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# Looking Into a Crystal Ball: Courts' Inevitable Refusal to Enforce Parties' Contracts to Expand Judicial Review of Non-Domestic Arbitral Awards

Eric Chafetz

## I. INTRODUCTION<sup>1</sup>

Arbitration is a type of alternate dispute resolution. Instead of litigating a dispute in a court of law or equity before a judge, parties agree to submit their dispute for adjudication before one or more arbitrators. Two distinct statutory frameworks govern the arbitration of domestic disputes and non-domestic disputes. First, Article (Art.) 1<sup>2</sup> of the Federal Arbitration Act (the FAA)<sup>3</sup> governs domestic disputes. Second, Art. 2 of the FAA<sup>4</sup> and The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award (NY Convention)<sup>5</sup> govern non-domestic disputes.<sup>6</sup>

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1. The author, Eric Chafetz, is a 2004 graduate of Brooklyn Law School and currently an associate with Togut, Segal & Segal in New York, New York. He would like to thank Professor Claire Kelly of Brooklyn Law School for her insights, feedback, and assistance throughout the entire writing process. Additionally, he would like to thank his wife Soraya Chafetz for her endless support and inspiration in all aspects of his life.

2. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2008) [hereinafter FAA]. Hereinafter, Art. 1 of the Federal Arbitration Act is also referred to as Chapter (Ch.) 1 and Art. 2 of the Federal Arbitration Act is referred to as Ch. 2.

3. The FAA is also known as the United States Arbitration Act. *See* Am. Postal Workers Union, AFL-CIO v. U.S. Postal Service, 823 F.2d 466, 469 (11th Cir. 1987).

4. FAA § 201. This section requires that The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award be enforced in accordance with Ch. 2 of the FAA.

5. Art. 1, section 1 of the NY Convention, in pertinent part, mandates that the NY Convention:

[S]hall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards *not considered as domestic awards* in the State where their recognition and enforcement are sought.

Without court intervention, an arbitration award is not enforceable and does not have the same binding effect as a court's judgment.<sup>7</sup> A party involved in an arbitration governed by the NY Convention can move for an award to be enforced in *any* signatory nation's court.<sup>8</sup> For example, if a

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The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 2520, 330 U.N.T.S. 3 [hereinafter NY Convention] (emphasis added).

6. The term "domestic" is not defined in Art. 1 of the NY Convention. To fill that void, various circuit courts have concluded 9 U.S.C. section 202 (discussed *infra* at note 16) defines awards "not considered as domestic" for purposes of the NY Convention. *Jacada* (Europe), Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 706-07 (6th Cir.), *cert denied*, 126 S. Ct. 735 (2005) [hereinafter *Jacada II*]; *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440-41 (11th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997); *Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir. 1995); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 933 (2d Cir. 1983); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982). The Sixth Circuit in *Jacada* made the following observation about the scope of 9 U.S.C. section 202:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title ["any maritime transaction or a contract evidencing a transaction involving commerce"], falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention *unless* that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For purposes of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

*Jacada II*, 401 F.3d at 706 (quoting 9 U.S.C. § 202 in brackets) (emphasis omitted).

Moreover, arbitration awards for purposes of the NY Convention have been classified as non-domestic in only two instances. First, federal courts have held that an arbitration award is non-domestic if one or more parties is not a United States citizen. Second, an award is considered non-domestic if it is between United States citizens, but has a reasonable relation with a foreign state. *See Jacada II*, 401 F.3d at 706-07; *Industrial Risk*, 141 F.3d at 1440-41; *Yusuf*, 126 F.3d at 19; *Jain*, 51 F.3d at 689; *Bergesen*, 710 F.2d at 933; *Ledee*, 684 F.2d at 186-87.

7. Section 207 of Art. 2 of the FAA governs the confirmation of an arbitrator's award under the NY Convention. It states: "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." FAA § 207. Section 207 continues: "[T]he court *shall confirm* the award *unless* it finds one of the grounds for refusal or deferral of recognition or enforcement of the award *specified in* the said Convention." FAA § 207 (emphasis added). The "specified grounds" of review are found in Art. V of the NY Convention. *See infra* note 9. The material/operative terms in this section have a virtually identical meaning as those in section 9 of Art. 1 of the FAA. *See infra* Part IV. A.

8. *Yusuf*, 126 F.3d at 22:

The [New York] Convention succeeded and replaced the Convention on the Execution of Foreign Arbitral Awards ("Geneva Convention"), Sept. 26, 1927, 92 L.N.T.S. 301. The primary defect of the Geneva Convention was that it required an award first to be recognized in the rendering state before it could be enforced abroad, *see* Geneva Convention arts. 1(d), 4(2), 92 L.N.T.S. at 305, 306, the so-called requirement of "double exequatur." This requirement "was an unnecessary time-consuming hurdle, and greatly

Nigerian party and a Swedish party participate in an arbitration in the United States, either party can move for the award to be enforced in Sweden, Nigeria, the U.S., or in any other signatory state.

In this context, court intervention can come in two forms. First, a victorious party can move for the confirmation of an arbitration award. Second, the losing party can challenge the validity of an arbitration award by moving to vacate it under certain narrow grounds of review enumerated in Art. V of the NY Convention.<sup>9</sup> The scope of these grounds of review and whether parties can contract to expand them are central to this article.

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limited [the Geneva Convention's] utility". . . The [New York] Convention eliminated this problem by eradicating the requirement that a court in the rendering state recognize an award before it could be taken and enforced abroad.

*Id.* at 22 (citations omitted). See also ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 266-67 (1981).

9. Art. V of the NY Convention is central to the topic of this Article. Art. V states:

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

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

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

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

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

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

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

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

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

NY Convention art. V (emphasis added).

Unlike under Art. 1 of the FAA,<sup>10</sup> courts have not addressed whether parties can contract to expand<sup>11</sup> the judicial review provisions in the NY Convention.<sup>12</sup> When courts do address this issue, they will initially rely upon courts' prior resolution of two issues: (1) whether parties can rely on the vacatur provisions in sections 10 and 11 of Art. 1 of the FAA in a vacatur proceeding under the NY Convention and Art. 2 of the FAA; and (2) whether parties can rely on manifest disregard of the law and other grounds of review implied under Art. 1 of the FAA in a vacatur proceeding brought pursuant to the NY Convention and Art. 2 of the FAA (collectively, these two issues are referred to as the Expansion Issues).

All courts addressing the Expansion Issues have resolved them in the negative (hereinafter, the Consensus). Significantly, they have concluded that only the provisions enumerated in Art. V<sup>13</sup> can be relied upon in a

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10. Sections 10 and 11 of Art. 1 of the FAA contain the grounds of review applicable to a vacatur proceeding under Art. 1 of the FAA. Section 10 of Art. 1 of the FAA reads in pertinent part:

§ 10. Same; vacation; grounds; rehearing

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

(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

....

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

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

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

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

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

....

FAA §§ 10-11.

11. This article will also briefly touch upon instances where judicial review is reduced or entirely eliminated under the NY Convention.

12. FAA §§ 10-11. This includes parties contracting to expand the NY Convention's judicial review provisions to include the grounds of review set forth in sections 10 and 11 of Art. 1 of the FAA, and those implied under it, including, but not limited to, manifest disregard of the law.

13. See NY Convention Art. V, *supra* note 9.

vacatur proceeding brought pursuant to the NY Convention.<sup>14</sup> Accordingly, it is a virtual impossibility that courts will allow parties to contract to expand Art. V of the NY Convention's judicial review provisions.

Although this conclusion is inevitable, it is misguided for various reasons, including the improper resolution of the Expansion Issues. When courts address whether parties can contract to expand the judicial review provisions in Art. V of the NY Convention,<sup>15</sup> they will rely upon section 202 of Art. 2 of the FAA,<sup>16</sup> which reiterates and reinforces section 2 of Art. 1 of the FAA.<sup>17</sup> Both sections include one of the most important purposes underlying Congress's adoption of Art. 1 and Art. 2 of the FAA – enforcing parties' arbitration agreements according to their terms, like any other contracts.

Moreover, courts will rely upon section 207 of Art. 2 of the FAA<sup>18</sup> and section 9 of Ch. 1 of the FAA,<sup>19</sup> each of which includes language emphasizing the narrow nature of judicial review Congress envisioned under Art. 1 of the FAA, the NY Convention, and Art. 2 of the FAA. However, due to the Consensus on the Expansion Issues, the virtually identical

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14. To the contrary, as will be discussed in more detail, all courts addressing the vacatur provisions in sections 10 and 11 of Art. 1 of the FAA have concluded that in addition to the provisions enumerated in those sections, parties can also rely upon certain other implied grounds of review.

15. See NY Convention Art. V, *supra* note 9.

16. Section 2 of Art. 1 of the FAA, reinforced by section 202 of Art. 2, states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

FAA § 2 (emphasis added).

17. See FAA § 2, *supra* note 16.

18. Section 207 of Art. 2 of the FAA states in pertinent part: "The court *shall confirm* the award *unless* it finds one of the grounds for refusal or deferral of recognition or enforcement of the award *specified in the said Convention.*" FAA § 207 (emphasis added).

19. Section 9 of Ch. 1 of the FAA states in pertinent part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must grant* such an order *unless* the award is vacated, modified, or corrected as *prescribed in* sections 10 and 11 of this title.

FAA § 9 (emphasis added).

meaning of these two sets of provisions will be ignored, or given less weight than they should be.

The courts, addressing whether parties can contract to expand the judicial review provisions under Art. V of the NY Convention, will also rely upon *Dean Witter Reynolds, Inc. v. Byrd*,<sup>20</sup> *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,<sup>21</sup> and *First Options of Chicago, Inc. v. Kaplan*.<sup>22</sup> These decisions attempt to balance two of the most important purposes underlying Art. 1 of the FAA and the NY Convention: enforcing parties' agreements according to their terms—referred to in both section 202 of Art. 2 of the FAA and section 2 of Art. 1 of the FAA—and the efficiency<sup>23</sup> of arbitration as an institution compared to what litigation was expected to provide.<sup>24</sup> Courts addressing whether parties can contract to expand the judicial review provisions in Art. V of the NY Convention will rely upon how courts have balanced these two policies when faced with parties' contracts to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA. However, due to the Consensus, the two policies will most likely not be balanced properly.

Courts faced with this issue under the NY Convention and Art. 2 of the FAA will additionally focus on decisions and commentators' writings addressing and reaching conflicting conclusions about whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Ch. 1 of the FAA.<sup>25</sup> However, despite these sources, courts' prior improper

20. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). See discussion *infra* Part IV.E.ii.

21. *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). See discussion *infra* Part IV.E.i.

22. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). See discussion *infra* Part IV.E.ii.

23. For purposes of this article, the use of the term "efficiency" refers to the amount of time for litigation (from beginning to end) as compared to an arbitration (from beginning to end) takes to complete. One of the benefits of arbitration is that it is supposed to be a more streamlined—shorter from beginning to end—form of dispute resolution.

24. See, e.g., Eric Chafetz, *The Propriety of Expanded Judicial Review Under the FAA: Achieving a Balance Between Enforcing Parties' Agreements According to Their Terms and Maintaining Arbitral Efficiency*, 8 CARDOZO J. CONFLICT RESOL. 1 (2006).

25. Whether parties in the federal courts can contract to expand the judicial review provisions in sections 10 and 11 of Ch. 1 of the FAA is far from clear. See Chafetz, *supra* note 24, at 3. There is a pronounced circuit split on the issue, which the Supreme Court of the United States (Supreme Court) has neither addressed nor resolved. *Id.* Among other Supreme Court precedents, these courts rely upon *Byrd*, *Volt*, and *First Options* in reaching their respective conclusions. *Id.* at 9-16. Compare *Gateway Tech., Inc. v. MCI Telecomm.*, 64 F.3d 993 (5th Cir. 1995) (allowing contractual expansion), *Syncor Int'l Corp. v. McLeland*, No. 96-226, 1997 WL 452245, at \*6 (4th Cir. Aug. 11, 1997), *cert denied*, 522 U.S. 1110 (1998) (allowing contractual expansion), and *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 289-290 (3rd Cir. 2001), *cert denied*, 534 U.S. 1020 (2001) (allowing contractual expansion), with *Bowen v. Amoco Pipeline Co.*, 254 F.3d 930 (10th Cir. 2001) (not allowing contractual expansion),

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resolution of the Expansion Issues will inevitably skew the analysis of whether parties can contract to expand the judicial review provisions in Art. V of the NY Convention toward not allowing such review.

This article will first discuss the legislative history of the NY Convention in general and the history of its vacatur provisions in particular. Second, it will summarize certain federal court decisions that address the Expansion Issues and reach the Consensus.<sup>26</sup> Third, it will argue that the Expansion Issues were resolved incorrectly, because the courts addressing them do not recognize how the operative/material language<sup>27</sup> in section 207 of Ch. 2 of the FAA<sup>28</sup> and section 9 of Ch. 1<sup>29</sup> of the FAA has a virtually identical meaning, and therefore should have been construed and applied in the same manner.<sup>30</sup>

Fourth, this article will discuss how the courts addressing the Expansion Issues incompletely analyze the interaction between the provisions in the NY Convention and in Ch. 1 of the FAA.<sup>31</sup> The provisions in Ch. 1 of the FAA are applicable to actions governed by the NY Convention to the extent that they do not “conflict” with the NY Convention’s provisions.<sup>32</sup>

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Kyocera Corp. v. Prudential-Bache Trade Serv. Inc., 341 F.3d 987 (9th Cir. 2003), *cert denied*, 540 U.S. 1098 (2004) (not allowing contractual expansion), and Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991) (recognizing in dicta contractual expansion is not appropriate). There is also a substantial amount of commentary on the issue. See, e.g., Anthony J. Longo, *Agreeing to Disagree: A Balanced Solution to Whether Parties May Contract For Expanded Judicial Review Beyond the FAA*, 36 J. MARSHALL L. REV. 1005, 1030 (2003) (proposing a unique solution whereby a rebuttable . . . “Presumption in Favor of the Right to Contract for Expanded Judicial Review” is created); Karon A. Sasser, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV. 337 (2001) (favoring expanded judicial review); William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT’L ARB. 531 (2000) (discussing disadvantages of expanded judicial review and favoring arbitral appellate review); Chafetz, *supra* note 24, at 3-5 (arguing that determining whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA depends on the balance of two policies underlying Art. 1 of the FAA—(i) enforcing parties’ agreements containing arbitration clauses according to their terms like any other contracts and (ii) the efficiency arbitration compared to litigation is supposed to provide).

26. See discussion *infra* Part III.

27. The terms “operative/material” are used throughout this article to refer to the important terms in certain statutes. In order to emphasize the significance of this language, the “operative/material” terms are italicized throughout.

28. See FAA § 207, *supra* note 7.

29. See discussion *infra* Part IV.A.

30. See discussion *infra* Part IV.A.

31. See discussion *infra* Part IV.B.

32. Section 208 of Art. 2 of the FAA concerns the relationship between Ch. 1 and Ch. 2 of the FAA. It states: “Chapter 1 applies to actions and proceedings brought under this chapter to the



Specifically, these courts do not define, or recognize the significance of, the term “conflict.” Fifth, this article will argue that the courts analyzing the Expansion Issues fail to recognize how the NY Convention’s vacatur provisions have historically been narrowly construed.<sup>33</sup>

Sixth, many of those same courts ignore how all the operative/material language in Art. V(1)(e) of the NY Convention is in the past tense.<sup>34</sup> This interpretation leads courts addressing the Expansion Issues to improperly conclude that the vacatur provisions in Ch. 1 of the FAA, and those implied under Ch. 1 of the FAA, can be applied to actions governed by the NY Convention and Art. 2 of the FAA, in certain instances, through Art. V(1)(e) of the NY Convention.<sup>35</sup>

Seventh, this article will contend that how courts have improperly resolved the Expansion Issues—the Consensus—foreshadows how those same courts will eventually resolve the issue of whether parties can contract to expand the judicial review provisions in Art. V of the NY Convention. Significantly, it will argue that *Volt*, *First Options*, and *Byrd*, among other precedents courts rely upon when addressing whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Ch. 1 of the FAA,<sup>36</sup> are also applicable to whether parties can contract to expand the judicial review provisions in Art. V of the NY Convention, but will be *much* less persuasive.

This inevitable conclusion—that parties cannot contract to expand the judicial review provisions in the NY Convention—is irrespective of how the main purpose underlying both Art. 1 and Art. 2 of the FAA is enforcing parties’ agreements according to their terms and how the vacatur provisions in both statutes are intended to be narrowly construed.<sup>37</sup>

## II. THE LEGISLATIVE HISTORY OF THE NY CONVENTION AND CH. 2 OF THE FAA

The NY Convention was adopted as a treaty governing international commercial arbitration on June 10, 1958, after an international commercial arbitration conference. The U.S. was a participant in the conference at the

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extent that chapter *is not in conflict with* this chapter or the Convention as ratified by the United States.” FAA § 208 (emphasis added).

33. See discussion *infra* Part IV.C.

34. See discussion *infra* Part IV.D.

35. See discussion *infra* Part IV.E.

36. See FAA §§ 10-11, *supra* note 10.

37. See FAA § 2, *supra* note 16.

United Nations, but failed to ratify the NY Convention until October 1968.<sup>38</sup> The U.S. finally became a signatory to the NY Convention upon the enactment of implementing legislation in 1970.<sup>39</sup>

The NY Convention was adopted by Congress as a new Ch. 2 of the U.S. Arbitration Act,<sup>40</sup> title 9 U.S. Code sections 201 through 208.<sup>41</sup> The reason the NY Convention was adopted as a new Ch. 2 was explained during a meeting of the Senate Committee on Foreign Relations on February 9, 1970, by Richard D. Kearney of the Office of the Legal Advisor of the U.S. Department of State.<sup>42</sup> He stated, “[it was] basically to avoid the confusion which might result from a series of minor changes in the different sections of the [United States] Arbitration Act as between cases falling under the act in its present form and cases falling under the Convention.”<sup>43</sup>

The main purpose of the NY Convention was to facilitate international commercial arbitration. With that purpose in mind, the Supreme Court in *Scherk v. Alberto-Culver Co.*<sup>44</sup> observed:

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.<sup>45</sup>

#### In other words:

The 1958 Convention’s basic thrust was to liberalize procedures for enforcing foreign arbitral awards: While the Geneva Convention placed the burden of proof on the party seeking enforcement of a foreign arbitral award and did not circumscribe the range of

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38. See Act of July 31, 1970, Pub. L. No. 91-368, § 1 1970 U.S.C.C.A.N. (84 Stat. 692); see SEN. REP. NO. 91-702, at 1-2 (1970); H.R. REP. NO. 91-1181, at 3601-02 (1970).

39. See Act of July 31, 1970, Pub. L. No. 91-368, § 1 1970 U.S.C.C.A.N. (84 Stat. 692); see SEN. REP. NO. 91-702; H.R. REP. NO. 91-1181.

40. See *supra* note 3.

41. See Act of July 31, 1970, Pub. L. No. 91-368, § 1 1970 U.S.C.C.A.N. (84 Stat. 692); see SEN. REP. NO. 91-702; H.R. REP. NO. 91-1181.

42. *Hearings on Sen. No. 3274 Before Senate Comm. on Foreign Relations*, 91st Cong., app. to SEN. REP. NO. 91-702, at 5 (1970) (statement of Richard D. Kearney, U.S. Department of State, Office of the Legal Advisor) [hereinafter *Kearney*].

43. See *Kearney*, *supra* note 42, at 5.

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

45. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520, n.15 (1974) (emphasis added). See also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538 (1995); SEN. REP. NO. 91-702 at 3 (1970) (“[T]he provisions of [Senate Bill No.] 3274 will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts.”).

available defenses to those enumerated in the convention, the 1958 Convention clearly shifted the burden of proof to the party defending against enforcement *and limited his defenses to seven set forth in Article V.*<sup>46</sup>

### III. SELECT FEDERAL COURTS' ANALYSES OF THE EXPANSION ISSUES

Various federal circuit and district courts have addressed the Expansion Issues. The first, whether the vacatur provisions in sections 10 and 11 of Ch. 1 of the FAA, to the extent they do not “conflict” with the vacatur provisions in the NY Convention, apply to actions governed by the NY Convention. The second, whether manifest disregard of the law or other non-statutory grounds of review implied under sections 10 and 11 of Ch. 1 of the FAA can also be implied in actions governed by the NY Convention.

Section 208<sup>47</sup> of Art. 2 of the FAA may conclusively resolve whether the vacatur provisions in sections 10 and 11 of Ch. 1 of the FAA apply to actions governed by the NY Convention—the First Expansion Issue—because the section clearly states that the provisions of Ch. 1 of the FAA apply unless they are in “conflict” with the NY Convention’s provisions. However, various courts disregard section 208 in its entirety.<sup>48</sup> Those courts also overlook how the term “conflict” is not defined in Ch. 2 of the FAA, can have more than one meaning, and depending on its meaning, can materially impact the resolution of the First Expansion Issue.

Other courts do first address section 208 of Art. 2 of the FAA before analyzing the second Expansion Issue: whether manifest disregard of the law or other grounds of vacatur implied under sections 10 and 11 of Ch. 1 of the FAA can also be implied in actions governed by the NY Convention. However, like those courts failing to address section 208,<sup>49</sup> these courts also do not define or recognize the significance of the term “conflict.”

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46. *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969, 973 (2d Cir. 1984) (emphasis added); *see also* Contini, *International Commercial Arbitration*, 8 AM. J. COMP. L. 283, 299 (1959).

47. *See supra* note 32.

48. *See* discussion *infra* Part IV.B. for a more detailed discussion of section 208 of Art. 2 of the FAA.

49. *See* discussion *infra* Part IV.B-C.

*A. Courts Discussing in Dicta, Whether any Grounds of Review Outside of Art. V of the NY Convention are Applicable to Vacatur Proceedings Governed by the NY Convention*

*i. Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier – Second Circuit - (1974)*

One of the first reported decisions to address the possibility that a ground of review not enumerated in Art. V of the NY Convention could still apply to a dispute governed by the NY Convention, was *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier*.<sup>50</sup> *Parsons* involved both a U.S. corporation—Parsons & Whittemore Overseas Co., Inc. (Parsons)—and an Egyptian corporation—Societe Generale De L'Industrie Du Papier (Societe).<sup>51</sup> A non-domestic arbitral award<sup>52</sup> was rendered against Parsons after an arbitration before the International Chamber of Commerce (the ICC).<sup>53</sup>

Parsons argued before the U.S. District Court that the award at issue should have been vacated for five reasons. Four were enumerated in the NY Convention, and the fifth, manifest disregard of the law, was implied under sections 10 and 11 of Art. 1 of the FAA.<sup>54</sup> In addressing the grounds of review applicable under the NY Convention, Judge Joseph Smith argued, relying on 9 U.S.C. section 208,<sup>55</sup> that the provisions of Ch. 1 of the FAA (9 U.S.C. sections 1-14) apply to the enforcement of foreign arbitration awards to the extent that they do not “conflict” with the NY Convention’s provisions.<sup>56</sup>

The Second Circuit then observed that section 207 of the NY Convention states: “The court *shall* confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in

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50. *Parsons*, 508 F.2d at 977.

51. *Id.* at 971.

52. *See supra* note 6 for a more detailed discussion of non-domestic arbitral awards.

53. *Parsons*, 508 F.2d at 971 (it is not clear from the opinion where the arbitration took place or where the award was rendered).

54. *Id.* at 972-73.

55. *See supra* note 32.

56. *Parsons*, 508 F.2d at 972-73 (citation omitted) (the Second Circuit did not attempt to define the term “conflict” or recognize its potential significance).

the said Convention.”<sup>57</sup> Pursuant to section 207, the Second Circuit recognized “[b]oth the legislative history of Article V . . . and the statute enacted to implement the United States’ accession to the Convention are strong authority for treating as *exclusive the bases* set forth in the Convention for vacating an award.”<sup>58</sup>

Alternatively, however, the court also recognized how the Supreme Court, and subsequently the Second Circuit, acknowledged an implied defense to the enforcement of an arbitration award under Art. 1 of the FAA, where the award at issue is in “manifest disregard of the law.”<sup>59</sup>

The court does not decide whether manifest disregard of the law applies to actions under the NY Convention and Art. 2 of the FAA, but observes, “[f]or even assuming that the ‘manifest disregard’ defense applies under the Convention, we would have no difficulty rejecting the appellant’s contention that such ‘manifest disregard’ is in evidence here.”<sup>60</sup>

*B. Courts Concluding that at a Minimum Parties Seeking to Vacate an Arbitration Award Must be Able to Rely on the Grounds of Review Enumerated in Art. V of the NY Convention*

*i. Fotochrome, Inc. v. Copal Company, Ltd. – Second Circuit - (1975)*

A year after the *Parsons* decision, the Second Circuit in *Fotochrome, Inc. v. Copal Co.*,<sup>61</sup> was confronted by a dispute between a U.S. corporation, Fotochrome, Inc. (Fotochrome), and a Japanese corporation, Copal Company, Ltd. (Copal). The underlying arbitration took place in Tokyo, Japan under the auspices of the Japan Commercial Arbitration Association.<sup>62</sup> During the course of the arbitration, Fotochrome filed for bankruptcy protection under Chapter XI of the U.S. Bankruptcy Act.<sup>63</sup>

The arbitration tribunal concluded the arbitration could continue despite Fotochrome’s bankruptcy filing.<sup>64</sup> Thereafter, the tribunal rendered an award in favor of Copal.<sup>65</sup> Copal then filed the arbitral award with the

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57. *Parsons*, 508 F.2d at 977 n.6 (emphasis added) (quoting 9 U.S.C. § 207).

58. *Parsons*, 508 F.2d at 977 (footnote omitted) (emphasis added).

59. *Parsons*, 508 F. 2d at 977.

60. *Id.*

61. *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 514 (2d Cir. 1975).

62. *Id.* at 514.

63. *Id.* at 515.

64. *Id.*

65. *Id.*

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Tokyo District Court.<sup>66</sup> Pursuant to Japan's Code of Civil Procedure, "the award became a final and conclusive judgment settling the rights and obligations of the parties in Japan."<sup>67</sup> In other words, the award could not be set aside for any reason in Japan.

Copal next filed a proof of claim in Fotochrome's bankruptcy proceeding.<sup>68</sup> Subsequently, Fotochrome challenged the validity of Copal's proof of claim before a special referee in the U.S.<sup>69</sup> The special referee concluded that the Japanese arbitral award was not a final judgment in the bankruptcy proceeding.<sup>70</sup> The U.S. District Court reversed the special referee's determination and found it was a final judgment.<sup>71</sup>

In reviewing the District Court's decision, the Second Circuit first observed that there are limited defenses against the enforcement of an arbitration award under both Ch. 1 of the FAA and Ch. 2 of the FAA and the NY Convention.<sup>72</sup> In other words, enforcement of an award may be refused "only on proof of specified conditions" under both statutory schemes.<sup>73</sup> Additionally, Art. III of the NY Convention requires that "each contracting state shall enforce arbitral awards in accordance with the rules of procedure of the territory where the award is relied upon."<sup>74</sup>

The Second Circuit concluded that a losing party may object to confirmation of an arbitration award in an action governed by the NY Convention on limited procedural grounds and the Japanese arbitral rule disallowing all review is not enforceable in the Second Circuit.<sup>75</sup>

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66. *Id.*

67. *Fotochrome*, 517 F.2d at 515.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Fotochrome*, 517 F.2d at 518 (emphasis added).

74. *Id.* at 519 (emphasis added).

75. *Id.*

*C. Courts Concluding that Parties can Only Rely on the Vacatur Provisions Enumerated in Art. V of the NY Convention, but not Addressing Art. V(1)(e) of the NY Convention*

*i. M & C Corp. v. Erwin Behr GmbH & Co. – Sixth Circuit - (1996)*

In 1996, the Sixth Circuit in *M & C Corp. v. Erwin Behr GmbH & Co.* was confronted by an arbitration award rendered after an arbitration in London, England.<sup>76</sup> The arbitration was between a German corporation, Erwin Behr GmbH & Co., KG (Behr), and a U.S. corporation, M & C Corporation (M & C).<sup>77</sup> Pursuant to the terms of the parties' arbitration agreement, the laws of the state of Michigan applied to the dispute.<sup>78</sup> The arbitrators ruled in favor of M & C.<sup>79</sup> The U.S. District Court then confirmed the arbitrators' award.<sup>80</sup>

In its challenge to the arbitration award before the Sixth Circuit, Behr argued that the vacatur provisions in sections 10 and 11 of Art. 1 of the FAA, as well as the NY Convention's vacatur provisions in Art. V, applied to this dispute.<sup>81</sup> Behr, in its motion to vacate, relied on one vacatur provision specified in Ch. 1 of the FAA—that the panel miscalculated the facts in making its damage calculation—and a ground of review implied under Ch. 1 of the FAA—that the arbitrator manifestly disregarded the law.<sup>82</sup>

The Sixth Circuit initially recognized that the district court had jurisdiction, pursuant to section 207<sup>83</sup> of Art. 2 of the FAA, to entertain a motion to confirm and a motion to vacate an arbitration award.<sup>84</sup> Additionally, it recognized how Art. V of the NY Convention allows a party to object to the confirmation of an arbitration award on certain limited grounds.<sup>85</sup>

Judge Daughtrey, writing for the Sixth Circuit, then observed that courts construing the vacatur provisions in sections 10 and 11 of Ch. 1 of the FAA have concluded that an award can be vacated pursuant to an extra-statutory

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76. *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 846-47 (6th Cir. 1996).

77. *Id.* at 846-47.

78. *Id.* at 846.

79. *Id.*

80. *Id.*

81. *Id.* at 850.

82. *M & C*, 87 F.3d at 850.

83. *See infra* note 242.

84. *M & C*, 87 F.3d at 848-49.

85. *Id.* at 848-49.

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ground—if the arbitrator’s decision manifestly disregards the law.<sup>86</sup> In addressing whether the vacatur provisions in and implied under Ch. 1 of the FAA would also apply to an action governed by the NY Convention and Ch. 2 of the FAA, the court argued that:

Although the New York Convention, and not the Federal Arbitration Act, usually applies to federal court proceedings to recognize or enforce arbitration awards made in *other* nations, 9 U.S.C. § 208 provides that the FAA may apply to actions brought pursuant to the New York Convention “to the extent that [the Federal Arbitration Act] is *not in conflict with* [9 U.S.C. §§ 201-208] or the Convention as ratified by the United States.”<sup>87</sup>

The court next observed, “9 U.S.C. § 207 explicitly requires that a federal court ‘*shall confirm* the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention [is applicable].’”<sup>88</sup> Likewise, “Article V of the Convention lists *the exclusive grounds* justifying refusal to recognize an arbitral award. Those grounds . . . *do not include* miscalculations of fact or manifest disregard of the law.”<sup>89</sup>

Accordingly, the Sixth Circuit held it did not have jurisdiction to entertain M & C’s request, because neither the grounds of review specified in sections 10 and 11 of Ch. 1 of the FAA, nor manifest disregard of the law,<sup>90</sup> are included in Art. V of the NY Convention.<sup>91</sup>

ii. *Lander Co., Inc. v. MMP Investments, Inc.* – Seventh Circuit - (1997)

In 1997, the Seventh Circuit in *Lander Co. v. MMP Investments, Inc.*, addressed an arbitration award rendered in the U.S. after an arbitration between two U.S. corporations, Lander Company, Inc. (Lander) and MMP

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86. *Id.* at 850-51 (citations omitted).

87. *Id.* at 851 (the Sixth Circuit did not attempt to define the term “conflict” or recognize its potential significance) (second emphasis added).

88. *M & C*, 87 F.3d at 851 (the court did not discuss Art. VI(e) of the NY Convention) (emphasis added).

89. *Id.* at 851 (emphasis added).

90. The court also observed that “manifest disregard of the law” cannot be pigeonholed into the public policy exception located in Art. V(2)(b) of the NY Convention. *M & C*, 87F.3d at 851 n.2. *See also* Nat’l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 804 n.1 (D. Del. 1990). For a more detailed discussion of how the grounds of review in Art. V of the NY Convention must be narrowly construed, *see infra* Part IV.C-D.

91. *M & C*, 87 F.3d at 851.



Investments, Inc. (MMP).<sup>92</sup> Lander won the arbitration and then sought confirmation of the award under the NY Convention and Ch. 2 of the FAA, and possibly Ch. 1 of the FAA, in a U.S. District Court.<sup>93</sup>

MMP moved to dismiss Lander's suit because the NY Convention was inapplicable—a jurisdictional argument—and also to vacate the award.<sup>94</sup> Lander opposed MMP's motion and argued vigorously that the NY Convention applied and the award should not be vacated.<sup>95</sup> The district court concluded the NY Convention did not apply and dismissed Lander's suit.<sup>96</sup>

On appeal, the Seventh Circuit concluded the district court erred in dismissing Lander's suit on jurisdictional grounds, as Lander sufficiently plead jurisdiction under both Art. 1 of the FAA and the NY Convention.<sup>97</sup> After deciding the jurisdictional issue, the Seventh Circuit decided to go one step further and also address whether the award should be vacated. Since the Seventh Circuit was only addressing a Motion to Dismiss, it hypothesized:

[I]f a court asked to enforce an arbitration award has *less authority* to turn down the request (in whole or part) under the Convention than under the Federal Arbitration Act, this could make a difference in this case—and may be why Lander, the enforcing party, was so eager to bottom jurisdiction on the Convention.<sup>98</sup>

The Seventh Circuit noted how the Sixth Circuit in *M & C*<sup>99</sup> found that, “manifest disregard of the law is an implied ground for vacating an award under [Art. 1 of the FAA], but neither an express nor, the court thought, an implied defense to enforcement under the Convention.”<sup>100</sup> The *Lander* court then recognized how the *M & C* court “held that it is indeed harder to knock out an award under the Convention,” because a party can *only* rely upon the vacatur provisions in Art. V of the NY Convention.<sup>101</sup> Also, relying on *M &*

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92. *Lander Co. v. MMP Investments, Inc.*, 107 F.3d 476, 477-78 (7th Cir. 1997) (determining the parties' dispute was considered non-domestic because it concerned a distribution agreement centered in Poland). See *supra* note 6 for a more detailed discussion of non-domestic awards.

93. See *Lander*, *supra* note 92, at 478 (outlining how MMP, in its opposition papers, stressed how it was unclear if Lander was moving under the NY Convention and/or Art. 1 of the FAA, for confirmation).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Lander*, 107 F.3d at 480 (emphasis added).

99. See *supra* text accompanying notes 76-91.

100. *Lander*, 107 F.3d at 480.

101. *Id.* See also *M & C*, *supra* note 76, at 851.

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C and section 208<sup>102</sup> of Art. 2 of the FAA, the Seventh Circuit observed that “[a]lthough the Convention is not exclusive, the U.S. implementing legislation provides that in the event of a *conflict* between its terms and those of the Federal Arbitration Act the Convention’s terms govern.”<sup>103</sup>

The *Lander* court reiterated that it did not need to decide this issue—whether manifest disregard of the law applies under the NY Convention and Art. II of the FAA—explicitly left open by *Parsons & Whittemore*,<sup>104</sup> because neither party raised it.<sup>105</sup> However, the court observed that because MMP’s position “may be right,” the issue should be considered.<sup>106</sup> This is especially true if MMP seeks to argue that the arbitrator manifestly disregarded the law later on in the proceedings.<sup>107</sup>

The court, relying on the Second Circuit’s decision in *Bergesen*,<sup>108</sup> then held that the NY Convention *could* apply to this case, which is significant, because the grounds of vacatur under the NY Convention are arguably narrower than those applicable to actions governed by Ch. 1 of the FAA.<sup>109</sup> Therefore, if the NY Convention applied, manifest disregard of the law would *not* apply to this dispute and other disputes in the Seventh Circuit.

iii. *The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.* – S.D. Cal. - (1998)

In 1998, the Southern District of California in *The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*,<sup>110</sup> addressed the Expansion Issues. The *Cubic Defense* Court was confronted with an award rendered in Zurich, Switzerland pursuant to Iranian law, and under the auspices of the ICC.<sup>111</sup>

102. See *supra* note 32.

103. *Lander*, 107 F.3d at 481 (showing how the *Lander* court did not attempt to define the term “conflict” or recognize its potential significance) (emphasis added).

104. See *supra* Part III.A.i.

105. *Lander*, 107 F.3d at 480. This language arguably relegates the court’s decision to dicta.

106. *Id.* at 480.

107. *Id.*

108. *Bergesen*, 710 F.2d, at 934.

109. *Lander*, 107 F.3d at 482.

110. *The Ministry of Def. and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998) [hereinafter *Cubic Defense*].

111. *Id.* at 1170.

The victorious party was The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran (Ministry of Defense), an Iranian organization, and the losing party was Cubic Defense Systems (Cubic), a U.S. Corporation.<sup>112</sup> Cubic moved to vacate the award under sections (a)–(c) of Art. V of the NY Convention.<sup>113</sup> In its analysis, the court first addressed whether the grounds of review in Ch. 1 of the FAA apply to actions governed by the NY Convention.<sup>114</sup> In analyzing this issue, the court observed that, “[t]he statute implementing the Convention states that a ‘court shall confirm the award unless it finds one of the grounds for refusal . . . specified in the said Convention.’”<sup>115</sup> Relying mainly on that provision, the court held that the grounds of review in section 10 of Art. 1 of the FAA were not applicable to an award rendered under the NY Convention.<sup>116</sup>

*D. Courts Concluding That Art. V(1)(e) of the NY Convention Allows Parties in Certain Vacatur Proceedings Brought Under the NY Convention to Rely on the Vacatur Provisions in and Implied Under Sections 10 and 11 of Art. 1 of the FAA*

*i. Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc. – Second Circuit - (1997)*

The Second Circuit revisited the Expansion Issues and delivered the seminal Circuit Court opinion on them in 1997. In *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*,<sup>117</sup> the court addressed a motion to vacate

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112. *Id.*

113. *Id.* at 1171.

114. *Id.*

115. *Id.* at 1171-72 (citing 9 U.S.C. § 207) (emphasis added).

116. *Cubic Defense*, 29 F. Supp. 2d at 1171-72; see also *Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir. 1992) (limiting discretion of district court to grounds of refusal specified in the NY Convention); *Management & Technical Consultants S.A. v. Parsons-Jurden Int’l Corp.*, 820 F.2d 1531, 1533-34 (9th Cir.1987) (“Under the Convention, an arbiter’s award can be vacated only on the grounds specified in the Convention.”); see also *Industrial Risk*, 141 F.3d at 1446 (finding that “the Convention’s enumeration of defenses is exclusive”); see discussion *infra* Part III.E.i. for a discussion of *Industrial Risk*; see also *Yusuf*, 126 F.3d at 20 (“[T]he grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award.”); see discussion *infra* Part III.D.i. for a discussion of *Yusuf*; see *M & C*, 87 F.3d at 851 (“Article V of the Convention lists the exclusive grounds justifying refusal to recognize an arbitral award.”); see *supra* text accompanying notes 76-91 for a discussion of *M & C*.

117. *Yusuf*, 126 F.3d at 15; see also, *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 195 (2d Cir. 1999); *Deiulemar Compagnia Di Navigazione v. Transocean Coal Co.*, No. 03 Civ.

brought by a Kuwaiti corporation, Yusuf Ahmed Alghanim & Sons (Alghanim), against a U.S. corporation, Toys “R” Us, Inc. (Toys “R” Us).<sup>118</sup> The arbitration being challenged took place under the auspices of the American Arbitration Association (AAA), in the U.S.<sup>119</sup>

The arbitrator awarded Alghanim \$46.44 million.<sup>120</sup> Alghanim petitioned the Southern District of New York for confirmation of the award under the NY Convention and Art. 2 of the FAA.<sup>121</sup> Toys “R” Us then filed a motion to vacate the award under Art. 1 of the FAA.<sup>122</sup> It argued that the award was clearly irrational, in manifest disregard of the law, and in manifest disregard of the terms of the agreement—all implied grounds of vacatur recognized under Art. 1 of the FAA.<sup>123</sup> In confirming the award, the district court held that, “[t]he Convention and the FAA afford overlapping coverage,<sup>124</sup> and the fact that a petition to confirm is brought under the NY Convention does not foreclose a cross-motion to vacate under [Art. 1 of] the FAA, and the Court will consider [Toys “R” Us’s] cross-motion under the standards of the FAA.”<sup>125</sup>

In reviewing the district court’s decision, the Second Circuit initially concluded the NY Convention clearly applied to this dispute.<sup>126</sup> It then addressed whether Art. 1 of the FAA also applied.<sup>127</sup> The court noted that pursuant to 9 U.S.C. section 207,<sup>128</sup> “[t]he court *shall* confirm the award *unless* it finds one of the grounds for refusal or deferral of recognition or enforcement of the award *specified in* the said Convention.”<sup>129</sup> The court

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2038 (RCC), 2004 WL 2721072, at \*8 (S.D.N.Y. Nov. 30, 2004); *Ludgate Ins. Co. v. Banco De Seguros Del Estado*, No. 02 Civ. 3653 (DC), 2003 WL 443584, at \*3 (S.D.N.Y. Jan. 6, 2003); *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F. Supp. 2d 279, 285 (S.D.N.Y. 1999).

118. *Yusuf*, 126 F.3d at 17.

119. *Id.* at 17-18.

120. *Id.* at 18.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Bergesen*, 710 F.2d at 933; *see also* discussion *supra* note 6.

125. *Yusuf*, 126 F.3d at 18 (footnote added).

126. *Id.* at 18.

127. *Id.* at 19.

128. *See infra* note 242.

129. *Yusuf*, 126 F.3d at 19 (citing 9 U.S.C. § 207) (emphasis added).

next addressed Art. V of the NY Convention,<sup>130</sup> which includes the grounds of review referred to in 9 U.S.C. section 207.<sup>131</sup>

The Second Circuit subsequently framed the issues before it as follows:

- 1) whether, in addition to the Convention's express grounds for refusal, other grounds can be read into the Convention by implication, much as American courts have read implied grounds for relief into the FAA, and
- (2) whether, under Article V(1)(e), the courts of the United States are authorized to apply United States procedural arbitral law, i.e., the FAA, to nondomestic awards rendered in the United States.<sup>132</sup>

In addressing the first issue, the court concluded that the NY Convention and Art. 1 of the FAA provide "overlapping coverage" to the extent they do not conflict.<sup>133</sup> To the contrary, "to the extent that the Convention prescribes the *exclusive grounds* for relief from an award under the Convention, that application of [Art. 1] the FAA's implied grounds would be in conflict, and is thus precluded."<sup>134</sup>

After concluding that only the grounds of review in Art. V of the NY Convention can apply to a vacatur proceeding under the NY Convention, the court addressed the scope of Art. V(1)(e) of the NY Convention. This provision allows vacatur of an award if "[t]he award . . . *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."<sup>135</sup>

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130. *See supra* note 9.

131. *Yusuf*, 126 F.3d at 19.

132. *Id.* at 19-20.

133. *Id.* at 20.

134. *Id.* at 20 (citing *M & C*, 87 F.3d at 851) (concluding that the NY Convention's exclusive grounds for relief "do not include miscalculations of fact or manifest disregard of the law") (emphasis added); *see also* *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 & n.15 (1974); *Parsons*, 508 F.2d at 973; *Int'l Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, Industrial Y Comercial*, 745 F. Supp. 172, 181-82 (S.D.N.Y. 1990) (refusing to apply a "manifest disregard of law" standard on a motion to vacate a foreign arbitral award); *Brandeis Intsel Ltd. v. Calabrian Chems. Corp.*, 656 F. Supp. 160, 167 (S.D.N.Y. 1987) ("the 'manifest disregard' defense is not available under Article V of the Convention or otherwise to a party . . . seeking to vacate an award of foreign arbitrators based upon foreign law."); *see also* VAN DEN BERG, *supra* note 8, at 265 ("the grounds mentioned in Article V are exhaustive," which is consistent with the NY Convention's pro-enforcement bias).

135. *Yusuf*, 126 F.3d at 20 (quoting NY Convention art. V(1)(e)) (emphasis added).

The Second Circuit then distinguished two decisions,<sup>136</sup> in which the respective district courts refused to apply grounds of vacatur implied under Ch. 1 of the FAA to actions governed by the NY Convention, because according to the *Yusuf* court, the requests were made in the context of “petitions to confirm awards rendered abroad.”<sup>137</sup> Significantly, the Second Circuit observed, “These [two district] courts *were not presented* with the question whether Article V(1)(e) authorizes an action to set aside an arbitral award under the domestic law of the state in which, or under which, the award *was rendered*.”<sup>138</sup> Or in other words, where the arbitral award “was rendered in the United States, and both confirmation and vacatur were then sought in the United States.”<sup>139</sup>

The court then concluded: “Article V(1)(e) of the Convention . . . allow[s] a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award.”<sup>140</sup> The court reasoned that “because the Convention allows the district court to refuse to enforce an award that has been vacated by a *competent authority* in the country where the award was rendered, the court may apply FAA standards to a motion to vacate a non-domestic award rendered in the United States.”<sup>141</sup>

In further support of its reasoning, the *Yusuf* court argued that its analysis was consistent with the Sixth Circuit’s in *M & C*,<sup>142</sup> which previously held that, “[i]t should not apply the FAA’s implied grounds for vacatur, because the United States did not provide the law of the arbitration for the purposes of Article V(1)(e) of the Convention.”<sup>143</sup> Also, with the Southern District of New York’s decision in *Int’l Standard*, which

136. See *Yusuf*, 126 F.3d at 20 n.2 (“In both *Celulsa Del Pacifico S.A. v. A. Ahlstrom Corp.*, No. 95 Civ. 9586, 1996 WL 103826 (S.D.N.Y. Mar. 11, 1996), and *Avraham v. Shigur Express Ltd.*, No. 91 Civ. 1238, 1991 WL 177633 (S.D.N.Y. Sept. 4, 1991), district courts in [the Second] Circuit refused to recognize the applicability of . . . [the grounds of review in and implied under sections 10 and 11 Art. 1 of the FAA] to nondomestic awards that had been rendered in the United States and were subject to confirmation under the [NY] Convention. However, [the two district courts *did not* address the significance of Article V(1)(e) [of the NY Convention].”).

137. *Yusuf*, 126 F.3d at 20.

138. *Id.* at 20 (footnote omitted) (emphasis added).

139. *Id.* at 21.

140. *Id.* at 21.

141. *Id.* at 21 (citing *Spector v. Torenberg*, 852 F. Supp. 201, 205-06 & n.4 (S.D.N.Y. 1994) (emphasis added)).

142. See *supra* note 76.

143. *Yusuf*, 126 F.3d at 21 (citing *M & C*, 87 F.3d at 849).

concluded “that only the state under whose procedural law the arbitration was conducted has jurisdiction under Article V(1)(e) to vacate the award, whereas on a petition for confirmation made in any other state, only the defenses to confirmation listed in Article V of the Convention are available.”<sup>144</sup>

Moreover, the Second Circuit relied on numerous commentators’ writings on the Convention’s vacatur provisions.<sup>145</sup> According to the court, the commentators determined that “an action to set aside an international arbitral award, as contemplated by Article V(1)(e), is controlled by the domestic law of the rendering state.”<sup>146</sup> The court then recognized:

From the plain language and history of the Convention, it is thus apparent that a party may seek to vacate or set aside an award in the state in which, or under the law of which, the award is rendered. Moreover, the language and history of the Convention make it clear that such a motion is to be governed by domestic law of the rendering state, despite the fact that the award is non-domestic within the meaning of the Convention as we have interpreted it in *Bergesen*, 710 F.2d at 932.<sup>147</sup>

Finally, the *Yusuf* court adopted the following two-prong test for the review of arbitration awards governed by the NY Convention:

In sum, we conclude that the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to *set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief*. See Convention art. V(1)(e). However, the Convention is equally clear that when an action

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144. *Id.* at 21 (citing *Int’l Standard*, 745 F. Supp. at 178).

145. *Id.* at 21.

146. *Yusuf*, 126 F.3d at 21. The court further observed that:

The possible effect of this ground for refusal [Article V(1)(e)] is that, as the award *can be set aside in the country of origin on all grounds contained in the arbitration law of that country*, including the public policy of that country, the grounds for refusal of enforcement under the Convention may indirectly be extended to include all kinds of particularities of the arbitration law of the country of origin. *This might undermine the limitative character of the grounds for refusal listed in Article V . . . and thus decrease the degree of uniformity existing under the Convention. . .* The defense in Article V(1)(e) incorporates the entire body of review rights in the *issuing jurisdiction. . . . If the scope of judicial review in the rendering state extends beyond the other six defenses allowed under the New York Convention, the losing party’s opportunity to avoid enforcement is automatically enhanced: The losing party can first attempt to derail the award on appeal on grounds that would not be permitted elsewhere during enforcement proceedings.*

*Id.* at 21-22 (emphasis added).

147. *Yusuf*, 126 F.3d at 23; see discussion *supra* note 6 for a discussion of non-domestic awards.

for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.<sup>148</sup>

ii. *Jacada (Europe), Ltd. v. Int'l Marketing Strategies* – W.D. MI. - (2003)

In 2003, the Western District of Michigan<sup>149</sup> addressed the Expansion Issues<sup>150</sup> in *Jacada (Europe), Ltd. v. Int'l Marketing Strategies*.<sup>151</sup> The court was confronted with a dispute between an English corporation, *Jacada (Europe) Ltd., f/k/a Client/Server Technology (Europe), Ltd. (Jacada)* and a U.S. corporation, *International Marketing Strategies (IMS)*.<sup>152</sup> The award at issue was rendered in the U.S. and under Michigan state law.<sup>153</sup> When addressing the applicable grounds of vacatur, the district court first observed how 9 U.S.C. section 207<sup>154</sup> states that the grounds of review in Art. V of the NY Convention,<sup>155</sup> are the only grounds that can be relied upon in a vacatur proceeding brought under the NY Convention.<sup>156</sup> In other words, the grounds are exclusive.<sup>157</sup>

The court then addressed how the *Yusuf* court<sup>158</sup> circumvented this conclusion by its interpretation of Art. V(1)(e) of the NY Convention.<sup>159</sup> Relying on *Yusuf* and its interpretation of Art. V(1)(e), the *Jacada I* court determined that “[b]ecause *Jacada* [English Corporation] has moved to set aside or vacate an arbitral award entered in the United States, this Court may apply its domestic arbitral law to set aside or vacate that arbitral award.”<sup>160</sup>

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148. *Yusuf*, 126 F.3d at 23 (emphasis added).

149. This court is located in the Sixth Circuit.

150. See *supra* text accompanying notes 12-19.

151. *Jacada (Europe), Ltd. v. Int'l Marketing Strategies*, 255 F. Supp. 2d 744 (W.D. Mich. 2003) [hereinafter *Jacada I*].

152. *Id.* at 745.

153. *Id.* at 745-46.

154. See *infra* note 242.

155. See *supra* note 9.

156. *Jacada I*, 255 F. Supp. 2d at 749.

157. *Id.*

158. See *supra* text accompanying notes 117-48.

159. *Jacada I*, 255 F. Supp. 2d at 749. See also *supra* note 9.

160. *Id.* at 750.



iii. *Jacada v. Int'l Marketing Strategies, Inc.* – Sixth Circuit - (2005)

In 2005, nine years after its decision in *M & C*,<sup>161</sup> the Sixth Circuit affirmed the Western District of Michigan's decision in *Jacada I*, in *Jacada v. Int'l Marketing Strategies, Inc.*<sup>162</sup> Like the district court in *Jacada I*, the Sixth Circuit in *Jacada II* relied on *Yusuf* and concluded that Art. V(1)(e)<sup>163</sup> of the NY Convention applied if the award at issue was made in the U.S. and confirmation and vacatur were also sought in the U.S.<sup>164</sup>

In concluding that Art. V(1)(e) of the NY Convention applied, the *Jacada II* court attempted to distinguish *M & C*, a prior decision rendered by a different panel of Sixth Circuit judges. First, the court recognized that Art. 1 of the FAA did not apply to cases governed by the NY Convention, if Art. 1 of the FAA was "in conflict" with the NY Convention or its implementing legislation.<sup>165</sup> Without defining the term "conflict," or discussing its significance, the court concluded that there was no conflict and the vacatur provisions in sections 10 and 11 of Art. 1 of the FAA applied.<sup>166</sup>

Second, the *Jacada II* court recognized how the award in *M & C* was made in England and confirmation sought in the U.S., while the award in *Jacada II* was made in the U.S. and confirmation also sought in the U.S.<sup>167</sup> Since the award at issue in *Jacada II* was made in the U.S., and confirmation was also sought in the U.S., Art. V(1)(e) authorized the court to apply the domestic procedural law of the state where the award was made, in this case, U.S. law.<sup>168</sup>

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161. See *supra* text accompanying notes 76-91 for a discussion of *M & C*.

162. *Jacada II*, 401 F.3d at 735.

163. See *supra* note 9.

164. *Jacada II*, 401 F.3d at 709.

165. *Id.* at 709 n.8.

166. *Id.*

167. *Id.* at 709.

168. *Id.* Art. III of the NY Convention dictates:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

NY Convention art. III (emphasis added).

iv. *Admart AG; Heller Werkstatt Gesmbh v. Stephen and Mary Birch Foundation* – Third Circuit - (2006)

In 2006, the Third Circuit addressed the scope of the Expansion Issues in *Admart AG v. Stephen and Mary Birch Foundation*.<sup>169</sup> The arbitration at issue took place in Switzerland and was governed by Swiss law.<sup>170</sup> It was between a U.S. corporation, Stephen and Mary Birch Foundation, Inc. (Birch Foundation), and various other parties, including a Swiss corporation, Admart AG (Admart).<sup>171</sup> The arbitrators ruled in favor of Admart and the District Court confirmed the award.<sup>172</sup>

On appeal, the Third Circuit remarked that an arbitration award must be confirmed unless one of the grounds specified in Art. V of the NY Convention applies.<sup>173</sup> The court next addressed *Yusuf* and noted how that decision established a two-prong approach for the confirmation of arbitration awards—(i) for those “awards rendered in the same nation as the site of the arbitral proceeding” and (ii) “those rendered in a foreign country.”<sup>174</sup> Further, how the *Yusuf* court “concluded that more flexibility was available when the arbitration site and the site of the confirmation proceeding were within the same jurisdiction.”<sup>175</sup>

On the other hand, the Third Circuit recognized how the *Yusuf* court found that “the [C]onvention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.”<sup>176</sup> Moreover, “[T]here is now considerable case law holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the *only* grounds available for setting aside an arbitral award.”<sup>177</sup>

Since the award at issue was rendered in a different state than where confirmation was sought, the court found that *only* those grounds of review

169. *Admart AG v. Stephen & Mary Birch Found.*, 457 F.3d 302 (3d Cir. 2006).

170. *Id.* at 302.

171. *Id.* at 303.

172. *Id.* at 305.

173. *Id.* at 307-08.

174. *Id.* at 308 (citing *Yusuf*, 126 F.3d at 22-23).

175. *Admart*, 457 F.3d at 308 (citing *Yusuf*, 126 F.3d at 22-23).

176. *Id.* at 308 (quoting *Yusuf*, 126 F.3d at 22-23).

177. *Id.* at 308 (quoting *Yusuf*, 126 F.3d at 20) (emphasis added).

enumerated in Art. V of the NY Convention could be relied upon by the party challenging the award.<sup>178</sup>

*E. Courts Concluding that Art. V(1)(e) of the NY Convention Does not Allow Parties to Rely on the Vacatur Provisions in and Implied Under Sections 10 and 11 of Art. 1 of the FAA in a Vacatur Proceeding Governed by Art. V of the NY Convention*

*i. Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte – Eleventh Circuit - (1998)*

About eight months after the *Yusuf* decision, the Eleventh Circuit weighed in on the Expansion Issues in *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte*.<sup>179</sup> This matter involved numerous U.S. corporations: Nitram, Inc. (Nitram), Industrial Risk Insurers (IRI), Barnard and Burk Group, Inc. (Barnard), Barnard and Burk Engineers and Constructors, Inc. (Barnard Engineers), American Home Assurance Company (AHAC) and ISI, Inc. (ISI), and a German Corporation, M.A.N. Maschinenfabrik Augsburg-Nürnberg AG (M.A.N.).<sup>180</sup>

Nitram commenced an action in Florida state court against IRI, Barnard, Barnard Engineers, and ISI.<sup>181</sup> The case was removed to federal court.<sup>182</sup> Barnard, Barnard Engineers, and ISI proceeded to file a third-party claim

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178. *Id.* at 308-09.

179. *Industrial Risk*, 141 F.3d at 1434 ; *see also* Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 267 F. Supp. 2d 1335, n.5 (S.D. Fla. 2003). The arbitration award at issue was rendered in Miami, Florida, under the auspices of the AAA, and did not involve a U.S. corporation. *Id.* The *Four Seasons* court observed that the decisions in *Industrial Risk* and *Yusuf* are inconsistent. *Id.* The Second Circuit in *Yusuf* distinguished between a motion to confirm and a motion to vacate, while the Eleventh Circuit in *Industrial Risk* did not distinguish between the proceedings. *Id.* Also, *Yusuf* concluded that the vacatur provisions in and implied under sections 10 and 11 of Art. 1 of the FAA were applicable to a non-domestic award rendered in the U.S., while the *Industrial Risk* court concluded that only the NY Convention's vacatur provisions in Art. V applied to a non-domestic award rendered in the U.S. *Id.* Based on *Industrial Risk*'s holding, the *Four Seasons*' court concluded the NY Convention's vacatur provisions were exclusive and that the "arbitrary and capricious" standard sometimes applied in vacatur proceedings brought pursuant to Ch. 1 of the FAA, is *never* applicable in actions governed by the NY Convention and Art. 2 of the FAA. *Id.* at 1341. *See also*, Nicor Int'l Corp. v. El Paso Co., 318 F. Supp. 2d 1160, n.7 (S.D. Fla. 2004) (observing the existence of a possible circuit split between *Industrial Risk* and *Yusuf* as to whether grounds of vacatur outside of Art. V of the NY Convention apply to actions governed by the NY Convention).

180. *Industrial Risk*, 141 F.3d at 1437-38.

181. *Id.* at 1438.

182. *Id.*

against M.A.N. Thereafter, M.A.N. moved to compel arbitration pursuant to an arbitration clause in the parties' contract.<sup>183</sup> An arbitration subsequently took place in Tampa, Florida, under the AAA's rules and governed by Florida law.<sup>184</sup> The arbitration panel found in favor of M.A.N. and against Barnard, Barnard Engineers, and ISI.<sup>185</sup>

The losing parties filed a motion to vacate, and one of their defenses to the arbitration award was not enumerated in Art. V of the NY Convention. However, the defense, that the arbitral award should be vacated on the ground that it is "arbitrary and capricious," is recognized by numerous courts as an implied ground of review under Art. 1 of the FAA.<sup>186</sup> The district court held that Ch. 1 of the FAA, 9 U.S.C. sections 1-16 (1994), as well as the NY Convention's vacatur provisions in Art. V, applied to this dispute.<sup>187</sup>

On appeal, the Eleventh Circuit framed the issue before it as follows:

Do the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . . and thus the provisions of Chapter 2 of the FAA, govern an arbitral award granted to a foreign corporation by an arbitral panel sitting in the United States and applying American federal or state law?<sup>188</sup>

The Eleventh Circuit overruled the district court and concluded that only Ch. 2 of the FAA, 9 U.S.C. sections 201-208, governing non-domestic arbitral proceedings, applied to this dispute.<sup>189</sup>

Judge Tjoflat, writing for the Eleventh Circuit, initially concluded that the award at issue was an award not considered domestic in the country where enforcement was sought.<sup>190</sup> Accordingly, he then observed, that the "Tampa panel's arbitral award must be confirmed *unless* appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention."<sup>191</sup> Thereafter, the court stated that the "New York Convention's enumeration of defenses against enforcement is *exclusive*."<sup>192</sup>

183. *Id.* at 1438-39.

184. *Id.* at 1439.

185. *Id.*

186. *Industrial Risk*, 141 F.3d at 1443.

187. *Id.* at 1440.

188. *Id.*

189. *Id.*

190. *Id.* See *supra* note 6 for a more detailed discussion of non-domestic awards.

191. *Industrial Risk*, 141 F.3d at 1441 (emphasis added).

192. *Id.* at 1442 (emphasis added).

The court subsequently argued that the omission of the arbitrary and capricious defense from the NY Convention's seven vacatur provisions is "decisive," despite how the award was made and the enforcement sought in the same signatory state.<sup>193</sup> In support of that argument, the court recognized that "Section 207 of Chapter 2 of the FAA explicitly requires that a federal court 'shall confirm [an international arbitral] award unless it finds one of the grounds for refusal or deferral of . . . enforcement of the award specified in the [New York] Convention.'"<sup>194</sup> Further, "[t]he Convention itself provides that 'enforcement of [an] award may be refused, at the request of the party against whom it is invoked, *only if* that party furnishes . . . proof that' one of the enumerated defenses is applicable."<sup>195</sup> The Eleventh Circuit then concluded "that *no defense* against enforcement of an international arbitral award under Chapter 2 of the FAA is available on the ground that the award is 'arbitrary and capricious,' or on *any other grounds not specified by the Convention.*"<sup>196</sup>

*F. Courts Allowing Certain Challenges to Arbitration Awards Outside of Art. V of the NY Convention Because the Challenges Are Arguably Distinct From the Grounds of Review in Art. V of the NY Convention*

*i. China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp. – Third Circuit - (2003)*

The Third Circuit addressed the Expansion Issues about three years before its decision in *Admart* in *China Minmetals Materials Import & Export Co v. Chi Mei Corp.*<sup>197</sup> An arbitration was conducted in China, before the China International Economic and Trade Arbitration Commission.<sup>198</sup> The dispute was between a U.S. corporation, Chi Mei Corporation (Chi Mei), and two Chinese corporations, China Minmetals Materials Import and Export Co., Ltd. (China Minmetals) and Production

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193. *Id.* at 1446.

194. *Industrial Risk*, 141 F.3d at 1446 (citing 9 U.S.C. § 207) (emphasis added).

195. *Industrial Risk*, 141 F.3d at 1446 (citing Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 2520, T.I.A.S. No. 6997, 330 U.N.T.S. 3, reprinted in 9 U.S.C.A. § 201 note) (emphasis added).

196. *Industrial Risk*, 141 F.3d at 1446 (emphasis added).

197. *China Minmetals Materials Import & Export Co. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003).

198. *Id.* at 277.

Goods and Materials Trading Corp. of Shantou S.E.Z. (Shantou).<sup>199</sup> China Minmetals was victorious.<sup>200</sup>

China Minmetals moved to confirm and enforce the arbitration award.<sup>201</sup> Chi Mei opposed China Minmetals' motion to confirm and also cross-moved to deny China Minmetals' requests.<sup>202</sup> Additionally, Chi Mei requested the court rule on the validity of the underlying arbitration agreement.<sup>203</sup> The district court entered an order granting Minmetals' motion to confirm and enforce the award and denying Chi Mei's cross-motion.<sup>204</sup> Chi Mei appealed the district court's decision to the Third Circuit.<sup>205</sup>

The Third Circuit observed:

The primary issue in this case is whether the district court properly enforced the foreign arbitration panel's award where that panel, in finding that it had jurisdiction, rejected Chi Mei's argument that the documents providing for arbitration were forged so that there was not any valid writing exhibiting an intent to arbitrate.<sup>206</sup>

The court recognized that the primary issue involved two distinct questions. The first, if a court "must consider whether a foreign arbitration award might be enforceable regardless of the validity of the arbitration clause on which the foreign body rested its jurisdiction."<sup>207</sup> China Minmetals argued that the general provisions in Art. 1 of the FAA and the NY Convention are different.<sup>208</sup> Particularly, the grounds of review enumerated in Art. V of the NY Convention are very limited and do not include whether there was a valid written arbitration agreement.<sup>209</sup> China Minmetals then argued that since the potential ground of vacatur relied upon by Chi Mei was not enumerated in Art. V of the NY Convention the court could not consider it.<sup>210</sup>

The second distinct question concerned the "district court's role, if any, in reviewing the foreign arbitral panel's finding that there was a valid

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199. *Id.* at 276-77.

200. *Id.* at 278.

201. *Id.*

202. *Id.*

203. *China Minmetals*, 334 F.3d at 278.

204. *Id.*

205. *Id.*

206. *Id.* at 279. This issue is arguably resolved by Art. II (3) of the NY Convention.

207. *Id.* at 279.

208. *China Minmetals*, 334 F.3d at 279.

209. *Id.*

210. *Id.* at 278.

agreement to arbitrate.”<sup>211</sup> In analyzing the two questions, the Third Circuit first examined 9 U.S.C. section 207.<sup>212</sup> It then laid out the vacatur provisions in Art. V of the NY Convention.<sup>213</sup> Next, it observed pursuant to 9 U.S.C. section 208,<sup>214</sup> that the provisions in Ch. 1 of the FAA—including its vacatur provisions—are applicable to actions brought under the NY Convention, to the extent that Ch. 1 of the FAA’s provisions do not “conflict” with the NY Convention.<sup>215</sup>

The court next recognized that the grounds of review under Art. V of the NY Convention were construed narrowly.<sup>216</sup> Relying on *Yusu*<sup>217</sup> and various other decisions, the Third Circuit argued that considerable case law has held that in “an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the NY Convention are the *only* grounds available for setting aside an arbitral award.”<sup>218</sup> This narrow construction is consistent with 9 U.S.C. section 207,<sup>219</sup> which states an award *shall* be confirmed unless one of the grounds specified in the NY Convention is satisfied.<sup>220</sup> Thereafter, the court observed that “[t]he absence of a written agreement is not articulated specifically as a ground for refusal to enforce an award under Article V of the Convention.”<sup>221</sup>

Despite how the court stresses that the only grounds of review a party can rely upon in a vacatur proceeding brought pursuant to the NY Convention are found in Art. V of the NY Convention, and how Art. V of the NY Convention does not include a ground of review specifying that an arbitration agreement has to be in writing, the Third Circuit concluded that the district court could consider whether the agreement was enforceable because arbitration is a matter of contract.<sup>222</sup> In reaching its conclusion, the

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211. *Id.* at 279.

212. *China Minmetals*, 334 F.3d at 279; *see also* discussion *infra* note 242.

213. *China Minmetals*, 334 F.3d at 279-80; *see also* discussion *supra* note 9.

214. *China Minmetals*, 334 F.3d at 280; *see also* discussion *supra* note 32.

215. *China Minmetals*, 334 F.3d at 280 (citing 9 U.S.C. § 208).

216. *China Minmetals*, 334 F.3d at 283; *see* discussion *infra* Parts IV.C-D for a more detailed discussion on how the grounds of review in Art. V of the NY Convention were meant to be narrowly construed.

217. *See supra* text accompanying notes 117-48.

218. *China Minmetals*, 334 F.3d at 283 (citation omitted) (emphasis added).

219. *See* discussion *infra* note 242.

220. *China Minmetals*, 334 F.3d at 283 (citing 9 U.S.C. § 207).

221. *Id.*

222. *Id.* at 286. The *China Minmetals* court does not rely on Art. II(3) of the NY Convention, which arguably resolves this issue. This section states that:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the

court distinguished *Yusuf*<sup>223</sup> and observed that “Minmetals cannot point to any case interpreting Art. V of the Convention so narrowly as to preclude that defense [that the agreement needs to be in writing] and we are aware of none.”<sup>224</sup> Finally, the court held that “a district court should refuse to enforce an arbitration award under the Convention where the parties did not reach a valid agreement to arbitrate [one not in writing], at least in the absence of a waiver of the objection to arbitration by the party opposing enforcement.”<sup>225</sup>

ii. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi* – Fifth Circuit - (2003)

In 2003, the Fifth Circuit addressed the Expansion Issues for the first time in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi*.<sup>226</sup> The dispute before the court involved an arbitration that took place

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request of one of the parties, refer the parties to arbitration, *unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

NY Convention art. II(3) (emphasis added).

223. *See supra* text accompanying notes 117-48.

224. *China Minmetals*, 334 F.3d at 286.

225. *Id.* at 286.

226. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi*, 335 F.3d 357 (5th Cir. 2003) [hereinafter *Karaha Bodas I*]. *See also* *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287-88, 309 (5th Cir. 2004) [hereinafter *Karaha Bodas II*]. *Karaha Bodas II* involved a dispute between the same parties in *Karaha Bodas I*, but before a different panel of Fifth Circuit judges. *Karaha Bodas II*, 364 F.3d at 281 n.3. The *Karaha Bodas II* court elaborated on the difference between primary and secondary jurisdictions as follows:

Article V enumerates the grounds on which a court with secondary jurisdiction may refuse enforcement. In contrast to the limited authority of secondary jurisdiction courts to review an arbitral award, courts of primary jurisdiction, usually the courts of the country of the arbitral situs, have much broader discretion to set aside an award. While courts of a primary jurisdiction country may apply their own domestic law in evaluating a request to annul or set aside an arbitral award, courts in countries of secondary jurisdiction may refuse enforcement only on the grounds specified in Article V.

The New York Convention and the implementing legislation, Chapter 2 of the FAA, provide that a secondary jurisdiction court must enforce an arbitration award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in the Convention. The court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact.

*Id.* at 287-88 (citation omitted).

Moreover, “Article V(1)(e) of the Convention provides that a court of secondary jurisdiction may refuse to enforce an arbitral award if it ‘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.’” *Id.* at 289 (quoting 9



in Switzerland between a Cayman Islands corporation, Karaha Bodas Company, L.L.C. (KBC), and an Indonesian government owned corporation, Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Perusahaan), under the rules of the United Nations Commission on International Trade Law.<sup>227</sup> The arbitration panel rendered a substantial award in favor of KBC.<sup>228</sup>

Perusahaan appealed the award to the Swiss Supreme Court, and shortly thereafter, while the appeal was pending, KBC initiated a confirmation proceeding in the U.S. District Court.<sup>229</sup> In opposing KBC's request for confirmation in the U.S. district court, Perusahaan filed a motion to vacate the award.<sup>230</sup> In its motion to vacate, Perusahaan relied on four grounds of review enumerated in the NY Convention.<sup>231</sup> The District Court granted KBC's request for confirmation and Perusahaan appealed.<sup>232</sup> Significantly, in its appeal, among other issues raised, Perusahaan challenged the district court's authority to enter a preliminary injunction prohibiting it from prosecuting a parallel proceeding it commenced in Indonesia.<sup>233</sup>

Perusahaan made several arguments before the Fifth Circuit, only one of which is important for purposes of this article. The argument was that the district court lacked authority to issue the preliminary injunction, because it was not a ground of review enumerated in Art. V of the NY Convention.<sup>234</sup>

Relying on *Yusuf*,<sup>235</sup> the Fifth Circuit first observed, "The New York Convention governs the confirmation and enforcement of the Award and 'mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought.'"<sup>236</sup> The court also observed a country has *primary jurisdiction* over an award if it is

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U.S.C. § 201, art. V(1)(e)). "Courts have held that the language, 'the competent authority of the country . . . under the law of which, that award was made' 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 . . . applied in the case." *Id.* at 289 (quoting *Int'l Standard*, 745 F. Supp. at 178).

227. *Karaha Bodas I*, 335 F.3d at 360-61.

228. *Id.*

229. *Id.* at 361.

230. *Id.*

231. *Id.*

232. *Karaha Bodas I*, 335 F.3d at 361.

233. *Id.* at 363. The remainder of the procedural aspects of this case are complex and need not be discussed for purposes of this article.

234. *Karaha Bodas I*, 335 F.3d at 363.

235. See *supra* text accompanying notes 117-48.

236. *Karaha Bodas I*, 335 F.3d at 364. See also *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 288 F. Supp. 2d 783, 792 (N.D. Tex. 2003).

faced with an award in “the country in which, or under the [arbitration] law of which, [an] award was made.”<sup>237</sup> On the other hand, all other signatory states are considered to have *secondary jurisdiction* and “can only contest whether that State should enforce the arbitral award.”<sup>238</sup>

Based on this two-pronged approach, Perushaan argued, “The limitation of being a court of secondary jurisdiction . . . also deprives the district court of the competence to issue injunctive relief here.”<sup>239</sup> The Fifth Circuit rejected that argument and held:

Although these treaty obligations limit the grounds on which the court can refuse to enforce a foreign arbitral award, there is nothing in the Convention or implementing legislation that expressly limits the inherent authority of a federal court to grant injunctive relief with respect to a party over whom it has jurisdiction. Given the absence of an express provision, we discern no authority for holding that the New York Convention divests the district court of its inherent authority to issue an anti-suit injunction.<sup>240</sup>

#### IV. ANALYSIS

The Consensus among the federal courts dictates that the grounds of review enumerated in Art. V of the NY Convention are the only grounds of review a court can consider in a vacatur proceeding brought pursuant to the NY Convention.<sup>241</sup> The Consensus, clear from courts’ resolution of the Expansion Issues, is erroneous for various reasons.

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237. *Karaha Bodas I*, 335 F.3d at 364 (quoting NY Convention, art. V(1)(e)).

238. *Id.* at 364.

239. *Id.*

240. *Id.* at 365.

241. The Consensus, initially referred to *supra* notes 13-17 and accompanying text, is arguably undermined by various courts, including the *China Minmetals* court. *China Minmetals*, 334 F.3d at 278-90. These courts allow parties to argue that an arbitration award should be vacated after an arbitration if the parties arguably never agreed to arbitrate—for example, if a signature was forged on the agreement. This is despite how the lack of a written agreement is not a ground of review enumerated in Art. V of the NY Convention. Although courts addressing this issue do not rely on Art. II (3) of the NY Convention, that section may speak to, and resolve this issue. NY Convention art. II(3). Art. II (3) allows a court to refer parties to arbitration unless the agreement at issue is found to be “null and void inoperative or incapable of being performed.” *Id.* Although this section does not speak directly to confirmation or vacatur proceedings, a compelling argument can be made that a court, even at the confirmation or vacatur stage, should make an independent determination about the enforceability of an arbitration clause.

Initially, the operative/material provisions in section 207<sup>242</sup> of the NY Convention have virtually the same meaning as the operative/material provisions in section 9 of Ch. 1<sup>243</sup> of the FAA, and therefore, should have been applied in the same way. The underlying intent of both provisions is to ensure that judicial review of arbitration awards under both Art. 1 of the FAA and the NY Convention and Art. 2 of the FAA are extremely limited.<sup>244</sup> Significantly, however, despite the similarities in the operative/material language, only courts addressing the grounds of vacatur in sections 10 and 11 of Art. 1 of the FAA have concluded that extra-statutory grounds of review can be relied upon.

The Consensus must be further questioned because courts addressing the Expansion Issues do not define the word “conflict” in section 208<sup>245</sup> of Ch. 2 of the FAA or recognize its potential significance. Moreover, virtually all courts addressing the grounds of vacatur applicable under the NY Convention and Ch. 2 of the FAA have misconstrued Art. V(1)(e) of the NY Convention.<sup>246</sup> In sidestepping the Consensus that has resulted from the resolution of the Expansion Issues, through Art. V(1)(e), courts have applied grounds of vacatur outside of Art. V of the NY Convention in situations where confirmation or vacatur of an arbitration award is sought in the same signatory state where the award was rendered.<sup>247</sup> To reach this conclusion, courts have ignored how the material/operative language in Art. V(1)(e) of the NY Convention is in the past tense.<sup>248</sup>

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242. Section 207 of the NY Convention states: “The court *shall confirm* the award *unless* it finds one of the grounds for refusal or deferral of recognition or enforcement of the award *specified in the said Convention.*” 9 U.S.C. § 207 (emphasis added).

243. Section 9 of Ch. 1 of the FAA states:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must grant* such an order *unless* the award is vacated, modified, or corrected *as prescribed in sections 10 and 11 of this title.*

9 U.S.C. § 9 (emphasis added).

244. See *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85 (2d Cir. 2005). “Given the strong public policy in favor of international arbitration . . . review of arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is very limited in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.” *Id.* at 90 (quoting *Yusuf*, 126 F.3d at 23).

245. See *supra* note 32.

246. The only circuit court that has questioned the conclusion about Art. V(1)(e) is the *Industrial Risk* court. See *supra* notes 179-96 and accompanying text.

247. See *supra* note 9.

248. See *infra* Part IV.D.

Additionally, many of the same courts also ignore how all the NY Convention's vacatur provisions have historically been narrowly construed.<sup>249</sup> Assuming that courts will even consider whether parties can contract to expand the judicial review provisions in Art. V of the NY Convention, after recognizing how the Expansion Issues were resolved in the negative, courts will likely rely upon (i) *Dean Witter Reynolds, Inc. v. Byrd*,<sup>250</sup> *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Junior University*,<sup>251</sup> and *First Options of Chicago, Inc. v. Kaplan*,<sup>252</sup> (ii) various cases addressing whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Ch. 1 of the FAA; and (iii) commentators' writings addressing the same issue.<sup>253</sup>

The majority of the courts and commentators addressing whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Ch. 1 of the FAA—(ii) and (iii) above—rely upon how select Supreme Court decisions—(i) above—resolved analogous issues. These courts and commentators attempt to resolve this issue, among other ways, by balancing two of the most important policies underlying Art. 1 of the FAA and the NY Convention: enforcing parties' agreements according to their terms—found in section 2 of Art. 1 of the FAA and section 202 of Art. 2 of the FAA—and promoting the efficiency arbitration as a form of dispute resolution, compared to litigation, is supposed to provide.<sup>254</sup>

As a result of the Consensus, however, courts addressing whether parties can contract to expand the judicial review provisions in Art. V of the NY Convention will downplay or completely ignore how other courts balanced these two policies when they addressed whether expansion was appropriate under Art. 1 of the FAA. Since the significance of these provisions will be ignored, it is difficult, if not impossible, to tell how courts will balance the efficiency arbitration as an institution is supposed to provide when compared to litigation, with enforcing parties' agreements according to their terms, and accordingly, whether parties can contract to expand the

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249. See *infra* Part IV.C.

250. *Byrd*, 470 U.S. 213.

251. *Volt*, 489 U.S. 468.

252. *First Options*, 514 U.S. 938.

253. The latter two groups of sources will not be addressed in great detail here. For a more detailed discussion, see Chafetz, *supra* note 24, at 1.

254. See *infra* Parts IV.E-G. These three sources, irrespective of how they balance the two underlying policies, will not be very persuasive, because the Consensus resolves the Expansion Issues in the negative.

judicial review provisions applicable to the NY Convention and Art. 2 of the FAA.

*A. The Similarities Between the Operative/Material Language in Section 207 of Ch. 2 of the FAA and Section 9 of Ch. 1 of the FAA*

Courts that refuse to apply the vacatur provisions in and implied under Ch. 1 of the FAA to actions governed by the NY Convention are incorrect. This is due to the similarities in the operative/material language present in section 207 of Art. 2 of the FAA and section 9 of Ch. 1 of the FAA. The operative/material language in these two provisions has a very similar, if not identical meaning.

Section 207 of Art. 2 of the FAA states: “The court *shall confirm* the award *unless* it finds one of the grounds for refusal or deferral of recognition or enforcement of the award *specified in the said Convention.*”<sup>255</sup>

Section 9 of Art. 1 of the FAA states:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must grant* such an order *unless* the award is vacated, modified, or corrected as *prescribed in sections 10 and 11 of this title.*<sup>256</sup>

Although 9 U.S.C. section 207 and 9 U.S.C. section 9 do not include identical language, certain operative/material terms, including “shall” and “must”, have virtually identical meanings. First, in the context of laws, regulations or directives, “shall” is used to “express what is mandatory.”<sup>257</sup> Likewise, “must” is defined as “be required by law, custom, or moral conscience” or “be commanded or requested”.<sup>258</sup> As both terms describe something that has to be done without exception, their meanings are virtually identical. Because the meaning of the terms is virtually indistinguishable, their application should also be the same if the other material/operative terms surrounding them have the same meaning.

Second, 9 U.S.C. section 207 includes the operative/material term “specified” and 9 U.S.C. section 9 uses the operative/material term “prescribed,” before laying out the provisions parties have to rely upon when

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255. 9 U.S.C. § 207 (emphasis added).

256. 9 U.S.C. § 9 (emphasis added).

257. Merriam Webster Dictionary, <http://www.m-w.com/dictionary/shall> (last visited Oct. 6, 2008).

258. Merriam Webster Dictionary, <http://www.m-w.com/dictionary/must> (last visited Oct. 6, 2008).

addressing a motion to confirm or vacate. The term “specified” means “to name or state explicitly or in detail”,<sup>259</sup> while the term “prescribed” means “to lay down a rule . . . to lay down as a guide, direction, or rule of action” or “to specify with authority.”<sup>260</sup> Both of these terms set a defined limit on what vacatur provisions a party can rely upon when seeking to vacate an arbitration award under either Art. 1 of the FAA, or the NY Convention and Art. 2 of the FAA. Therefore, because the language modifying the grounds of review that have to be relied upon is virtually identical, the provisions should have been construed in the same fashion.

Finally, both provisions include the operative/material term “unless,” which in this context means “except on the condition that: under any other circumstance than.”<sup>261</sup> The use of the term “unless” establishes for both provisions that an award can only be vacated if one of the subject vacatur provisions subsequently specified is satisfied.

Accordingly, the use of the term “unless,” coupled with “shall” or “must”, and “prescribed” or “specified”, would seem to conclusively establish that the grounds of review set forth in Art. 1 of the FAA and the NY Convention and Art. 2 of the FAA are the only grounds of review a party can rely upon when attempting to vacate an arbitration award under either Art. 1 of the FAA or the NY Convention and Art. 2 of the FAA.

Despite how the text of 9 U.S.C. section 9<sup>262</sup> seems to mandate that vacatur provisions outside of sections 10 and 11 of Art. 1 of the FAA cannot be relied upon in a vacatur proceeding brought under Ch. 1 of the FAA, all of the federal circuit courts construing this text have concluded that manifest disregard of the law can be relied upon although it is not a ground of review enumerated in sections 10 and 11 of Art. 1 of the FAA.<sup>263</sup> Additionally, most federal circuit courts have recognized other implied grounds of review outside of those specified in sections 10 and 11 of Ch. 1 of the FAA.<sup>264</sup>

259. Merriam Webster Dictionary, <http://www.m-w.com/dictionary/specified> (last visited Oct. 6, 2008).

260. Merriam Webster Dictionary, <http://www.m-w.com/dictionary/prescribed> (last visited Oct. 6, 2008).

261. Merriam Webster Dictionary, <http://www.m-w.com/cgi-bin/unless> (last visited Oct. 6, 2008).

262. See *supra* note 19.

263. See *Birmingham News Co. v. Horn*, 901 So. 2d 27, 48-49 (Ala. 2004) (collecting cases illustrating how every circuit recognizes manifest disregard of the law).

264. See, e.g., *Manion v. Nagin*, 392 F.3d 294, 298-99 (8th Cir. 2004) (recognizing a “completely irrational” extra-statutory ground of review); *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 802 (8th Cir. 2004) (recognizing the same ground of review); *Brown v.*

To the contrary, despite language with a virtually identical meaning, courts construing the grounds of vacatur applicable under the NY Convention have concluded that only those grounds of review enumerated in Art. V of the NY Convention can be relied upon.<sup>265</sup> This anomalous result is clear from the Consensus in how courts have resolved the Expansion Issues.

None of the courts addressing the Expansion Issues under the NY Convention have sufficiently addressed this inconsistent treatment of the virtually identical meanings of the operative/material language. As a result of this failure, those courts that have reached the conclusion that the grounds of review in Art. V of the NY Convention are exclusive are incorrect.<sup>266</sup> Since the courts addressing the Expansion Issues do not acknowledge that the meanings of the material/operative language in the two provisions are virtually identical, the same courts will also most likely misconstrue whether parties can contract to expand the judicial review provisions enumerated in Art. V of the NY Convention.

### *B. The Meaning of the Term “Conflict” in Section 208 of the NY Convention is Misconstrued and/or Ignored*

Pursuant to section 208 of Art. 2 of the FAA, all the provisions in Art. 1 of the FAA apply to the NY Convention to the extent they do not “conflict”

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Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 779 (11th Cir. 1993) (recognizing an “arbitrary or capricious” extra-statutory ground of review); U.S. Postal Serv. v. National Ass’n of Letter Carriers, 847 F.2d 775, 778 (11th Cir. 1988) (recognizing the “arbitrary or capricious” standard as well); Safeway Stores v. Am. Bakery and Confectionery Workers, Local 111, 390 F.2d 79, 82 (5th Cir. 1968) (recognizing that if an award is arbitrary or capricious, courts would not enforce it); Hruban v. Steinman, No. 01-2277, 2002 WL 1723889 (3d Cir. 2002) (recognizing a “public policy” extra-statutory ground of review); Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union, 77 F.3d 850, 853 (5th Cir. 1996) (recognizing a “public policy” review standard); Delta Air Lines, Inc. v. Airline Pilots Ass’n, 861 F.2d 665, 671 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (recognizing a “public policy” extra-statutory ground of review); Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc., 138 F.3d 160, 165 (recognizing an extra-statutory ground of review where the award “fails to draw its essence from the underlying contract” (citing Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1320 (5th Cir. 1994)); Anderman/Smith Operating Co., 918 F.2d 1215, 1218 (5th Cir. 1990) (holding that an arbitrator’s decision must “draw its essence” from the contract); Manville Forest Prod. Corp. v. United Paperworkers Int’l Union, 831 F.2d 72, 74 (5th Cir. 1987) (recognizing a ground of review based on a “violation of public policy” standard).

265. Logically, the Consensus’s interpretation may be the correct interpretation of the provisions, and the courts addressing this issue under Art. 1 of the FAA are incorrect, but the courts addressing the Expansion Issues do not make this observation, which further undermines their analysis.

266. As will be discussed in more detail *infra* Parts IV.C-E, the majority of these courts circumvent this prohibition in certain instances through their interpretation of Art. V(1)(e) of the NY Convention.

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with the provisions in the NY Convention.<sup>267</sup> This includes the vacatur provisions in Art. V of the NY Convention. The term “conflict” is not defined in the FAA or by any of the case law construing it, but in the context of this statute it would most likely mean: (1) “to show antagonism or irreconcilability: fail to be in agreement or accord;” or (2) “a: competitive or opposing action of incompatibles: antagonistic state or action (as of divergent ideas, interests, or persons) b: mental struggle resulting from incompatible or opposing needs, drives, wishes, or external or internal demands.”<sup>268</sup>

When these definitions are applied in the context of section 208 of Art. 2 of the FAA, it is clear that if there is a “conflict” between a provision in the NY Convention and a provision in or implied under Ch. 1 of the FAA, the provision in the NY Convention applies. However, courts have not sufficiently addressed whether there is only a “conflict” when the NY Convention is silent about a certain issue, but Ch. 1 of the FAA speaks to the issue, or if a conflict only exists when a provision in the NY Convention and a provision in Ch. 1 of the FAA resolve the same issue in a different fashion. In other words, if a ground of review in the NY Convention says X and a ground of review in Ch. 1 of the FAA or implied under it says Y, then X would apply. On the other hand, however, if the NY Convention is silent on a given issue and a ground of review in or implied under Ch. 1 of the FAA says X, does X apply, or does the silence in the NY Convention govern?<sup>269</sup>

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267. See *supra* note 32.

268. Merriam-Webster Online Dictionary, [http://mw1.merriam-webster.com/dictionary/conflict\[1\]](http://mw1.merriam-webster.com/dictionary/conflict[1]), [http://mw1.merriam-webster.com/dictionary/conflict\[2\]](http://mw1.merriam-webster.com/dictionary/conflict[2]) (last visited Oct. 6, 2008).

269. Analogously, section 2-207 of the Uniform Commercial Code (U.C.C.) delineates between terms that are “different” and terms that are “additional” in the context of contracts for the sale of goods. Specifically, section 2-207 concerns documents exchanged by contracting parties, which cover the purchase and sale of goods, but do not contain the same terms. In other words, section 2-207 applies to what is commonly referred to as the “battle of the forms.” Terms that are “different” are those that are discussed in the original document and the subsequent document, but are not the same. For example, the original document says each widget costs \$10, while a subsequent document says each widget costs \$12. On the other hand, terms that are “additional” are those that are included in the subsequent document, but not in the initial document. For example, the initial document does not include any warranties as to the quality of the goods involved, while the subsequent document does include warranties. The U.C.C. has adopted specific rules to analyze “different” and “additional” terms, in recognition of how the two concepts are not the same. Courts construing the word “conflict” under the NY Convention, however, have not recognized this significant difference between the two concepts.



Accordingly, as a result of this distinction, courts have not sufficiently addressed the meaning or the significance of the term “conflict” when analyzing whether a District Court can apply grounds of review in or implied under Art. 1 of the FAA to actions governed by the NY Convention. Since courts do not pay attention to the definition of “conflict,” their analysis is incomplete.<sup>270</sup>

For example, if there is no conflict when the NY Convention is silent on an issue—i.e. the NY Convention does not include the same grounds of review as are in or implied under Art. 1 of the FAA—an argument can be made that the grounds of review in sections 10 and 11 of Ch. 1 of the FAA, or implied under it, can be relied upon as a result of this silence. If this is the case, then those courts that undermine the Consensus by interpreting Art. V(1)(e) of the NY Convention to mean that the grounds of review in Ch. 1 of the FAA and implied under them can apply to actions governed by the NY Convention in certain situations is superfluous, as the grounds would apply anyway.<sup>271</sup>

As such, the failure of courts to sufficiently address the actual meaning of the term “conflict”, will most likely lead courts to further misconstrue whether parties can contract to expand the judicial review provisions in Art. V of the NY Convention when faced with the issue.

### *C. The NY Convention’s Vacatur Provisions Were Intended to be Narrowly Construed*

Various courts have circumvented the Consensus by construing Art. V(1)(e) of the NY Convention to allow parties in certain instances—where an award is rendered and confirmation is sought in the same jurisdiction—to apply vacatur provisions outside of those enumerated in Art. V of the NY Convention.<sup>272</sup> Courts reach this conclusion despite how an analogous

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270. The *Industrial Risk* court implicitly concluded that if the NY Convention was silent on an issue, a party could not apply a provision in “conflict” with the silence. *Industrial Risk*, 141 F.3d at 1446. The court did not discuss the meaning of the term “conflict” or its relevance. However, it seemed to rely on the use of the word “shall” in 9 U.S.C. section 207 as determinative, and requires that only the vacatur provisions in Art. V of the NY Convention can be applied when a court reviews an arbitration award governed by the NY Convention and Art. 2 of the FAA. *Id.* However, this interpretation of section 207 of Art. 2 of the FAA is arguably incorrect, as those courts addressing an analogous section, section 9 of Art. 1 of the FAA, which includes the word “must” instead of “shall”, came to the exact opposite conclusion. For a more detailed discussion of these two provisions see *supra* Part IV.A. In fact, all the circuit courts addressing the same argument under section 9 of Art. 1 of the FAA have at least recognized manifest disregard of the law, a ground of review not enumerated in sections 10 and 11 of Art. 1 of the FAA.

271. See *infra* Part IV.D for a more detailed discussion of Art. V(1)(e).

272. See *supra* note 9.

argument has been entertained and rejected by all courts addressing it. The analogous argument is that manifest disregard of the law—a ground of review implied under Ch. 1 of the FAA<sup>273</sup>—can be pigeonholed into the public policy ground of review found in Art. V(2)(b) of the NY Convention. This unanimous rejection demonstrates how Congress intended for the NY Convention's grounds of review to be narrowly construed.<sup>274</sup>

Despite numerous courts concluding that the NY Convention's review provisions were intended to be narrowly construed, the Second Circuit in *Yusuf*,<sup>275</sup> and its progeny, have still tried to pigeonhole the manifest disregard of the law ground of review—and the other vacatur provisions enumerated in, and implied under sections 10 and 11 of Ch. 1 of the FAA—into Art. V(1)(e) of the NY Convention. This attempt to circumvent the inherently narrow nature of the NY Convention's vacatur provisions, like the attempt to apply manifest disregard of the law through Art. V(2)(b)—the NY Convention's public policy ground of review—should have been rejected.

However, irrespective of whether this group of courts improperly construes Art. V(1)(e) of the NY Convention, the application of the grounds of review in sections 10 and 11 of Art. 1 of the FAA and those implied under it in this fashion will not assist parties who wish to argue that they can contract to expand the judicial review provisions found in Art. V of the NY Convention. The grounds of review in sections 10 and 11 of Art. 1 of the FAA and implied under it, are applied *through* one of the NY Convention's specified vacatur provisions, Art. V(1)(e)—consistent with the Consensus<sup>276</sup>—*not in addition* to the vacatur provisions enumerated in Art. V of the NY Convention.

#### *D. The Operative/Material Language in Art. V(1)(e) of the NY Convention is in the Past Tense*

Article V(1)(e) allows an arbitration award to be vacated when “[t]he award has *not yet become binding on the parties*,<sup>277</sup> or *has been set aside or*

273. See FAA §§ 10-11, *supra* note 10.

274. *Karaha Bodas II*, 364 F.3d at 288 (“Defenses to enforcement under the New York Convention are construed narrowly, ‘to encourage the recognition and enforcement of commercial arbitration agreements in international contracts . . . .’”).

275. See *supra* text accompanying notes 117-48.

276. See *supra* text accompanying notes 13-19.

277. The phrase “not yet become binding on the parties” is superfluous. Due to the use of the word “or” before the phrase “has been set aside or suspended”, the phrase “not yet become binding

*suspended by a competent authority of the country in which, or under the law of which, that award was made.*<sup>278</sup>

Courts attempting to pigeonhole the vacatur provisions from sections 10 and 11 of Ch. 1 of the FAA and the grounds of review implied under the provisions, into Art. V(1)(e) of the NY Convention, fail to recognize how the material/operative language in the statute—“*has been set aside or suspended*”—is in the past tense. It must be noted that the aforementioned quoted language modifies both the “*by a competent authority of the country*” and the “*under the law of which*” language. The significance of this language being in the past tense, is that any action a court takes pursuant to this provision must be based on a past action taken by a previous competent authority, or under the law of a competent authority. In other words, it acts as both a condition precedent and a finality requirement.

Because all the relevant language in Art. V(1)(e) of the NY Convention is in the past tense, this provision does not allow—as the *Yusuf* court, its progeny, and certain commentators argue—a court to apply a signatory state’s domestic arbitration law to disputes where enforcement of an award is sought in the same jurisdiction where it was rendered. Any interpretation of this provision allowing domestic vacatur provisions to apply ignores how domestic vacatur law is applied prior to the awards at issue being “*set aside or suspended by a competent authority.*”<sup>279</sup>

Significantly, the awards addressed by *Yusuf* and its progeny are in full force and effect when this misguided interpretation of Art. V(1)(e) is applied, as the awards were validly rendered by an arbitration panel and addressed in the first instance by a reviewing U.S. federal court. Moreover, if the drafters of the NY Convention intended for a signatory state’s domestic arbitral law to apply to a dispute governed by the NY Convention, they would have specified that clearly in the text of the NY Convention. Instead, courts have had to *misconstrue* the purpose of, and stretch the meaning of, Art. V(1)(e), to allow vacatur provisions outside of Art. V of the NY Convention to apply.

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on the parties” must be treated as independent from the latter portions of Art. V(1)(e). The use of the word “and” would have changed the meaning of the entire provision. Read literally in its current form, the phrase “not yet become binding on the parties” would allow an award to be vacated solely if it is not binding on the parties—no other showing would be required. All arbitration awards are not binding until approved by a court. Accordingly, all the awards at issue before the courts addressing the Expansion Issues are not initially binding on the parties. The effect of this provision would be that an arbitration award could be vacated for any reason. This in turn undermines the narrow nature of arbitral review, and could not have possibly been the intent of the drafters.

278. See *supra* note 9 (footnote added).

279. See *Yusuf*, 126 F.3d at 20.

Additionally, an interpretation that recognizes the significance of the past tense is consistent with the legislative history behind the NY Convention, case law interpreting the NY Convention, and commentator's writings, all stressing the uniformity that the NY Convention was intended to provide.<sup>280</sup> Any semblance of uniformity is lost, and the non-domestic party potentially prejudiced, when a court is allowed to apply vacatur provisions unique to the jurisdiction of its choice.

*E. Parties Will Not Be Allowed to Contract to Expand the Judicial Review Provisions in Art. V of the NY Convention*

Section 202 of the NY Convention reiterates and reinforces section 2 of Ch. 1 of the FAA. Both provisions set forth one of the major policies underlying both the NY Convention and Art. 2 of the FAA and Art. 1 of the FAA—that parties' contracts containing arbitration provisions must be enforced according to their terms, like any other contract. Each provision states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*<sup>281</sup>

In addition to section 2 of Ch. 1 of the FAA, courts analyzing whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA rely on *Byrd*,<sup>282</sup> *Volt*,<sup>283</sup> and *First Options*,<sup>284</sup> among other Supreme Court precedents, in support of their respective positions. When read together, these three decisions demonstrate that one major purpose underlying Art. 1 of the FAA is to enforce parties' agreements according to their terms, while another is the efficiency arbitration as an institution compared to litigation is supposed to provide.<sup>285</sup>

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280. See *supra* note 146.

281. 9 U.S.C. § 2 (emphasis added).

282. *Byrd*, 470 U.S. 213.

283. *Volt*, 489 U.S. 468.

284. *First Options*, 514 U.S. 938.

285. The efficiency arbitration, as an institution, is supposed to provide distinguishes it from litigation, and makes it a truly alternative form of dispute resolution.

Courts allowing parties to contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA, argue that treating parties' contracts containing an arbitration clause the same as any other contract trumps any other policy underlying Art. 1 of the FAA.<sup>286</sup> On the other hand, those courts concluding parties cannot contract to expand judicial review under sections 10 and 11, note that enforcing parties arbitration agreements according to their terms, like any other contracts, does not trump, but must coexist with other policies underlying Art. 1 of the FAA, especially the efficiency arbitration as an institution provides.<sup>287</sup>

Only select cases addressing confirmation or vacatur proceedings under the NY Convention and Art. 2 of the FAA, or the Expansion Issues, address *Byrd, Volt* or *First Options*.<sup>288</sup> None of the cases relying on these three decisions do so in the context of private agreements to expand judicial review. However, it logically follows that since these cases are relied upon to any extent by courts analyzing the NY Convention and Art. 2 of the FAA, courts will rely upon them when they finally address whether parties can contract to expand the judicial review provisions in Art. V of the NY Convention. However, unlike in the context of Art. 1 of the FAA, any argument in support of allowing parties to contract to expand the judicial review provisions in Art. V of the NY Convention, must be weighed against the Consensus on the Expansion Issues.

#### i. *Volt*

The court in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* was faced with a situation where a California state statute allowed a court to stay an arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where "there is a possibility of conflicting rulings on a common issue of law or fact."<sup>289</sup> The provision in the California state statute is not included in Art. 1 of the FAA.

The Supreme Court in *Volt* dictates, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy

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286. See Chafetz, *supra* note 24, at 3, 16-25.

287. See Chafetz, *supra* note 24, at 3, 25-36.

288. See, e.g., *Encyclopaedia Universalis S.A.*, 403 F.3d at 91 (relying on *Volt*); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1293-94 (11th Cir. 2004) (relying on *First Options*); *China Minmetals*, 334 F.3d at 280-91 (recognizing that *First Options* has been applied in an international context); *Baker Marine*, 191 F.3d at 197 (relying on *Volt*); *Industrial Risk*, 141 F.3d at 1450 (relying on *Volt*); *Guang Dong Light Headgear Factory Co. v. ACI Int'l*, 2005 WL 1118130 at \* 7, \*9 (relying on *First Options*); *Jacada I*, 255 F. Supp. 2d at 750 (relying on *Volt*).

289. *Volt*, 489 U.S. at 471.

is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”<sup>290</sup> Courts concentrate on certain language from *Volt* when addressing whether contractual agreements to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA are enforceable. The relevant language begins as follows:

In recognition of Congress’ *principal purpose* of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which “require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration” . . . (finding pre-empted a state statute which rendered agreements to arbitrate certain franchise claims unenforceable); . . . (finding pre-empted a state statute which rendered unenforceable private agreements to arbitrate certain wage collection claims).<sup>291</sup>

The Supreme Court continued:

But it does not follow that the FAA prevents the enforcement of agreements to arbitrate *under different rules* than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA’s *primary purpose* of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are *generally free* to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted. *Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to “rigorously enforce” such agreements according to their terms . . . we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.*<sup>292</sup>

The Supreme Court’s decision in *Volt* also includes certain limiting/qualifying language, (some of which is included in the above quoted passage), ignored by most courts addressing whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA.<sup>293</sup> Due to the presence of this language, a compelling argument can be made that courts will not uphold *all* contracts between parties relating to arbitration agreements—despite the policy in section 2 of Ch. 1 of the

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290. *Id.* at 469.

291. *Id.* at 478-79 (citations omitted) (emphasis added).

292. *Volt*, 489 U.S at 479 (citations omitted) (emphasis added).

293. See Chafetz, *supra* note 24, at 11-13, 43-47.

FAA—including *all* contracts to expand Art. 1 of the FAA’s judicial review provisions.<sup>294</sup>

The limiting/qualifying language in *Volt* includes the Supreme Court’s pronouncement that the state rules parties wish to apply must not either “undermine the goals and policies of the FAA”<sup>295</sup> or “[do] violence to the policies behind the FAA.”<sup>296</sup> Other limiting/qualifying language includes the pronouncement that preemption only occurs when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>297</sup> A final potentially limiting/qualifying phrase is the Supreme Court’s declaration that “parties are *generally free* to structure their arbitration agreements as they see fit.”<sup>298</sup>

It is not clear from *Volt* what limiting language the Supreme Court wishes for the lower courts to apply to a given case.<sup>299</sup> There is no indication that the Supreme Court intended for all the limiting language to mean the same thing, and it does not.<sup>300</sup> This results in ambiguity, confusion, and a difficulty predicting when parties’ agreements to apply state law in actions governed by Ch. 1 of the FAA will be preempted.<sup>301</sup>

While stressing the importance of enforcing parties’ agreements according to their terms—section 2 of Ch. 1 of the FAA—the *Volt* court unquestionably determined Art. 1 of the FAA was not intended to completely preempt state arbitration schemes.<sup>302</sup> State arbitration rules would apply if the parties intended for them to apply.

Courts addressing whether parties can contract to expand the judicial review provisions enumerated in sections 10 and 11 of Art. 1 of the FAA, argue that *Volt*’s premise concerning parties’ intent also can be applied to

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294. *Volt*, 489 U.S. at 479.

295. *Volt*, 489 U.S. at 478 (emphasis added).

296. *Id.* at 479 (emphasis added). See also, Milana Koptsiovsky, *A Right To Contract For Judicial Review of An Arbitration Award: Does Freedom of Contract Apply to Arbitration Agreements?*, 36 CONN. L. REV. 609 (2004) (construing the “doing violence” language in *Volt* as applying to only one policy, “the Act’s overriding purpose of ensuring that private arbitration agreements are enforced according to their terms,” and in light of *Byrd* outweighing speed, efficiency and finality). But see, Ilya Enkisev, *Above the Law: Practical and Philosophical Implications of Contracting For Expanded Judicial Review*, 3 J. AM. ARB. 61, 71 (2004) (recognizing the phrase in *Volt*, “without doing violence to the policies behind. . .the FAA [is] often forgotten” and that “the policy and purpose behind the FAA is to ‘reverse the longstanding judicial hostility to arbitration agreements.’”).

297. *Volt*, 489 U.S. at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (emphasis added).

298. *Volt*, 489 U.S. at 479 (emphasis added).

299. See Chafetz, *supra* note 24, at 11-13, 43-47.

300. See *id.*

301. See *id.*

302. See *id.*

parties' agreements to expand Art. 1 of the FAA's judicial review provisions.<sup>303</sup> Thus, if parties intend for more judicial review than provided for in sections 10 and 11 of Art. 1 of the FAA, then Art. III courts must oblige and apply the parties agreed upon standards, subject to the aforementioned limiting language.<sup>304</sup>

Due to parties' reliance on various aspects of *Volt* in the context of Art. 2 of the FAA and the NY Convention,<sup>305</sup> parties will also rely on *Volt* when arguing that contracts to expand the judicial review provisions in Art. V of the NY Convention should be enforced.<sup>306</sup> However, the qualifying/limiting language in *Volt*, and the circuit split on whether parties can contract to expand judicial review in an action governed by Art. 1 of the FAA, suggest that not all parties' agreements would preempt Art. 1 of the FAA, despite the contracting parties' intent.<sup>307</sup>

Arguably then, this qualifying/limiting language must also be applied to parties' agreements to expand the vacatur provisions in Art. V of the NY Convention. This language would work to counteract those arguments made in support of contracts to expand the judicial review provisions in the NY Convention, like it does under sections 10 and 11 of Art. 1 of the FAA.<sup>308</sup>

## ii. *Byrd* and *First Options*

Various courts also rely on *Dean Witter Reynolds, Inc. v. Byrd*<sup>309</sup> and *First Options of Chicago, Inc. v. Kaplan*<sup>310</sup> when analyzing whether parties can contract to expand the judicial review provision in sections 10 and 11 of Art. 1 of the FAA. Those courts note, that pursuant to *Byrd* and *First Options*, the resolution of whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA, depends, among other things, on the balance between two of the main purposes

303. *See id.*

304. *See* Chafetz, *supra* note 24, at 11-13, 43-47.

305. *See supra* note 286.

306. These contracts under the NY Convention could include agreements to apply the vacatur provisions, in and implied under sections 10 and 11 of Art. 1 of the FAA. If this is the case, courts may potentially have to re-visit their resolution of the Expansion Issues.

307. *See* Chafetz, *supra* note 24, at 11-13, 43-47.

308. *See id.*

309. *Byrd*, 470 U.S. 213.

310. *First Options*, 514 U.S. 938.



underlying the FAA: (i) enforcing parties' agreements according to their terms and (ii) maintaining arbitral efficiency.<sup>311</sup>

### 1. *Byrd*

In *Byrd*, Lamar Byrd (Mr. Byrd) opened a securities account with Dean Witter Reynolds Inc. (Dean Witter).<sup>312</sup> An arbitration clause in Mr. Byrd's Customer Agreement stated "[a]ny controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration."<sup>313</sup> Mr. Byrd sued Dean Witter in federal court and alleged violations of the federal securities laws and also certain pendant state claims.<sup>314</sup> Dean Witter argued that the district court should order arbitration of the pendant state claims, but at the same time, stay arbitration of those claims until the federal claims were litigated in federal court.<sup>315</sup> Dean Witter assumed that the causes of action brought pursuant to the federal securities laws had to be litigated in federal court and did not request that they be arbitrated.<sup>316</sup> The district court denied this request and the Ninth Circuit Court of Appeals affirmed.<sup>317</sup>

The question presented to the Supreme Court in *Byrd* was "whether, when a complaint raises both federal securities claims and pendent state claims, a Federal District Court may deny a motion to compel arbitration of the state-law claims, despite the parties' agreement to arbitrate their disputes."<sup>318</sup> The Supreme Court held that "the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be possibly inefficient maintenance of separate proceedings in different forums."<sup>319</sup> In reaching this conclusion, the Supreme Court found that the overriding goal of the FAA was *not to* "promote the expeditious resolution of claims," *but to* enforce arbitration agreements to the same extent as any other contracts, according to their terms.<sup>320</sup> However, "[t]his is not to say that Congress was

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311. Chafetz, *supra* note 24, at 11-13, 43-47.

312. *Byrd*, 470 U.S. at 214.

313. *Id.* at 215 (quoting App. to Pet. for Cert. 11).

314. *Id.* at 214.

315. *Id.* at 215.

316. *Id.* at 215.

317. *Byrd*, 470 U.S. at 215-216.

318. *Id.* at 214.

319. *Id.* at 217.

320. *Id.* at 219-220.

blind to the potential benefit of the legislation for expedited resolution of disputes.”<sup>321</sup>

The Supreme Court then compared two of Art. 1 of the FAA’s main purposes: (i) maintaining arbitral efficiency; and (ii) enforcing parties’ agreements according to their terms.<sup>322</sup>

The court observed:

*We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is “piecemeal” litigation, at least absent a countervailing policy manifested in another federal statute. . . . By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act.*<sup>323</sup>

## 2. First Options

*First Options* concerned a dispute between First Options of Chicago, Inc. (First Options), Manuel Kaplan (Mr. Kaplan) and Carol Kaplan (Manuel Kaplan and Carol Kaplan are collectively referred to as the Kaplans) and Mr. Kaplan’s wholly owned investment company, MK Investments Inc. (MKI).<sup>324</sup> MKI and the Kaplans incurred substantial amounts of debt to First Options after the 1987 Stock Market Crash.<sup>325</sup> The Kaplans and MKI entered into a four document “workout” agreement to alleviate the Kaplans’ debt load.<sup>326</sup> Of the four documents, only the workout agreement signed by MKI contained an arbitration clause.<sup>327</sup> The Kaplans and MKI could not satisfy all their debts to First Options, so First Options sought arbitration against the Kaplans and MKI to protect its interests.<sup>328</sup> Since only MKI

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321. *Id.* at 220.

322. *Byrd*, 470 U.S. at 221.

323. *Id.* (citation omitted) (emphasis added).

324. *First Options*, 514 U.S. at 940.

325. *Id.* at 940.

326. *Id.*

327. *Id.* at 941.

328. *Id.* at 940.

signed the workout document containing the arbitration clause, the Kaplans refused to arbitrate.<sup>329</sup>

The Supreme Court in *First Options* granted *certiori* to resolve two questions, only one of which is relevant to this article. The relevant question was “[whether] the parties agree[d] to submit the arbitrability question . . . itself to arbitration?”<sup>330</sup> The court determined that the terms of the parties’ agreement govern who decides whether the court or the arbitrator decides the issue of arbitrability.<sup>331</sup>

The Supreme Court addressed three counter-arguments made by First Options against the proposition that an arbitrator or arbitration panel should make an initial determination about the arbitrability of a dispute.<sup>332</sup> The second and third counter-arguments are relevant to balancing the importance of arbitral efficiency and enforcing parties’ agreements according to their terms.<sup>333</sup> The second counter-argument proposed by First Options was that “permitting parties to argue arbitrability to an arbitrator without being bound by the result would cause delay and waste in the resolution of disputes.”<sup>334</sup> “The third counter-argument was ‘that the Arbitration Act . . . requires a presumption that the Kaplans agreed to be bound by the arbitrators’ decision, not the contrary.’”<sup>335</sup>

As to the second argument, the Supreme Court observed it was inconclusive “for factual circumstances vary too greatly to permit a confident conclusion about whether allowing the arbitrator to make an initial (but independently reviewable) arbitrability determination would, in general, slow down the dispute resolution process.”<sup>336</sup> “In addressing the third argument, the court found it to be legally erroneous and that ‘there is no strong arbitration-related policy favoring First Options in respect to its particular argument here.’”<sup>337</sup>

The court then concluded that “the basic objective in this area is *not* to resolve disputes in the quickest manner possible, no matter what the parties’ wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties.”<sup>338</sup>

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329. *First Options*, 514 U.S. at 941.

330. *Id.* at 943.

331. *Id.* at 943.

332. *Id.* at 946.

333. See Chafetz, *supra* note 24, at 15-16, 54-57.

334. *First Options*, 514 U.S. at 946.

335. Chafetz, *supra* note 24, at 16 (quoting *First Options*, 514 U.S. at 946).

336. *First Options*, 514 U.S. at 946-947.

337. Chafetz, *supra* note 24, at 16 (quoting *First Options*, 514 U.S. at 947).

338. *First Options*, 514 U.S. at 947 (citations omitted) (emphasis added).

*F. Distinguishing Byrd and First Options From Cases Addressing Contractual Expansion of the Vacatur Provisions in Sections 10 and 11 of Art. 1 of the FAA and Art. V of the NY Convention*

The issues considered in *Byrd* and *First Options* are clearly distinguishable from the issue of parties contracting to expand the judicial review provisions in sections 10 and 11 of Ch. 1 of the FAA—which numerous courts have addressed—and Art. V of the NY Convention.<sup>339</sup>

“First, based on the [issue] before the *Byrd* court . . . the bifurcation of proceedings—and the *First Options* court—the determination of who decides arbitrability—the Supreme Court held the policy of enforcing parties’ agreements according to their terms trumps the efficient resolution of disputes.”<sup>340</sup> However, both *Byrd* and *First Options* dealt with situations where ignoring the parties’ intent would have *potentially lead* to the underlying disputes not being arbitrated.<sup>341</sup> Here, in the context of expanded judicial review, that is not the case, as the underlying dispute has already been arbitrated and the issue before the court solely involves judicial review of an arbitration award.

“In *Byrd*, the Supreme Court held that a court must grant a motion to compel arbitration of pendant state law claims, even if the federal claims are not arbitrable, and the ruling would result in the bifurcation of the proceedings . . . In other words, a concurrent arbitration and litigation between the same parties addressing different issues and causes of action.”<sup>342</sup> Likewise, *First Options* addressed whether parties were allowed to decide *who should decide the issue* of arbitrability,<sup>343</sup> or in other words, who should decide which issues and causes of action are arbitrable.<sup>344</sup> The decision of who decides arbitrability ultimately leads to a determination of whether a dispute is or is not arbitrated.

“Second, if *Byrd* made a determinative statement about the balance between maintaining arbitral efficiency and enforcing parties’ agreements according to their terms, *First Options* would have cited *Byrd* for that proposition.”<sup>345</sup> Although the *First Options* court did cite *Byrd*, it did not

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339. See Chafetz, *supra* note 24, at 15-16, 54-57.

340. *Id.* at 54-57.

341. See *id.*

342. *Id.* at 55.

343. See *id.* at 55 (emphasis added).

344. See Chafetz, *supra* note 24, at 55.

345. *Id.* at 55.

cite it for this purpose, even though it was called on to balance the two policies.<sup>346</sup> Thus, it is virtually impossible to argue *Byrd's* reasoning is determinative on the balance between these two policies, being that *First Options* did not rely on *Byrd*.<sup>347</sup>

Third, the fact the appropriate balance is an open question, is demonstrated by how the Supreme Court in *First Options*—the most recent of its decisions balancing these two policies—does not decisively resolve the issue.<sup>348</sup> Those courts that rely on *First Options* and argue that maintaining arbitral efficiency was not Congress's primary goal in promulgating Art. 1 of the FAA, only concentrate on the Supreme Court's response to *First Options'* third argument, and fail to recognize the ambiguity introduced by the Court's analysis of the second argument.<sup>349</sup>

As has been noted previously:

The Supreme Court's analysis of these two arguments is irreconcilable. As to the second, the court implies that the "slow[ing] down of the dispute resolution process" is material if "factual . . . circumstances . . . could permit a confident conclusion" the dispute resolution process would be slowed down. In response to the third argument, the court specifically states the FAA's underlying purpose was "not to resolve disputes in the quickest manner possible," but to enforce arbitration agreements according to their terms, like any other agreement.<sup>350</sup>

There is irrefutable evidence that the dispute resolution process is slower and less efficient when parties contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA.<sup>351</sup> Initially, this type of review is often referred to as "expanded" or "supplemental" review. This characterization alone demonstrates that the review process is slower and less efficient.<sup>352</sup> Second and more importantly, without expanded judicial review, the confirmation of arbitration awards would be limited to the restrictive judicial review provisions in sections 10 and 11 of Art. 1 of the FAA, and other implied grounds of review, like manifest disregard of the law.<sup>353</sup> Courts are intimately familiar with all of these standards.

Since arbitral efficiency is markedly affected if parties' contracts to expand Art. 1 of the FAA's judicial review provision are honored, this issue is clearly distinguishable from the issue before the Supreme Court in *First*

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346. See Chafetz, *supra* note 24, at 55 (citing *First Options*, 514 U.S. at 945).

347. See Chafetz, *supra* note 24, at 55.

348. See *id.*

349. See Chafetz, *supra* note 24, at 55; see *supra* Part IV.E.(ii)(2).

350. See *id.* at 55-56 (quoting *First Options*, 514 U.S. at 947).

351. See *id.* at 56.

352. See *id.*

353. See *id.*

*Options*, which concluded that arbitral efficiency was not compromised.<sup>354</sup> Accordingly, the Supreme Court will balance the effect of enforcing parties' contracts to expand judicial review on arbitral efficiency, with the enforcement of parties' agreements according to their terms, and try to reconcile *First Options'* resolution of argument two and argument three in the context of parties contracting to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA.<sup>355</sup>

Moreover, since courts addressing the NY Convention rely on *First Options* in certain contexts, those same courts will also rely on *First Options* when faced with parties' contracts to expand Art. V of the NY Convention's judicial review provisions. Those courts would then arguably reconcile arguments two and three in the same fashion—acknowledging the adverse effects of enforcing parties' contracts to expand the judicial review provisions in Art. V of the NY Convention on arbitral efficiency—as those courts addressing whether parties can contract to expand judicial review under sections 10 and 11 of Ch. 1 of the FAA.<sup>356</sup>

## V. CONCLUSION

The majority of courts construing whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA, among other sources, rely on section 2 of Art. 1 of the FAA, *Volt*, *First Options*, and *Byrd*. Those courts conclude that enforcing parties' agreements according to their terms is the most important policy underlying Art. 1 of the FAA.<sup>357</sup> Despite acknowledging the importance of this policy, the courts addressing whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA are split on the issue.<sup>358</sup> This split exists despite how all the federal courts addressing this issue have concluded that grounds of vacatur *outside of* those enumerated in

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354. See Chafetz, *supra* note 24, at 56-57.

355. See *id.* at 57.

356. See *Encyclopaedia Universalis*, 403 F.3d 85, 90 (“Given the strong public policy in favor of international arbitration . . . review of arbitral awards under the New York Convention is ‘very limited in order . . . to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.’” (quoting *Yusuf*, 126 F.3d at 23)); see also Chafetz, *supra* note 24, at 15-16, 54-57.

357. See *supra* note 25 and accompanying text.

358. See *id.*

sections 10 and 11 of Ch. 1 of the FAA,<sup>359</sup> including manifest disregard of the law or certain other implied grounds of vacatur,<sup>360</sup> can be relied upon in vacatur proceedings.<sup>361</sup>

On the other hand, not one court analyzing the Expansion Issues and the vacatur provisions in Art. V of the NY Convention, has reached a conclusion contrary to the Consensus,<sup>362</sup> which mandates that parties cannot rely upon any vacatur provisions outside of those enumerated in Art. V of the NY Convention during a vacatur proceeding. Even those courts recognizing that a signatory state's domestic vacatur provisions apply in certain instances, do so only by applying them through Art. V(1)(e) of the NY Convention. In other words, the provisions in Ch. 1 of the FAA and those implied under it apply directly through a provision in Art. V of the NY Convention, not in an implied fashion like how manifest disregard of the law and other non-statutory grounds of review are applied under Art. 1 of the FAA.

When courts finally address whether parties can contract to expand Art. V of the NY Convention's vacatur provisions, they to, like courts addressing the issue under Art. 1 of the FAA, will rely upon section 202 of the FAA,<sup>363</sup> *Volt, Byrd, and First Options*.<sup>364</sup> Arguments relying on these precedents under Art. 1 of the FAA have been met with a mixed reception, despite how all courts addressing them have recognized implied grounds of review under Ch. 1 of the FAA.<sup>365</sup> These same arguments will be made when parties attempt to contract to expand the judicial review provisions in Art. V of the NY Convention. However, the arguments will be a lot less convincing as the Consensus on the Expansion Issues is that only the grounds of review in Art. V of the NY Convention can be relied upon when parties move to vacate an arbitration award. Based on the resolution of the Expansion Issues alone, the problems that parties contracting to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA were faced with under Art. 1 of the FAA, will be a greater impediment when courts finally address whether parties can contract to expand judicial review under the NY Convention.

All told, it is very unlikely that parties will be allowed to contract to expand the judicial review provisions in Art. V of the NY Convention.

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359. See 9 U.S.C. §§ 10-11.

360. See *supra* notes 10-17 and accompanying text.

361. See *supra* note 25.

362. See *supra* text accompanying notes 13-20 for a discussion of the Consensus.

363. As discussed in *supra* notes 15-17 and accompanying text, this section is identical to section 2 of Art. 1 of the FAA.

364. See *supra* Parts IV.E.i-ii for a discussion of these three decisions.

365. See *supra* note 25.

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Although an argument can be made, it is not as strong as the argument that can be made under Ch. 1 of the FAA, which so far only has resulted in a pronounced circuit split.



