Article V recognizes only seven grounds for refusing enforcement of an arbitral award. Article V(1) details the allowable defenses that may be raised by the parties to the recognition and enforcement of the award while article V(2) states the grounds on which the court itself may deny enforcement. Article VI permits the court either to accept an article V reason to deny enforcement of the award or to accept the argument of the party seeking enforcement of the award and require security on the award from the opposing party.

A. Article III—The Basic Obligation

Article III of the New York Convention contains the fundamental obligation of a contracting State to recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied on and under the conditions set forth in the Convention. The forum State must not impose "substantially more onerous conditions or higher fees or charges" on

49. Id. art. III; see also infra notes 56–59 and accompanying text.
50. Id. art. IV; see also infra notes 60 & 61 and accompanying text.
51. Id. art. V; see infra notes 62–252 and accompanying text for a full analysis of the refusal provisions.
52. Id. The allowable defenses include: the absence of a valid agreement; lack of fair opportunity to be heard; the award exceeds the scope of the agreement; improper composition or procedure of the arbitral tribunal; and the award is not binding or has been set aside.
53. Id. The grounds on which the court may deny enforcement are that either the subject matter of the dispute is not arbitrable or recognition of the award would violate the enforcing country's public policy.
54. Id. art. VI; see supra note 43 (specific language of article VI).
55. Article VII states that the New York Convention shall not affect the validity of other agreements entered into by the contracting States, except that the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect on contracting States. Articles VIII, IX, and X address the procedure of accession to the Convention. Article XI details the applicability of the Convention to a federal or nonunitary State. Articles XII and XIII specify when the New York Convention comes into force or may be terminated in regard to specific States. Article XIV limits the use of the New York Convention by a contracting State against other contracting States to the extent the State is bound by the Convention. Article XV stipulates for the Secretary General of the United Nations to notify the contracting States of the status of the other contracting States. Finally, Article XVI states that the Chinese, English, French, Russian, and Spanish texts of the Convention are all equally authentic, and that the Secretary General of the United Nations shall transmit a certified copy of the Convention to the contracting States. See generally Aksen, supra note 31.
56. New York Convention, article III, provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." New York Convention, supra note 13, art. III.
the recognition or enforcement of arbitral awards to which the Convention applies
than it imposes on the recognition or enforcement of domestic arbitral awards.\textsuperscript{57}
The New York Convention thus remits the parties to domestic laws already in place with respect to enforcing awards. If domestic awards are hard to enforce, the New York Convention does not make foreign awards easier to enforce.\textsuperscript{58}

The lack of a uniform system of international procedural rules of enforcement for foreign awards is one of the biggest drawbacks of the New York Convention. In light of the various views about arbitration, the achievement of uniformity is a lofty goal. The contracting States have been left free to establish different procedures for the recognition and enforcement of foreign awards and domestic awards within the limits of the "substantially more onerous conditions" rule.\textsuperscript{59}

\section*{B. Article IV—Proving the Award}

The New York Convention places the burden of proving the invalidity of the award on the defendant. The proponent of the award is required to: (1) file an application for recognition and enforcement of the award with the competent authority in the contracting State; (2) supply the duly authenticated original award or a duly certified copy; (3) supply the original arbitration agreement or a duly certified copy; and (4) supply, if appropriate, a translation of the award and agreement, which may be certified by an official or a sworn translator or by a diplomatic or consular agent.\textsuperscript{60} This establishes a prima facie case and the burden shifts to the defendant to establish the invalidity of the award on one of the grounds specified in article V.\textsuperscript{61}

\section*{C. Article V—Grounds for Refusal}

United States courts recognize article V of the New York Convention as the exclusive source of their authority to deny enforcement of a foreign arbitral award.\textsuperscript{62} This recognition is consistent with the Convention's implementing legislation, which states that a "court shall confirm the award unless it finds one of the grounds specified in the said Convention."\textsuperscript{63} The U.S. judicial interpret-

\textsuperscript{57} Id.

\textsuperscript{58} There are no rules promulgated for conducting arbitration, there are no tribunals established for enforcing awards and there are no procedural standards created for the enforcement of awards. The New York Convention directs the parties to the rules of procedure of the territory where the award is relied on. See Quigley, Convention on Foreign Arbitral Awards, 58 A.B.A. J. 821 (1972).

\textsuperscript{59} New York Convention, supra note 13, art. III.

\textsuperscript{60} Id. art. IV.

\textsuperscript{61} See Parsons & Whittemore Overseas Co. v. Société Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974).


\textsuperscript{63} 9 U.S.C. § 207 (1976).
tation of the Convention places the burden of proving the nonenforceability of the award on the party seeking to prevent enforcement in the United States.\footnote{See, e.g., Parsons & Whittemore, 508 F.2d at 973; Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334 (5th Cir. 1976). Some suggest that this burden discourages contesting enforcement of the award. See Note, The Validity of the Foreign Sovereign Immunity Defense in Suits Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 Fordham Int'l L.J. 321, 332 (1983–84).}

Article V lists five grounds the defendant may assert to argue for denial of the recognition and enforcement of the award and two further grounds upon which the competent authority of the forum State may, on its own motion, refuse recognition or enforcement.\footnote{New York Convention, supra note 13, art. V. The party defending the enforcement action has the burden of proof and must raise the procedural defect. See Imperial Ethiopian Gov't, 535 F.2d at 336; Parsons & Whittemore, 508 F.2d at 973.} The courts favor granting recognition and enforcement whenever possible. In general, the courts favor international commercial arbitration\footnote{See Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). The Court, referring to the New York Convention, stated that the goal of this Convention is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts.} and recognition and enforcement under the New York Convention is seldom refused.\footnote{See generally Sanders, A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 13 Int'l L. 269 (1979).} The overall scheme of the Convention is to facilitate enforcement of arbitral awards. Nonetheless, it is vitally important that parties, seeking enforcement and nonenforcement alike, have a clear understanding of the grounds for denial of recognition. The operation of each specific refusal provision is, therefore, considered below.

1. Article V(1)(a): The Absence of a Valid Arbitration Agreement

[T]he parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.\footnote{New York Convention, supra note 13, art. V(I)(a).}

The first ground for nonrecognition is the absence of a valid arbitration agreement. A court should not enforce an award against a party that never agreed to arbitrate. This defect may involve a determination of several items: whether there was an agreement; whether there was an agreement to be bound by the arbitrator's decision, or merely to submit the dispute to an umpire; or whether the agreement was valid (e.g., whether it was illegal or induced by fraud or duress). A party may claim that a particular party did not have the capacity to make the arbitration agreement or that the agreement was invalid under applicable law.\footnote{McClendon, supra note 10, at 63.} No reported U.S. judicial decision, however, 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.\textsuperscript{70}

The Convention allows the enforcing State to examine the validity of the agreement, but only under the law selected by the parties or the law of the place of arbitration.\textsuperscript{71} The law applicable to the parties is used to judge the capacity of the parties to the contract. The court remains free to utilize its own conflict of laws principles in arriving at the law governing the capacity of the parties. The article V(1)(a) defense distinguishes between the law under which a court should examine the capacity of the parties ("the law applicable to them") and the law under which a court should examine the validity of the agreement ("the law to which the parties have subjected [the agreement] or, failing any indication . . . , under the law of the country where the award was made").\textsuperscript{72} In the former situation, a court may apply its conflict of laws rules to determine the applicable law.\textsuperscript{73} In the latter case, the parties are bound by the law they have selected (either expressly or by default).\textsuperscript{74}

This provision contains no requirement that the agreement be in writing. It seems difficult, however, to see how the proponent could supply the enforcing State with a copy of the agreement, as required by article IV, unless it were in writing. For the same reason, it also appears that the parties' choice of law must be in the agreement itself.

Litigation of an article V(1)(a) defense has not been reported in any U.S. court.\textsuperscript{75} The validity of this defense, however, has been restrictively defined by the United States Supreme Court's decision in \textit{Prima Paint Corp. v. Flood & Conklin Manufacturer}.\textsuperscript{76} In \textit{Prima Paint} the Court held that the validity of the contract was itself a matter for the arbitrator to decide.\textsuperscript{77} The judiciary should base its decision regarding arbitrability upon an examination of the arbitration clause only, and not the entire contract.\textsuperscript{78} It is hard to imagine a case, however, in which one would have proof of the invalidity of the clause itself without proof.

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\item \textsuperscript{70} See generally I-XIV Y.B. Com. Arb. (International Council for Commercial Arbitration) (cumulative summary of all cases involving the New York Convention).
\item \textsuperscript{71} New York Convention, supra note 13, art. V(1)(a).
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Cf. \textit{In Re Ferrara S.p.A. v. United Grain Growers, Ltd.}, 441 F. Supp. 778 (S.D.N.Y. 1977), aff'd without op., 580 F.2d 1044 (2d Cir. 1978) (United States law rather than Italian law governed the court's construction of the underlying contract containing the arbitration clause).
\item \textsuperscript{74} The parties can expressly identify what law will govern; otherwise by default, the law of the territory of the arbitration governs. \textit{See generally} Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948 (S.D. Ohio 1981), for a case in which the failure to select a specific law may have worked to the prejudice of the party which prevailed at the arbitration.
\item \textsuperscript{75} \textit{See generally} [1987] XII Y.B. Com. Arb. Key (International Council for Commercial Arbitration). If the parties fail to specify their choice of law within the agreement then the parties will be bound by the law of the territory of the arbitration. New York Convention, supra note 13, art. V(1)(a).
\item \textsuperscript{76} 388 U.S. 395 (1967).
\item \textsuperscript{77} Id. at 403-04.
\item \textsuperscript{78} Id.
\end{itemize}
of the invalidity of the entire contract. Since incapacity of the parties would seem to bring into question the validity of the entire contract, pursuit of this defense was impliedly discouraged in *Prima Paint.*

2. Article V(l)(b): Lack of Fair Opportunity to be Heard

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.

The second ground incorporates a basic notion of due process into the New York Convention. Enforcement of an arbitral award may be denied if the party was not given proper notice of either the appointment of the arbitrator or the proceeding, or if the party was unable to present his case. The word "proper" was adopted to take care of the situation where the defendant was under some legal incapacity. The phrase "or was otherwise unable to present his case" was needed to deal with the circumstances where force majeure or other causes operated to prevent a party from presenting his case or where he was not given adequate opportunity to do so. Although the clause contains no criteria upon which to gauge the adequacy of the notice, this defense "essentially sanctions the application of the forum State's standard of due process." There is, however, a remote chance that a court may analogize to the previous clause of the New York Convention, which states that the question of validity of the agreement is determined under the law the parties have selected, or, failing any selection, under the law of the place of arbitration. The due process exception, like other article V defenses to enforcement of arbitral awards, has been narrowly

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79. After *Prima Paint*, 388 U.S. at 395, the courts have consistently upheld the validity of arbitration agreements. While the following cases were not litigated under the Convention, the arguments asserted demonstrate what the court will accept or reject in considering the validity of any arbitration agreement. The courts have rejected the following arguments favoring the invalidity of arbitration agreements: the cause of action arose prior to the agreement to arbitrate and therefore could not have been covered by it; see Coenen v. R.W. Pressprich & Co., 453 F.2d 1209 (2d Cir.), cert. denied, 406 U.S. 949 (1972); the contract provided expressly for various types of judicial relief, see *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972); the claims being pressed to arbitrate are frivolous, see *National R.R. Passenger Corp. v. Missouri Pac. R.R.*, 501 F.2d 423 (8th Cir. 1974). The defenses that the courts have acknowledged include: the specific agreement for arbitration was procured by fraud, see *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 136 Cal. Rptr. 378 (1977); there was never an arbitration agreement embodied in a written contract, see *Itoh & Co. v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. 1977).


81. New York Convention, supra note 13, art. V(1)(b).

82. *Id.*


85. *See Parsons & Whittemore*, 508 F 2d at 975. This statement concisely phrases the object of the V(1)(b) defense. It concerns the fundamental principle of procedures, that of a fair hearing and adversary proceedings.
construed. The U.S. courts generally look at the overall result (whether the defendant got a fair hearing) and do not overturn awards because the defendant was unable to present some part of his case, such as a witness, or could not cross-examine the other party’s witness. Nor can the defendant complain if he had notice of the hearing and failed to attend.

In Parsons & Whittemore Overseas Co. v. Société Generale de L’Industrie du Papier (RAKTA) the Second Circuit rejected the defense put forward by the American company that the arbitrators had violated standards of due process by refusing to postpone a hearing because one of the witnesses could not be present due to a prior commitment to lecture at an American university. The court found that the refusal did not infringe Parsons & Whittemore’s due process rights under the United States Constitution. A speaking engagement did not justify the rearrangement of an international arbitration, according to the court: arbitrators have a strong interest in adhering to a schedule set on the basis of convenience “to parties, counsel and arbitrators scattered about the globe.” Also, “inability to produce one’s witnesses before an arbitral tribunal is a risk inherent in an agreement to submit to arbitration.” The court stated that when a party agrees to arbitrate, it may be agreeing to forgo some of the advantages of litigation, such as compulsory process. Since the witness provided the arbitrators with an affidavit covering most of his proposed testimony, Parsons & Whittemore could not claim that the matter was decided without considering the witness’s particular evidence of its defense. The court held that the arbitrators acted within their power in refusing to delay the proceedings.

In Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co. the party seeking to block enforcement of the award claimed it was “unable to present its case” under article V(1)(b), because its rights and liabilities under the disputed agreement had not matured. The party opposing enforcement argued that because legal rights under the agreement between the

86. *Id.*
88. See Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co., 415 F. Supp. 133, 137 (D.N.J. 1976), where the court said that “[m]ost have held that an arbitration award is not fraudulently obtained within the meaning of [9 U.S.C.] § 10(a) . . . when the protesting party had an opportunity to rebut his opponent’s claims at the arbitration hearing.”
89. 508 F.2d 969 (2d Cir. 1974); see *infra* note 86 and accompanying text (full description of the facts).
90. 508 F.2d at 975.
91. *Id.* at 975–76.
92. *Id.* at 975.
93. *Id.*
94. *Id.*
95. *Id.* at 976.
UN CONVENTION OF 1958: "REFUSAL" PROVISIONS

parties were not yet fully determinable, its adversary's commencement of arbitration was premature and the party opposing enforcement was therefore unable to present its case. The court held that this argument misconstrued the intent of the due process exception, which primarily guarantees notice and an opportunity to be heard. Neither of these protections was impaired in the case, and therefore article V(1)(b) did not bar enforcement of the award.

In Laminoirs-Trefileries-Cableries de Lens, S.A. (LTCL) v. Southwire Co. Southwire contended that it was prevented from offering certain pertinent evidence at the arbitral hearing. The court ultimately concluded 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." Therefore, the court held that Southwire was not denied a fair hearing, and refused to deny the award in reliance upon this defense.

3. Article V(1)(c): The Award or a Nonseverable Part of it Exceeds the Submission to Arbitration

[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 submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.]

The third ground is really a restatement of the principle of article V(1)(a). An award should not be enforced against a party that never agreed to arbitrate the subject matter. Further, an award should not be enforced when it deals with matters not submitted or beyond the scope of the submission and these decisions cannot be separated from the rest of the award. An award rendered on a dispute

97. Medford conceded liability under the agreement that was the subject of arbitration but alleged that it had a right to offset this liability by commissions that it earned under a separate agreement. Id. at 135-36.
98. Id. at 140.
99. In Ferrara S.p.A. v. United Grain Growers, Ltd., 441 F. Supp. 778 (S.D.N.Y. 1977), aff'd without op., 580 F.2d 1044 (2d Cir. 1978), a case not directly applying the New York Convention, the court addresses an allegation that an award is invalid because the demand for arbitration was improperly served. The court recognized that notice had been mailed to a given address; therefore, there was no merit to the claim of improper notice.
100. Biotronik, 415 F. Supp at 140-41.
102. Id. at 1066. Southwire argued that its attorney was prevented from fully cross-examining LTCL's international projects manager with regard to a renegotiation clause in the contract.
103. Id. at 1067.
104. Id.
105. New York Convention, supra note 13, art. V(1)(c).
not within the scope of the agreement to arbitrate may be refused recognition and enforcement. The language shows a bias in favor of enforcement, however, by permitting the court to enforce a severable part of an award. The portions of the award dealing with disputes within the scope of the submission may be recognized and enforced if they are severable. The New York Convention, however, once again fails to specify what law would govern severability. The best approach would be to square the provision with article V(1)(a) by looking to the law chosen by the parties or, absent such choice, to the law of the State where the award was made.

The Parsons & Whittemore court provided the most comprehensive interpretation of the defense: "This defense to enforcement of a foreign award, like the others already discussed, should be construed narrowly. Once again a narrow construction would comport with the enforcement-facilitating thrust of the Convention." The Parsons & Whittemore court read article V(1)(c) very narrowly and enforced the arbitrator's award for loss of production even though the contract stated that "neither party shall have any liability for loss of production." The court determined that so long as it could reasonably believe that the arbitration panel had not ignored that provision, but had simply not interpreted it to deny its own jurisdiction, it was not necessary for the court and the arbitrators to agree on a contract interpretation. In denying the defense, the court characterized other challenges to the damages awarded as "attempts to secure a reconstruction . . . of the contract—an activity wholly inconsistent with the deference due arbitral decisions on law and fact."

A similar situation arose in Fertilizer Corp. of India v. IDI Management, Inc., in which the arbitrators awarded consequential damages even though the parties' contract excluded such liability. After Parsons & Whittemore, the district court in Fertilizer Corp., even if so inclined, would have had difficulty vacating the award. The opinion of the arbitral panel in Fertilizer Corp., a "speaking award" in which the arbitrator's reasoning is stated, made specific reference to the liability exclusion in the contract, thus establishing beyond doubt that the panel was not ignoring the provision as required by Parsons & Whittemore. The Fertilizer Corp. court, acting under the narrow judicial review of arbitral awards granted to an American court, may not substitute its

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106. Id.
107. 508 F.2d 969 (2d Cir. 1974); see infra notes 180–86 and accompanying text (facts of the case).
108. 508 F.2d at 976.
109. Id.
110. Id. at 976–77.
111. Id. at 976.
113. Id. at 958.
114. Id. at 960. When arbitrators explain their conclusion "in terms that offer even a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented by litigants who merely argue . . . for a different result."
judgment for that of the arbitrators.\textsuperscript{115} The court found no action beyond the scope of the arbitrator's authority and affirmed the award.\textsuperscript{116}

4. \textit{Article V(I)(d): Improper Composition or Procedure of the Arbitral Tribunal}

[T]he 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.\textsuperscript{117}

If the arbitral panel was not selected in accordance with the arbitration agreement or if not covered by the agreement with the law of the State where the arbitration was held, or if the arbitration procedure was not in accord with the terms of the agreement, enforcement may be denied. This clause is subject to conflicting interpretations.\textsuperscript{118} Because procedure must be in accord merely with the law to which the parties agree, the argument can be made that it need not be in accord with any preexisting institutionalized arbitration procedures. This view seeks delocalized arbitration, which need not be based upon the law of any country. This interpretation follows logically from the language of the provision.\textsuperscript{119} Conversely, the provision can be construed as being restricted to the law of a particular country. The U.S. courts have held in favor of the latter interpretation, insofar as the parties agree to procedures that do not tamper with basic due process notions.

The U.S. courts have addressed the question of the improper composition of the arbitral tribunal twice. First, the losing party in one arbitration relied on this defense to challenge the award in \textit{Imperial Ethiopian Government v. Baruch-Foster Corp.}\textsuperscript{120} After the arbitration panel made the award, the losing party, Baruch-Foster, discovered that the third arbitrator had previously drafted the Civil Code for the Ethiopian Government, the prevailing party.\textsuperscript{121} Baruch-Foster claimed the selection violated the arbitration agreement, which provided that the third arbitrator should have no direct or indirect connection with either party. The district court confirmed enforcement of the award, finding that Baruch-Foster had waived any objection to the composition of the panel.\textsuperscript{122} Baruch-Foster,

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.} at 959.

\textsuperscript{117} New York Convention, \textit{supra} note 13, art. V(I)(d).

\textsuperscript{118} This section is the product of a compromise between antagonistic negotiating forces. One group argued for "complete subjection of the arbitral procedure to the law of the country where the award was made," the other advocated "contractual freedom to designate an arbitral procedure independent of the law of any country." \textit{Quigley, supra} note 4, at 1068--69.


\textsuperscript{120} 535 F.2d 334 (5th Cir. 1976).

\textsuperscript{121} \textit{Id.} at 335. It was conceded that the arbitrator was a member of the committee that drafted the civil code for Ethiopia.

\textsuperscript{122} \textit{Id.} at 336.
however, appealed and claimed that the district court erred in denying the motion for discovery directed at the alleged connection between the third arbitrator and the Ethiopian government. The court of appeals affirmed enforcement of the award on the grounds that Baruch-Foster's allegations were unsubstantiated and that the district court correctly denied any discovery on the issue.  

Second, in *Al Haddad Bros. Enterprises v. MIS Agapi*, 124 Al Haddad invoked the article V(1)(d) defense. 125 In particular, the arbitration provision called for an arbitration panel composed of one arbitrator appointed by each party, and if two arbitrators did not agree, an umpire appointed by the two arbitrators would render the decision. 126 The award was made by a sole arbitrator. 127 Regardless, the court reasoned that the fact that the award was not rendered in accordance with the parties' agreement was not fatal. 128 The Convention allows recognition of an award that complies with the laws of the country where the arbitration occurred. 129 Under British law a sole arbitrator may decide a dispute; therefore, the award was not invalidated by the defense. 130

5. Article V(1)(e): The Award Is Not Binding or Has Been Set Aside or Suspended

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, the award was made. 131

This clause contains two grounds for refusal: (1) the award has not yet become binding; or (2) the award has been set aside or suspended by the court of the country where the award was made. To be enforceable, the award, according to the law under which it was made, must be binding on the parties, and it must not have been set aside or suspended. The provision was a response to concerns that the award should not be given binding effect in one country when it is not binding under the law where it was made. 132 The countervailing consideration was the desirability of avoiding the "double exequatur," which requires judicial recognition of the award in both the rendering State and in the State in which enforcement is sought. 133

123. *Id.* at 337. The Fifth Circuit declined to adopt the district court's waiver theory.
127. *Id.*
128. *Id.* at 210.
132. *See* Quigley, *supra* note 4, at 1069.
No one wanted the New York Convention to require judicial proceedings in confirmation of the award in both the rendering and enforcing States. At the same time, an award that has been set aside by competent authority in the State where rendered should hardly be granted enforcement in another State. The hardest question is the status, in the enforcing State, of an award that is still subject to review in the rendering State by appeal or other procedures. The determination of when an award is "binding" causes difficulties since the New York Convention fails to define the term. Different bases for enforcement have different standards governing when an award is binding. Under the 1927 Geneva Convention, which the New York Convention superseded, the award had to be "final" in the country where made in order to be enforceable abroad. The usual commercial treaty language is "final and enforceable." Either "final" or "enforceable" can cause interpretation problems. "Final" implies completion of all permitted appeals. "Enforceable" means some kind of court action, because arbitral awards are not self-executing. It was to avoid this problem that the language "binding on the parties" is used in the New York Convention instead of "final" or "enforceable."

The defense was raised by IDI in Fertilizer Corp. v. IDI. IDI argued that since the case was under appeal in an Indian court, the award could not be considered binding in the United States. The U.S. district court rejected this argument and found that a pending court appeal did not alter the "binding" effect of the award for the purposes of the New York Convention. Under the Convention, "binding" means that no further arbitral appeals are available. The fact that recourse may be had to a court of law does not prevent the award from having binding effect. Were it to hold otherwise, the court would be validating a means by which a losing party could evade enforcement of an

134. Quigley, supra note 4, at 1069.
141. Id. at 955. The award was being reviewed by an Indian court to determine whether the arbitrators could properly award consequential damages when the contract expressly provided otherwise.
142. Id. at 956–57. "An award is entitled to the respect which is due to judgments of a court of last resort."
143. McLaughlin, supra note 10, at 300.
144. Id.
award by bringing, in a foreign court, a postarbitral action to set the award aside.\textsuperscript{145}

Article VI sheds some light on Fertilizer's finding regarding the "binding" effect of an award.\textsuperscript{146} That provision was drafted to improve upon the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927,\textsuperscript{147} which provides that an award would not be considered binding if an appeal was pending in the rendering country.\textsuperscript{148} Article VI provides that a pending appeal only allows, and does not compel, the court to adjourn its decision.\textsuperscript{149} The article also allows the court in the enforcing State to require suitable security from the party opposing enforcement of the awards as a condition to such enforcement.\textsuperscript{150} The decision to set aside or suspend the award is based on an ad hoc determination by the court, guided by the proenforcement attitude of the New York Convention.\textsuperscript{151}

6. Article V(2)(a): Subject Matter Not Arbitrable

[T]he subject matter of the difference is not capable of settlement by arbitration under the law of that country.\textsuperscript{152}

This ground, like the following ground, may be raised by the enforcing court on its own accord.\textsuperscript{153} This clause carries over the similar provision in article (1)(b) of the Geneva Convention.\textsuperscript{154} The enforcing State is empowered to decide the "arbitrability" of the dispute under its local standards.\textsuperscript{155} If the grounds of a dispute cannot be settled by arbitration under the domestic law of the enforcing State, a court may refuse to enforce an award granted through a foreign arbitration panel.

In Parsons & Whittemore,\textsuperscript{156} the defendants asserted the nonarbitrability defense. The argument was premised on the fact that the dispute had a significant impact on U.S. foreign policy.\textsuperscript{157} Therefore, the defendants argued, the dispute could not "be placed at the mercy of foreign arbitrators 'who are charged with

\textsuperscript{145} Fertilizer Corp., 517 F. Supp. at 958 (quoting Aksen, supra note 31, at 11).
\textsuperscript{146} New York Convention, supra note 13; see also supra note 43 (for the specific language).
\textsuperscript{147} See Geneva Convention, supra note 29.
\textsuperscript{148} Id. art. I(d).
\textsuperscript{149} New York Convention, supra note 13, art. VI.
\textsuperscript{150} Id.
\textsuperscript{151} Fertilizer Corp., 517 F. Supp. at 961.
\textsuperscript{152} New York Convention, supra note 13, art. V(2)(a).
\textsuperscript{153} Id. at art. V(2).
\textsuperscript{154} Article I(b) of the Geneva Convention provides: "To obtain such recognition or enforcement, it shall, further be necessary: . . . (b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon." The text of the Geneva Convention is reprinted in 3 G. HUDSON, INTERNATIONAL LEGISLATION 2153-60 (1931).
\textsuperscript{155} Quigley, supra note 4, at 1070.
\textsuperscript{156} Parsons & Whittemore, 508 F.2d at 969; see infra notes 180–86 and accompanying text (full description of the facts).
\textsuperscript{157} 508 F.2d at 975.
the execution of no public trust' and whose loyalties are to foreign interests." The court concluded that the mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not render the dispute nonarbitrable. Simply because acts of the United States are somehow implicated in a case, one cannot conclude that the United States is vitally interested in its outcome. In analyzing the national interest, the court noted that the Supreme Court’s decision in favor of arbitrability in Scherk v. Alberto-Culver Co., a case far more prominently displaying public features than the instant one, compels, by analogy, the conclusion that the foreign award against Parsons & Whittemore dealt with a subject arbitrable under U.S. law.

The defense, however, was successfully invoked to deny enforcement of an arbitral award against Libya in Libyan American Oil Co. (LIAMCO) v. Socialist People’s Libyan Arab Jamahirya [hereinafter LIAMCO]. In 1973–1974 Libya nationalized LIAMCO’s rights under petroleum concessions that it had granted nearly twenty years before. Dissatisfied with the compensation for its interest and equipment, LIAMCO pursued arbitration as provided in the agreement. An award was rendered in Geneva in LIAMCO’s favor. When LIAMCO tried to enforce the award in the United States, Libya opposed it by claiming sovereign immunity and alternatively by claiming that nationalization was not subject to arbitration.

The court denied Libya’s sovereign immunity claim on the grounds that by agreeing to arbitration governed by foreign law, Libya waived its sovereign immunity. In the second defense, the court interpreted the “subject matter of the differences” in the case as Libya’s nationalization of LIAMCO’s assets and the rate at which LIAMCO should be compensated for the assets taken under the nationalization. The court accepted Libya’s argument that the subject matter in dispute was the oil concession nationalization, an act of state, and that

158. Id. (quoting Brief for Appellant at 23).
159. Id. at 975.
160. Id.
162. Parsons & Whittemore, 508 F.2d at 975.
165. LIAMCO, 484 F. Supp. at 1178; see also Ipitrade Int’l, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.C. Cir. 1978) (an action for enforcement of an arbitral award based on breach of contract, the court held that the foreign sovereign’s “agreement to adjudicate all disputes arising under the contract in accordance with Swiss law and by the arbitration under ICC rules constitute[d] a waiver of sovereign immunity under the Act.” 465 F. Supp. at 826).
166. LIAMCO, 482 F. Supp. at 1178.
nationalization laws abrogated all terms of the concession. The court reasoned that since it could not have compelled arbitration in this instance, because arbitration would necessarily review the validity of the nationalization and thus violate the act of state doctrine, it could not enforce the award. LIAMCO appealed the district court's decision, but before the appeal was decided, the parties settled, and the appeal was dismissed.

The defense of nonarbitrary subject matter is unique in that it has met with some success in the U.S. courts. The defense, however, may be limited to a few areas, such as nationalization decrees. As Scherk demonstrates, U.S. courts have recognized and enforced arbitral awards arising out of a type of dispute that would not be arbitrable under national law. Although traditionally nonarbitrable under U.S. law, disputes over patent rights are now arbitrable under congressional legislation. Similarly, agreements to arbitrate alleged violations of U.S. racketeering laws arising from international transactions will be enforced under the New York Convention.

7. Article V(2)(b): The Public Policy of the Forum

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

The final express defense of article V has been the most frequently litigated. This clause has the effect of relegating the ultimate decision on the efficacy of the New York Convention to the good faith of the contract States. The legislative history of the provision offers no certain guidelines to its construction. Basically, if the judge finds that the recognition and enforcement of the foreign award would be contrary to the public policy of his country, the judge may refuse recognition and enforcement. Unfortunately, a broad interpretation of the public policy defense undermines the strength and effectiveness of the New York Convention, and in turn casts doubt on the effectiveness of international arbitration.

167. Id. at 1179.
168. Id. at 1178-79.
170. See infra notes 193-200 and accompanying text.
174. Quigley, supra note 4, at 1070.
175. "To say that public policy prohibits arbitration in a particular instance explains little: 'public policy' is a catch phrase elusive of meaning without reference to the context in which it is used." Sterk, Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense, 2 CARDOZO L. REV. 481 (1981), discusses the public policy defense.
176. See Note, The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards, 7 CAL. W. INT'L L.J. 228, 228-29 n.1 (1977), which states that the "public policy defense
indicated in its report to the U.N. Conference that its intention is to limit the application of the public policy exception "to cases in which the recognition or enforcement of a foreign arbitral award would be distinctly contrary to the basic principles of the legal system of the country where the award was invoked." 177

The U.S. courts have upheld this limitation and only allowed the defense where recognition and enforcement of the award would violate the "most basic notions of morality and justice." 178 Although this defense is often asserted, it is rarely successful. 179 There is an international public policy, as well as a domestic policy, and the two must be viewed together. Thus, although defenses available against domestic awards may also be available in international cases as violations of public policy, this does not necessarily lead to a refusal to enforce. Numerous cases assert the public policy defense even though it would be more appropriate under another defense. This tactic may not be that useful. Courts generally apply the same narrow construction and refuse the defense as a violation of public policy.

The first American court called on to interpret directly the extent of the public policy defense was the United States Court of Appeals for the Second Circuit in *Parsons & Whittemore Overseas Co. v. Société Generale de L'Industrie du Papier (RAKTA).* 180 The court's analysis stands mainly for the principle that, although the court will not enforce an award that is contrary to the public policy of the United States, public policy is not equated with our national policy or our national political interest.

The controversy arose when Parsons & Whittemore, a U.S. corporation, withdrew its work crew from Egypt. The work crew had been in Egypt to construct a paperboard mill for RAKTA, an Egyptian corporation. 181 The Arab-Israeli Six Day War and deteriorating U.S.-Egyptian relations prompted Parsons & Whittemore to leave Egypt. 182 In order to excuse its delay in completing the project, Parsons & Whittemore invoked the "force majeure" clause of the contract with RAKTA. 183 RAKTA disagreed with this position,
demanded arbitration of the dispute, and ultimately obtained an arbitral award for damages resulting from the breach of contract.\textsuperscript{184} Parsons & Whittemore then sought a declaratory judgment in the United States to block RAKTA from enforcing the arbitral award.\textsuperscript{185} The court refused to grant the judgment and instead issued an order confirming RAKTA's award.\textsuperscript{186}

Parsons & Whittemore raised several defenses to the enforcement of the award: one was a public policy argument. American citizens in Egypt had an obligation to abandon the construction of the mill when U.S.-Egyptian relations were severed. The court did not accept this interpretation of the defense: ""[t]o read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility.""\textsuperscript{187} The court saw no definite guidelines from the legislative history of the New York Convention nor any convincing arguments from the commentators. The court drew inferences from the New York Convention as a whole and, relying on the ""general proenforcement bias"" of the Convention, recognized only a ""narrow reading of the public policy defense.""\textsuperscript{188} A decision to the contrary ""would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement.""\textsuperscript{189} The court emphasized that the defense was not to be used to protect national interest, but rather that, by acceding to the Convention, the United States was subscribing to a supernational interest.\textsuperscript{190} This, coupled with the fears of retaliatory use of the public policy exception by foreign courts, led the Second Circuit to conclude:

> [A]n expansive construction of this defense would violate the Convention's basic effort to remove pre-existing obstacles to enforcement. . . .

We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.\textsuperscript{191}

This language is now the standard by which attempts to invoke the public policy defense are judged.\textsuperscript{192} The standard of ""morality and justice,"" however, offers little guidance.

The Supreme Court continued to distinguish between domestic public policy and the narrower concept of international public policy in \textit{Scherk v. Alberto-}
The question in Scherk was whether to allow the arbitration of a securities issue in an international contract despite federal statutes prohibiting the waiver of a right to a trial in a domestic securities case. Alberto-Culver, a U.S. corporation, contracted with Scherk, a German citizen, for the transfer of business enterprises and trademark rights held by Scherk to Alberto-Culver. The sales contract contained express warranties that the trademarks were unencumbered and included a clause to arbitrate any claim that might arise from the transaction. After the transfer, Alberto-Culver claimed it had discovered that the trademark rights were subject to undisclosed encumbrances. Scherk refused to rescind the contract and Alberto-Culver brought suit in a U.S. district court, alleging that Scherk had violated U.S. securities laws. Scherk sought to stay the litigation by relying on the arbitration clause. The district and circuit courts denied Scherk’s attempt to stay litigation, relying on the Supreme Court’s decision in Wilko v. Swan. The Wilko decision denied enforcement of arbitration on the grounds that the issue concerned the domestic sale of securities and that arbitration on the question of securities transactions was against public policy.

The Supreme Court in Scherk, however, found the Wilko precedent factually inapplicable and therefore upheld the arbitration provision. The crucial distinction between Scherk and Wilko, the Supreme Court noted, concerned the truly international nature of “Alberto-Culver’s contract to purchase the business entities belonging to Scherk. . . . Such an international contract involves considerations and policies significantly different from those controlling in Wilko.” Agreements to select a forum and governing law play a crucial role in international business transactions by providing certainty for the parties. National courts, according to the Supreme Court, should not subvert these goals, but rather should consider the broader implications of their actions: “A parochial

194. This defense might be more appropriate under article V(2)(a). This article allows a defense where the subject matter is not a subject that should be arbitrated. See supra notes 152–72 and accompanying text.
195. Scherk, 417 U.S. at 508.
196. Id. The arbitration clause provided that “any controversy or claim [that] shall arise out of this agreement or the breach thereof” would be referred to arbitration.
197. Id. at 509.
198. Id. The security violations were based on § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. § 78(b) and rule 10b-5 promulgated thereunder, 17 C.F.R. § 240-10b-5.
199. Scherk, 417 U.S. at 510.
200. 346 U.S. 427 (1953). The case involved an agreement between Wilko and Hayden, Stone & Co., a large brokerage firm, under which Wilko agreed to purchase, on margin, a number of shares of a corporation’s common stock. Wilko alleged the purchase was induced by misrepresentation and brought a suit for damages. The defendant responded that Wilko had agreed to submit all controversies to arbitration.
201. The court noted the Wilko suit was brought under § 12(2) of the Securities Act of 1933. Scherk, 417 U.S. at 513. There is no statutory counterpart to § 12(2) in the Securities Exchange Act of 1934 which governs the Scherk litigation.
202. Id. at 515.
refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but also invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." 

Finally, the Court noted that its ruling must be consistent with the goals of the New York Convention. Yet no clear guidelines emerged from Scherk except, possibly, the necessity that the contract be truly "international."

The public policy defense has rarely been successful before U.S. courts despite the variety of claims that challengers have tried to bring within its scope. The most recent examination of the defense by the Supreme Court is in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. Mitsubishi involved the determination of whether an American court should enforce an agreement to resolve antitrust claims by arbitration when the agreement arises from an international transaction. The controversy arose under an arbitration agreement between a Japanese party and a U.S. party. Although the agreement provided for arbitration of disputes in Japan, the U.S. party filed a claim in the U.S. district court under federal antitrust laws. The First Circuit concluded that the antitrust exception created by some circuit courts made antitrust claims nonarbitrable. Finding statutory support for its conclusion, the circuit court cited article II(1) of the Convention, which removed such claims from arbitration since they were "not capable of settlement by arbitration."

Citing Scherk, the first case enunciating the federal policy of interpreting the Convention defenses restrictively, the United States Supreme Court reversed the First Circuit and reaffirmed its strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. The Court stated that "[h]ere, as in Scherk, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution." Moreover, the Supreme Court rejected arguments that antitrust claims were inappropriate for arbitration. The
Court concluded that "concerns of international comity, respect for the capacity of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require enforcement of transnational agreements to arbitrate."212

Later, in *Fotochrome, Inc. v. Copal Co.*,213 the United States Court of Appeals for the Second Circuit again enforced an arbitration clause in an international contract when the court probably would not have enforced the agreement had the arbitration clause been in a purely domestic contract. In *Fotochrome* the court reversed the Bankruptcy Court’s stay of arbitration proceedings.214 The court noted that the New York Convention is silent on the subject of bankruptcy, providing no indication of whether bankruptcy should fall under the public policy umbrella.215 The court, stressing the strong policy in favor of international recognition, construed the public policy defense narrowly and adopted the *Parsons & Whittemore*216 guideline of "most basic notion of morality and justice."217 Since the award was a valid determination on the merits of the dispute, it was not reviewable by the Bankruptcy Court. The court concluded that the New York Convention mandated enforcement of the foreign award.218

The strong policy of enforcing arbitral awards has even overshadowed the presence of inconsistent testimony to find enforcement. In *Waterside Ocean Navigation Co. v. International Navigation Ltd.*219 the party against whom the arbitral awards were rendered in London, International Navigation Ltd., challenged enforcement of the award in the U.S. courts, alleging that the award was based on inconsistent sworn testimony by a witness for the prevailing party.220 International Navigation Ltd. argued that confirming the award would violate U.S. public policy favoring the protection of the "sanctity of the oath and maintenance of the integrity of the judicial system."221 The district court rejected International Navigation’s claim and the Second Circuit affirmed the decision.222

The Second Circuit noted that the public policy defense "must be construed in light of the overriding purpose of the Convention," and that the Convention’s

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213. 517 F.2d 512 (2d Cir. 1975).
214. *Id.* at 520.
216. 508 F.2d at 974.
217. *Fotochrome*, 517 F.2d at 513.
218. *Id.* at 516.
219. 737 F.2d 150 (2d Cir. 1984).
220. *Id.* at 151.
221. *Id.*
222. *Id.* at 155.
purpose is to encourage enforcement of foreign arbitral awards.\textsuperscript{223} The court found that "the assertion that the policy against inconsistent testimony is one of our nation's 'most basic notion[s] of morality and justice' goes much too far."\textsuperscript{224}

The courts have rejected the public policy defense based on the grounds that the award was made by arbitrators with undisclosed connections to the prevailing party.\textsuperscript{225} In *Fertilizer Corp v. IDI*,\textsuperscript{226} IDI asserted that the arbitrator had served as counsel for Fertilizer Corp. on at least two other occasions.\textsuperscript{227} The court stated that while it agreed that the preferable conduct was disclosure of the relationship, it decided that the "'stronger public policy . . . is that which favors arbitration.'"\textsuperscript{228} The court, therefore, found that recognition or enforcement would not be contrary to the public policy of the United States, and enforcement may not be denied on this basis.\textsuperscript{229} The courts have held that nondisclosure does not taint the award so as to deny enforcement.

An open question remains as to whether one can invoke the public policy defense to block enforcement of awards obtained by fraud. In *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*,\textsuperscript{230} a federal district court confronted the question of whether the defense of fraud applied to the New York Convention under U.S. law. The court found that the alleged conduct did not constitute fraud and expressly declined to answer the question presented.\textsuperscript{231} The Second Circuit in *Waterside Ocean Navigation Co. v. International Navigation, Ltd.*, however, summarily dismissed a claim that fraud violated U.S. public policy and that evidence of fraud barred enforcement of a foreign arbitral award under the New York Convention.\textsuperscript{232} The court rejected the defense of inconsistent testimony and stressed the narrow scope of the public policy defense.\textsuperscript{233} Thus, the question of whether U.S. courts will recognize fraud as a valid public policy defense has not been definitively answered.

Dictum in *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co., A.G.*\textsuperscript{234} suggests that if an agreement to arbitrate is secured under duress, a U.S. court may recognize another exception to the general proenforcement policy and refuse to enforce the award. The court stated that "'[a]greements exacted by

\textsuperscript{223} Id. at 152.
\textsuperscript{224} Id.
\textsuperscript{225} See also *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334 (5th Cir. 1976).
\textsuperscript{227} Id. at 953.
\textsuperscript{228} Id. at 954-55.
\textsuperscript{229} Id. at 955.
\textsuperscript{230} Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co., 415 F. Supp. 133 (D.N.J. 1976). Medford argued that the failure of the successful party to enter into evidence any information about the alleged agreement said to affect the claim constituted fraud. *Id.* at 140.
\textsuperscript{231} Id. at 140.
\textsuperscript{232} 737 F.2d 150, 153 (2d Cir. 1984).
\textsuperscript{233} Id. at 151-52.
duress contravene the public policy of the nation,\textsuperscript{235} and accordingly duress, if established, furnishes a basis for refusing enforcement of an award under article V(2)(b) of the Convention.\textsuperscript{236} This principle is not a binding interpretation on the Convention since the court that made the statement did not find duress in the making of the agreement and confirmed the award.\textsuperscript{237}

In \textit{Transmarine} a second public policy violation was asserted. In this argument, Marc Rich reiterated an objection it raised at the arbitration hearing, that the presence of one of the arbitrators on the panel was improper.\textsuperscript{238} Marc Rich disclaimed any specific allegations of bias, but did object to an appearance of bias.\textsuperscript{239} The court found no appearance of bias since the relationship in question was "far too tenuous . . . to require the disqualification of an experienced and respected maritime arbitrator, particularly where Rich offers no challenge to [the arbitrator's] personal integrity."\textsuperscript{240}

The article V public policy defense has been partly successful, however, in at least one U.S. court, in \textit{Laminoirs-Trefileries-Cableries de Lens, S.A. [LTCL] v. Southwire Co.}\textsuperscript{241} That case involved a purchase agreement for steel wire between a French seller, LTCL, and an American buyer, Southwire, both of whom were bound by an arbitration clause and a clause providing that the agreement would be governed by the laws of Georgia to the extent that they did not conflict with the laws of France.\textsuperscript{242} When a dispute arose over the price to be paid by Southwire, the issue was arbitrated according to the terms of the agreement, and an award was made in favor of LTCL.\textsuperscript{243} The arbitration panel, relying on French

\textsuperscript{235} \textit{Id.} at 358
\textsuperscript{237} \textit{Transmarine}, 480 F. Supp. at 359-61. Rich alleged economic duress since Transmarine breached the contract and Rich had no choice but to agree to Transmarine's terms. The court concluded that Rich merely exercised its business judgment and that such does not constitute duress.
\textsuperscript{238} \textit{Id.} at 357. Although this type of public policy violation has been asserted in other cases, e.g., \textit{Fertilizer Corp. of India v. IDI Mgmt, Inc.}, 517 F. Supp. 948 (S.D. Ohio 1981), it might be more appropriately asserted under article V(1)(d). This article allows a defense where the composition of the arbitral body is not in accord with the parties' agreement or applicable law. \textit{See supra} notes 117–30 and accompanying text. Rich placed reliance upon \textit{Commonwealth Coating Corp. v. Continental Casualty Corp.}, 393 U.S. 145 (1968).
\textsuperscript{239} \textit{Transmarine}, 480 F. Supp. at 356. Rich bases this defense upon the fact that the arbitrator in question was president and chief operating officer of a corporation that had pursued a claim against Rich in arbitration and then in federal courts. \textit{See Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.}, 579 F.2d 691 (2d Cir. 1978) (court decided specifically that awards should not be vacated because of an appearance of bias).
\textsuperscript{240} \textit{Transmarine}, 480 F. Supp. at 357-58. The court suggests that the only grounds for disqualification of an arbitrator is a direct financial relationship between the arbitrator and a party to the arbitration.
\textsuperscript{242} \textit{Id.} at 1065.
\textsuperscript{243} \textit{Id.} at 1065–66. In the agreement the price to be paid was to be determined according to a formula based on the world market price of steel. A dispute arose as to the interpretation of the world market price adjustment clause.
law, awarded LTCL interest on payments due. The initial rates were 10½ percent and 9½ percent, respectively, and were increased to 15½ percent and 14½ percent, respectively, two months after the notification of the award. These rates were selected as the maximum rates permissible under French law. During enforcement proceedings in U.S. federal court, Southwire invoked article V(2)(b) of the Convention, arguing against enforceability of the award because the rates were usurious and against public policy. The court found the initial rates acceptable, even though higher than Georgia law generally allowed. In upholding enforcement of the award, the court observed that the United States "cannot have trade and commerce in world markets and international waters exclusively on [its] terms, governed by [its] laws, and resolved in [its] courts." Separately analyzing the issue of escalated interest, however, the court concluded that the interest rates did not reflect actual damages. Instead, they constituted a penalty, which U.S. law disfavors. Citing article V(2)(b), the court refused to enforce the escalated interest rates on the award.

Unfortunately, these cases illustrate that the courts' articulated standards for evaluating article V(b)(2) public policy defenses are vague and subjective. The public policy defense must be construed in light of the overriding purpose of the Convention, which is "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." The courts have unequivocally stated that the public policy defense should be construed narrowly. The defense should apply only where enforcement would violate our "most basic notions of morality and justice."

III. Proenforcement Attitude

Courts in the United States pursue a consistent, well-articulated policy of recognizing and enforcing awards rendered in both domestic and foreign arbitration. The same fundamental policies motivating U.S. courts to enforce

244. Id. at 1067.
245. Id. at 1068.
246. Id.
247. Id. at 1069.
248. Id.
249. Id.
250. Id.
251. See Scherk, 417 U.S. 506, 520 n.15; see also Waterside, 737 F.2d at 152; Bergesen v. Joseph Muller Corp., 710 F.2d 928, 933 (2d Cir. 1983); Fotochrome, 517 F.2d at 516; Parsons & Whittemore, 508 F.2d at 973.
252. See Fotochrome, 517 F. 2d at 516; Parsons & Whittemore, 508 F.2d at 974.
agreements to arbitrate also motivate courts to recognize and enforce foreign arbitral awards. United States courts consistently uphold the arbitral process because it offers many attractive features not generally available to parties litigating through the court system. While the majority of arbitral awards are satisfied through voluntary compliance of the parties involved, on some occasions a party must invoke external authority to enforce a losing party's obligation and collect the damages awarded. The proenforcement policy is grounded in the New York Convention.

The United States Supreme Court leaves no doubt that the goals of the New York Convention, and the principle purpose underlying American adoption and implementation of it, is to encourage the recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standards by which the agreements to arbitrate are observed and arbitral awards are enforced. The goal of the New York Convention is a summary procedure to expedite the recognition and enforcement of arbitral awards. There is a strong policy in the U.S. courts favoring arbitration, especially in the context of international agreements. Arbitration clauses are to be liberally construed. Moreover, any doubts as to whether an arbitration clause may be interpreted to cover the asserted dispute are resolved in favor of arbitration. Given the narrow construction and interpretation of the defenses allowed under the New York Convention, arbitral awards are supported by a proenforcement attitude.


254. An example of the favorable attitude with which U.S. courts view arbitration is Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985). In Dean Witter, the United States Supreme Court resolved a split among the circuits concerning the arbitrability of pending state claims that arise out of the same transaction and are sufficiently related factually and legally to federal nonarbitrable claims. The Court concurred with opinions of the Sixth, Seventh, and Eighth Circuits that the Federal Arbitration Act, "both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and 'not substitute [its] own views of economy and efficiency' for those of Congress." Id. at 217 (citing Dickinson v. Heinold Securities, Inc., 661 F.2d 638, 646 (7th Cir. 1981)).


256. "An essential element in a successful international . . . system of effective commercial arbitration is the ease and efficiency with which awards are enforced." Id. § 46:00.

257. See Scherk, 417 U.S. at 517 n.10.

258. See Imperial Ethiopian Gov't v. Baruch-Foster Corp., 335 F.2d 334, 335 (5th Cir. 1976).

259. See Prima Paint, 388 U.S. at 395.


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IV. Conclusion

Parties contract to arbitrate disputes in order to avoid litigation and maintain superior commercial relations with their business counterparts. For the most part, arbitral awards are satisfied voluntarily. Nevertheless, parties must be confident that, if necessary, means will be available to enforce arbitral awards. The history of enforcement of foreign arbitral awards under the New York Convention provides that assurance.

The proenforcement policy of the U.S. courts is consistently applied. Courts in the United States pursue a consistent, well-articulated policy of recognizing and enforcing awards rendered in arbitration. In short, in the absence of compelling defensive arguments justifying a contrary result, the U.S. courts will actively support the rights of parties to choose arbitration as a means for dispute settlement and to have the results of arbitral proceedings enforced without extensive judicial review. The U.S. courts will continue to limit the grounds for refusal of enforcement of arbitral awards. If there is any flexibility in the refusal defenses it is found in the public policy defense. Article V(2)(b), however, is quickly being defined. Refusal is only guaranteed if there is a significant showing of corruption or fraud; otherwise, awards will be enforced.