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

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I. INTRODUCTION

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 1 (“Art.”) of the Federal Arbitration Act (hereinafter, the “FAA”) governs domestic disputes. Second, Article 2 of the FAA and The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award (the “NY Convention”) govern non-domestic disputes.

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Likewise, Article 2 of the Federal Arbitration Act is referred to as Ch. 2. The FAA is also known as the United States Arbitration Act. See, American Postal Workers Union, AFL-CIO v. U.S. Postal Service, 823 F.2d 466, 469 (11th Cir. 1987).

Section 201 of Ch. 2 of the FAA, is codified in Title 9 of the U.S. Code. 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.

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

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

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. §202 (discussed infra at n. 16) defines awards "not considered as domestic" for purposes of the NY Convention. Jacada v. Int'l Marketing Strategies, Inc., 401 F.3d 701, 706-07 cert denied Jacada (Europe), Ltd. v. Int'l Marketing Strategies, Inc., 126 S.Ct. 735 (2005); Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1440-41 (11th Cir. 1998); Yusef Ahmed Alghanim & Sons, W.L.L. 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. § 202:

[a]n 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. 401 F.3d at 706 (emphasis added).
Without court intervention, an arbitration award is not enforceable and does not have the same binding effect as a court’s judgment.\(^7\) 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.\(^8\) For example, if a Nigerian party and a Swedish party participate in an arbitration in the United States (the “U.S.”), either party can move for the award to enforced in Sweden, Nigeria and 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.\(^9\) The scope of these

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.\(^8\) _Jacada_, 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 that:

> [w]ithin 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.

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. (emphasis added).

The "specified grounds" of review are found in Art. V of the NY Convention and are addressed \textit{infra} at n. 9. The material/operative terms in this section have a virtually identical meaning as those in §9 of Art. 1 of the FAA, addressed \textit{infra} at pp. 33-35.

\(^8\) _Yusuf_, 126 F.3d at 22-23 (“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 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.”); see also Albert Jan van den Berg, \textit{The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation} 265 (1981).

\(^9\) Art. V of the NY Convention is central to 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
grounds of review and whether parties can contract to expand them are central to this article.

(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. (emphasis added).
Unlike under Art. 1 of the FAA\textsuperscript{10}, courts have not addressed whether parties can contract to expand\textsuperscript{11} the judicial review provisions in the NY Convention.\textsuperscript{12} 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 §§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").

\textsuperscript{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:

\begin{itemize}
  \item[(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--
  \begin{itemize}
    \item[(1)] where the award was procured by corruption, fraud, or undue means;
    \item[(2)] where there was evident partiality or corruption in the arbitrators, or either of them;
    \item[(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
    \item[(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
  \end{itemize}

\end{itemize}

Section 11 of Art. 1 of the FAA reads in pertinent part:

\begin{itemize}
  \item[(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.
  \item[(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.
  \item[(c)] Where the award is imperfect in matter of form not affecting the merits of the controversy.
\end{itemize}

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

\textsuperscript{12} This includes parties contracting to expand the NY Convention's judicial review provisions to include the grounds of review set forth in §§10 and 11 of Art. 1 of the FAA, and those implied under it, including, but not limited to, manifest disregard of the law.
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, can be relied upon in a vacatur proceeding brought pursuant to the NY Convention. 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, they will rely upon §202 of Art. 2 of the FAA, which is identical to § 2 of Art. 1 of the FAA. 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 §207 of Art. 2 of the FAA and §9 of Ch. 1 of the FAA, 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 meaning of these two sets of provisions will be ignored, or given less weight than it 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,

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13 See supra at n. 9.
14 To the contrary, as will be discussed in more detail infra, all courts addressing the vacatur provisions in §§10 and 11 of Art. 1 of the FAA, have concluded that in addition to the provisions enumerated in those provisions, parties can also rely upon certain other implied grounds of review.
15 See supra at n. 9.
16 Section 202 of Art. 2 of the FAA and §2 of Art. 1 of the FAA both state:

[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. (emphasis added).

17 See supra at n. 16.
18 Section 207 of Art. 2 of the FAA states in pertinent part: “[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.” (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.” (emphasis added).
of Art. 2 of the FAA and §2 of Art. 1 of the FAA – and the efficiency arbitration as an institution compared to litigation was expected to provide. 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 §§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 commentator's writings addressing and reaching conflicting conclusions about whether parties can contract to expand the judicial review provisions in §§10 and 11 of Ch. 1 of the FAA. However, despite these sources, courts

23 For purposes of this article, the use of the term “efficiency” refers to the amount of time a 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.
25 Whether parties in the federal courts can contract to expand the judicial review provisions in §§10 and 11 of Ch. 1 of the FAA is far from clear. See, Chafetz, supra n. 24, at 3 (2006). 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 Technologies, Inc. v. MCI Telecommunications, 64 F.3d 993 (5th Cir. 1995)(allowing contractual expansion); Syncor Int’l Corp. v. McLeland, No. 96-226, 120 F.3d 262, 1997 WL 452245 at * 6 (4th Cir. August 11, 1997) cert denied, 522 U.S. 1110, 118 S.Ct. 1039 (1998)(allowing contractual expansion); Roadway Package System, Inc. v. Kayser, 257 F.3d 287, 289-290 (3rd Cir. 2001) cert denied 534 U.S. 1020, 122 S.Ct. 545 (2001)(allowing contractual expansion) with Bowen v. Amoco Pipeline Company, 254 F.3d 930 (10th Cir. 2001)(not allowing contractual expansion); Kyocera Corp. v. Prudential-Bache Trade Services Inc., 341 F.3d 987 (9th Cir. 2003) cert denied 540 U.S. 1098, 124 S.Ct. 980 (2004)(not allowing contractual expansion); Chicago Typographical, 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 (2003) (Proposing a unique solution whereby a rebuttable “Presumption in Favor of the Right to Contract for Expanded Judicial Review” is created.); Karan A. Sasser, Freedom to Contract for Expanded Judicial Review in Arbitration Agreements, 31 CUMB. L. REV. 337 (2001) (favoring expanded judicial review); William H. Knell, 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 n. 24, at 3-5 (2006) (arguing that determining whether parties can contract to expand the judicial review provisions in §§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).
prior improper 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, towards 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. 26

Third, it will argue that the Expansion Issues were resolved incorrectly, because the courts addressing them do not recognize how the operative/material language 27 in §207 of Ch. 2 of the FAA 28 and §9 of Ch. 1 29 of the FAA has a virtually identical meaning, and therefore should have been construed and applied in the same manner. 30

Fourth, 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. 31 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. 32 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. 33

Sixth, many those same courts ignore how all the operative/material language in Art. V(1)(e) of the NY Convention is in the past tense. 34 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. 35

26 See infra at pp. 12-31.
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 supra at n. 7.
29 See infra at pp. 33-34.
30 See infra at pp. 33-35.
31 See infra at pp. 36-37.
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 extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.” (emphasis added).
33 See infra at pp. 37-38.
34 See infra at pp. 38-39.
35 Id.
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 §§10 and 11 of Ch. 1 of the FAA, 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.

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

The NY Convention was adopted by Congress as a new Ch. 2 of the U.S. Arbitration Act, title 9 U.S. Code sections 201 through 208. 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. He stated, "[i]t 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.

The main purpose of the NY Convention was to facilitate international commercial arbitration. With that purpose in mind, the Supreme Court in Scherk v.

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36 See supra at n. 10.
37 See supra at n. 16.
40 See supra at n. 3.
Alberto-Culver Co.\textsuperscript{44} observed, "[t]he goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."\textsuperscript{45}

In other words:

[t]he 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 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.\textsuperscript{46}

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 §§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 and/or other non-statutory grounds of review implied under §§10 and 11 of Ch. 1 of the FAA, can also be implied in actions governed by the NY Convention.

Section 208\textsuperscript{47} of Art. 2 of the FAA may conclusively resolve whether the vacatur provisions in §§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 §208\textsuperscript{48} in its entirety. 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 §208 of Art. 2 of the FAA before analyzing the second expansion issue, whether manifest disregard of the law and/or other grounds of

\begin{footnotesize}
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\item \textsuperscript{44}417 U.S. 506, 520, fn. 15, 94 S.Ct. 2449 (1974).
\item \textsuperscript{45}Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 538, 115 S.Ct. 2322 (1995)(emphasis added); see also, Sen.Rep. No. 91-702, 2d Sess., p. 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.").
\item \textsuperscript{46}See, Contini, International Commercial Arbitration, 8 Am.J.Comp.L. 283, 299 (1959); see also Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L', 508 F.2d 969, 973 (2d Cir. 1984)(emphasis added).
\item \textsuperscript{47}See supra at n. 32.
\item \textsuperscript{48}See infra at pp. 36-37 for a more detailed discussion of §208 of Art. 2 of the FAA.
\end{itemize}
\end{footnotesize}
Vacatur implied under §§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 §208, these courts also do not define or recognize the significance of the term "conflict".

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


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., Inc. v. Societe Generale De L’Industrie Du Pappier. Parsons involved both a U.S. corporation – Parsons & Whittemore Overseas Co., Inc. (“Parsons”) – and an Egyptian corporation – Societe Generale De L’Industrie Du Pappier (“Societe”). A non-domestic arbitral award was rendered against Parsons after an arbitration before the International Chamber of Commerce (the “ICC”).

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

The Second Circuit then observed that §207 of the NY Convention states, "....[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in the said Convention." Pursuant to §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."
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.”

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."  

**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**


A year after the *Parsons* decision, the Second Circuit in *Fotochrome, Inc. v. Copal Company, Ltd.* 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. During the course of the arbitration, Fotochrome filed for bankruptcy protection under Chapter XI of the U.S. Bankruptcy Act.

The arbitration tribunal concluded the arbitration could continue despite Fotochrome's bankruptcy filing. Thereafter, the tribunal rendered an award in favor of Copal. Copal then filed the arbitral award with the Tokyo District Court. 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." 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. Subsequently, Fotochrome challenged the validity of Copal's proof of claim before a

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59 *Parsons*, 508 F. 2d at 977.
60 *Id.* at 977.
61 517 F.2d 512, 514 (2d Cir. 1975).
62 *Fotochrome*, 517 F.2d at 514.
63 *Id.* at 515.
64 *Id.* at 515.
65 *Id.* at 515.
66 *Id.* at 515.
67 *Fotochrome*, 517 F.2d at 515.
68 *Id.* at 515.
special referee in the U.S. The special referee concluded that the Japanese arbitral award was not a final judgment in the bankruptcy proceeding. The U.S. District Court reversed the special referee's determination and found it was a final judgment.

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. In other words, enforcement of an award may be refused "only on proof of specified conditions" under both statutory schemes. 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."

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.


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

In its challenge to the arbitration award before the Sixth Circuit, Behr argued that the vacatur provisions in §§10 and 11 of Art. 1 of the FAA, as well as the NY

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69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
74 Fotochrome, 517 F.2d at 518 (emphasis added).
75 Id. at 519 (emphasis added).
76 87F.3d 844, 846-47 (6th Cir. 1996).
77 M&C, 87F.3d at 846-47
78 Id. at 846.
79 Id.
80 Id.
Convention's vacatur provisions in Art. V, applied to this dispute.\textsuperscript{81} 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.\textsuperscript{82}

The Sixth Circuit initially recognized that the District Court had jurisdiction pursuant to §207\textsuperscript{83} of Art. 2 of the FAA to entertain a motion to confirm and a motion to vacate an arbitration award.\textsuperscript{84} Additionally, how Art. V of the NY Convention allows a party to object to the confirmation of an arbitration award on certain limited grounds.\textsuperscript{85}

Judge Daughtrey, writing for the Sixth Circuit, then observed that courts construing the vacatur provisions in §§10 and 11 of Ch. 1 of the FAA, have concluded that an award can be vacated pursuant to an extra-statutory ground – if the arbitrator's decision manifestly disregards of the law.\textsuperscript{86} 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:

\begin{quote}
[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.\textsuperscript{87}

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].'\textsuperscript{88} 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."\textsuperscript{89}

Accordingly, the Sixth Circuit held it did not have jurisdiction to entertain M&C's request, because neither the grounds of review specified in §§10 and 11 of Ch. 1 of the FAA, nor manifest disregard of the law\textsuperscript{90}, are included in Art. V of the NY Convention.\textsuperscript{91}
\end{quote}

In 1997, the Seventh Circuit in *Lander Company, Inc. 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 Investments, Inc. ("MMP"). 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.

MMP moved to dismiss Lander's suit because the NY Convention was inapplicable, a jurisdictional argument, and also to vacate the award. Lander opposed MMP's motion and argued vigorously that the NY Convention applied and the award should not be vacated. The District Court concluded the NY Convention did not apply and dismissed Lander's suit.

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.

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:

…if 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.

The Seventh Circuit noted how the Sixth Circuit in *M&C* 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

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91 *M&C*, 87F.3d at 851.
92 107 F.3d 476 (7th Cir. 1997) (The parties' dispute was considered non-domestic because it concerned a distribution agreement centered in Poland); see supra at n. 6 for a more detailed discussion of non-domestic awards.
93 *Id.* (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 *Lander*, 107 F.3d at 478.
97 *Id.*
98 *Lander*, 107 F.3d at 480 (emphasis added).
99 See supra at pp. 15-16.
under the Convention." 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. 101 Also, relying on *M&C* and §208 102 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." 103

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 & Wittemore*, 104 because neither party raised it. 105 However, the court observed that since MMP's position "may be right" the issue should be considered. 106 Especially, if MMP seeks to argue that the arbitrator manifestly disregarded the law later on in the proceedings. 107

The court, relying on the Second Circuit's decision in *Bergesen* 108, 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. 109 Therefore, if the NY Convention applied, manifest disregard of the law would *not* apply to this dispute and other disputes in the Seventh Circuit.


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.* 110, 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. 111 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. 112 Cubic moved to vacate the award under sections (a) – (c) of Art. V of the

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100 *Lander*, 107 F.3d at 480.
101 *Lander*, 107 F.3d at 480.
102 See *supra* at n. 32.
103 *Lander*, 107 F.3d at 481 (emphasis added)(the *Lander* court did not attempt to define the term "conflict" or recognize its potential significance).
104 See *supra* at pp. 12-13.
105 *Lander*, 107 F.3d at 480 (this language arguably relegates the court's decision to dicta).
106 *Lander*, 107 F.3d at 480.
107 Id.
108 See *supra* at n. 6.
109 *Lander*, 107 F.3d at 482.
112 Id. at 1170.
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.\textsuperscript{114} 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.'"\textsuperscript{115} Relying mainly on that provision, the court held that the grounds of review in §10 of Art. I of the FAA were not applicable to an award rendered under the NY Convention.\textsuperscript{116}


The Second Circuit revisited the Expansion Issues and delivered the seminal Circuit Court opinion on them in 1997. In \textit{Yusef Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.},\textsuperscript{117} the court addressed a motion to vacate brought by a Kuwaiti corporation, Yusef Ahmed Alghanim & Sons ("Alghanim"), against a U.S. corporation, Toys "R" Us, Inc. ("Toys "R" Us").\textsuperscript{118} The arbitration being challenged, took place under the auspices of the American Arbitration Association ("AAA"), in the U.S.\textsuperscript{119}

The arbitrator awarded Alghanim $46.44 million.\textsuperscript{120} Alghanim petitioned the Southern District of New York for confirmation of the award under the NY Convention

\textsuperscript{113} Id. at 1171.
\textsuperscript{114} Id. at 1171.
\textsuperscript{116} \textit{Cubic Defense}, 29 F.Supp. 2d at 1171-72; see also, Ministry of Defense 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 arbitree's award can be vacated only on the grounds specified in the Convention."); see also \textit{Industrial Risk}, 141 F.3d at 1446 (finding that "the Convention's enumeration of defenses is exclusive"); see infra at pp. 25-27 for a discussion of \textit{Industrial Risk}; \textit{Yusuf Ahmed}, 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 infra at pp. 19-22 for a discussion of \textit{Yusef Ahmed}; \textit{M & C Corp.}, 87 F.3d at 851 ("Article V of the Convention lists the exclusive grounds justifying refusal to recognize an arbitral award."); see supra at pp. 15-16 for a discussion of \textit{M & C Corp.}
\textsuperscript{118} \textit{Yusef}, 126 F.3d at 17.
\textsuperscript{119} Id. at 17.
\textsuperscript{120} Id. at 18.
and Art. 2 of the FAA. Toys "R" Us then filed a motion to vacate the award under Art. 1 of the FAA. 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. In confirming the award, the District Court held that "[t]he Convention and the FAA afford overlapping coverage," 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.

In reviewing the District Court's decision, the Second Circuit initially concluded the NY Convention clearly applied to this dispute.

It then addressed whether Art. 1 of the FAA also applied. The court noted that pursuant to 9 U.S.C. § 207, "[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." The court next addressed Art. V of the NY Convention, which includes the grounds of review referred to in 9 USC § 207.

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.

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. 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."
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."  

The Second Circuit then distinguished two decisions, 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 *Yusef* Court, the requests were made in the context of "petitions to confirm awards rendered abroad." Significantly, the Second Circuit observed, "[t]hese [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." 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." 

The court then concluded that "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." 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 nondomestic award rendered in the United States."  

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135 *Yusef*, 126 F.3d at 20 citing NY Convention Art. V(1)(e)(emphasis added).  
136 *Yusef*, 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 §§10 and 11 Art. 1 of the FAA to non-domestic awards that had been rendered in the U.S. and were subject to confirmation under the NY Convention. However, the two district courts did not address the significance of Art. V(1)(e) of the NY Convention.).  
137 *Yusef*, 126 F.3d at 21.  
138 *Yusef*, 126 F.3d at 20 (emphasis added).  
139 *Yusef*, 126 F.3d at 21.  
In further support of its reasoning, the *Yusef* court argued that its analysis was consistent with the Sixth Circuit's in *M & C*,142 which previously held that, "it 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."143 Also, with the Southern District of New York's decision in *Int'l Standard*, which 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."144

Moreover, the Second Circuit relied on numerous commentators' writings on the Convention’s vacatur provisions.145 According to the court, the commentators have 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."146 The court then recognized that:

> [f]rom 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 nondomestic within the meaning of the Convention as we have interpreted it in *Bergesen*.147

Finally, the *Yusef* court adopted the following two prong holding for the review of arbitration awards governed by the NY Convention:

142 *See supra* at pp. 15-16.
143 *Yusef*, 126 F.3d at 21 citing *M & C* 87 F.3d at 849.
144 *Yusef*, 126 F.3d at 21 citing *Int'l Standard* 745 F.Supp. at 178.
145 *Yusef*, 126 F.3d at 21.
146 *Yusef*, 126 F.3d at 21. The court further observed that:

> [t]he 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 (emphasis added).

147 *Yusef*, 126 F.3d at 23; *see supra* at n. 6 for a discussion of non-domestic awards.
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 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.148


In 2003, the Western District of Michigan149 addressed the Expansion Issues150 in Jacada (Europe), Ltd v. Int'l Marketing Strategies.151 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”).152 The award at issue was rendered in the U.S. and under Michigan state law.153 When addressing the applicable grounds of vacatur, the District Court first observed how 9 U.S.C. §207154 states that the grounds of review in Art. V of the NY Convention155, are the only grounds that can be relied upon in a vacatur proceeding brought under the NY Convention.156 In other words, the grounds are exclusive.157

The court then addressed how the Yusef Court158 circumvented this conclusion by its interpretation of Art. V(1)(e) of the NY Convention.159 Relying on Yusef 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.”160


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148 *Yusef*, 126 F.3d at 23 (emphasis added).
149 This court is located in the Sixth Circuit.
150 See *supra* at p. 7.
152 Certain Underwriters, 239 F.Supp. 2d at 815.
154 See *infra* at n. 242.
155 Id.
156 See *supra* at pp. 19-22.
157 See *supra* at n. 9.
158 See *supra* at n. 9.
159 Jacada, 255 F.Supp. 2d at 750.
In 2005, nine years after its decision in *M&C*\(^{161}\), the Sixth Circuit affirmed the Western District of Michigan's decision in *Jacada I*, in *Jacada v. Int'l Marketing Strategies, Inc.*\(^{162}\). Like the district court in *Jacada I*, the Sixth Circuit in *Jacada II* relied on *Yusef* and concluded that Art. V(1)(e)\(^{163}\) 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.\(^{164}\)

In concluding that Art. V(I)(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.\(^{165}\) Without defining the term "conflict", or discussing its significance, the court concluded that there was no conflict and the vacatur provisions in §§10 and 11 of Art. 1 of the FAA applied.\(^{166}\)

Second, the *Jacada II* court recognized how the award in *M&C* was made in England and confirmation sought in the US, while the award in *Jacada II* was made in the U.S. and confirmation also sought in the U.S.\(^{167}\) 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\(^{168}\) of the state where the award was made. In this case, U.S. law.


In 2006, the Third Circuit addressed the scope of the Expansion Issues in *Admart AG; Heller Werkstatt Gesmbh v. Stephen and Mary Birch Foundation*.\(^{169}\) The arbitration at issue took place in Switzerland and was governed by Swiss law.\(^{170}\) 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").\(^{171}\) The arbitrators ruled in favor of Admart and the District Court confirmed the award.\(^{172}\)

\(^{161}\) *See supra* at pp. 15-16 for a discussion of *M&C*.

\(^{162}\) 401 F.3d 701 (6th Cir. 2005) *cert denied* *Jacada (Europe), Ltd. v. International Marketing Strategies, Inc.*, 126 S.Ct. 735 (2005)(hereinafter, "*Jacada II*").

\(^{163}\) *See supra* at n. 9.

\(^{164}\) *Jacada II*, 401 F.3d at 709.

\(^{165}\) *Jacada II*, 401 F.3d at 709 n. 8.

\(^{166}\) *Id.* at 709 n. 8.

\(^{167}\) *Id.* at 709.

\(^{168}\) *Id.* at 709; Art. III of the NY Convention dictates:

\[^{169}\]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards. (emphasis added).

\(^{170}\) 457 F3d 302 (3d Cir. 2006).

\(^{171}\) *Admart AG*, 457 F3d at 303.

\(^{172}\) *Id.* at 305.
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.\textsuperscript{173} The court next addressed \textit{Yusef} 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."\textsuperscript{174} Further, how the \textit{Yusef} court "concluded that more flexibility was available when the arbitration site and the site of the confirmation proceeding were within the same jurisdiction."\textsuperscript{175}

On the other hand, the Third Circuit recognized how the \textit{Yusef} 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 Art. V of the Convention."\textsuperscript{176} 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."\textsuperscript{177}

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 enumerated in Art. V of the NY Convention could be relied upon by the party challenging the award.\textsuperscript{178}


About eight months after the \textit{Yusef} decision, the Eleventh Circuit weighed in on the Expansion Issues in \textit{Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte}.\textsuperscript{179} This

\begin{itemize}
\item \textsuperscript{173} Id. at 307-08.
\item \textsuperscript{174} Id. at 308.
\item \textsuperscript{175} Id. at 308.
\item \textsuperscript{176} Id. at 308.
\item \textsuperscript{177} Id. at 308 (citations omitted)(emphasis added).
\item \textsuperscript{178} Id. at 308-09.
\item \textsuperscript{179} 141 F.3d 1434 (11th Cir. 1998) \textit{cert denied} Nitram, Inc. v. M.A.N. Gutehoffnungshutte GmbH, 525 U.S. 1068, 119 S.Ct. 797 (1999); \textit{see also}, Four Seasons Hotels and 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. The \textit{Four Seasons} court observed that the decisions in \textit{Industrial Risk} and \textit{Yusef} are inconsistent. The Second Circuit in \textit{Yusef} distinguished between a motion to confirm and a motion to vacate, while the Eleventh Circuit in \textit{Industrial Risk} did not distinguish between the proceedings. Also, \textit{Yusef} concluded that the vacatur provisions in and implied under §§10 and 11 of Art. 1 of the FAA were applicable to a non-domestic award rendered in the U.S., while the \textit{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. Based on \textit{Industrial Risk's} holding, the \textit{Four Seasons} court concluded the NY
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.").\textsuperscript{180}

Nitram commenced an action in Florida state court against IRI, Barnard, Barnard Engineers and ISI.\textsuperscript{181} The case was removed to Federal Court.\textsuperscript{182} Barnard, Barnard Engineers and ISI proceeded to file a third-party claim against M.A.N. Thereafter, M.A.N. moved to compel arbitration pursuant to an arbitration clause in the parties’ contract.\textsuperscript{183} An arbitration subsequently took place in Tampa, Florida, under the AAA’s rules, and governed by Florida law.\textsuperscript{184} The arbitration panel found in favor of M.A.N. and against Barnard, Barnard Engineers and ISI.\textsuperscript{185}

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.\textsuperscript{186} The District Court held that Ch. 1 of the FAA, 9 U.S.C. §§1-16 (1994), as well as the NY Convention's vacatur provisions in Art. V, applied to this dispute.\textsuperscript{187}

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

\textit{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?}\textsuperscript{188}

The Eleventh Circuit overruled the district court, and concluded that only Ch. 2 of the FAA, 9 U.S.C. §§ 201-208, governing non-domestic arbitral proceedings, applied to this dispute.\textsuperscript{189}

\footnotesize{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 \textit{never} applicable in actions governed by the NY Convention and Art. 2 of the FAA,); see also, Nicor Intl Corp. v. El Paso Co., 318 F.Supp. 1160, n. 7 (S.D. Fl. 2004)(observing the existence of a possible circuit split between Industrial Risk and Yusef as to whether grounds of vacatur outside of Art. V of the NY Convention apply to actions governed by the NY Convention.).

\textit{Industrial Risk}, 141 F.3d at 1437-38.

\textit{Id.} at 1438.

\textit{Id.} at 1438-39.

\textit{Id.} at 1439.

\textit{Id.}

\textit{Industrial Risk}, 141 F.3d at 1443.

\textit{Id.} at 1439.

\textit{Id.} at 1440.

\textit{Id.} at 1440.}
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.\footnote{\textit{Industrial Risk}, 141 F.3d at 1440; see supra at n. 6 for a more detailed discussion of non-domestic awards.} Accordingly, it then observed, that the "Tampa panel's arbitral award must be confirmed \textit{unless} appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention."\footnote{\textit{Industrial Risk}, 141 F.3d at 1441 (emphasis added).} Thereafter, the court stated that the "New York Convention's enumeration of defenses against enforcement is \textit{exclusive}."\footnote{\textit{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 "\textit{decisive}," despite how the award was made and enforcement sought in the same signatory state.\footnote{\textit{Id.} at 1446.} In support of that argument, the court recognized that "Section 207 of Chapter 2 of the FAA explicitly requires that a federal court '\textit{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.' "\footnote{\textit{Industrial Risk}, 141 F.3d at 1446 citing \textit{9 U.S.C. § 207} (1997 supp.) (emphasis added).} 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, \textit{only if} that party furnishes ... proof that one of the enumerated defenses is applicable.' "\footnote{\textit{Id.} at 1446.} The Eleventh Circuit then concluded "that \textit{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 \textit{any other grounds not specified by the Convention}."\footnote{\textit{Industrial Risk}, 141 F.3d at 1446 citing \textit{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 \textit{9 U.S.C.A. § 201 note} (West supp.1997)) (emphasis added).}

F. \textbf{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}


The Third Circuit addressed the Expansion Issues about three years before its decision in \textit{Admart} in \textit{China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Co.}.\footnote{\textit{China Minmetals}, 334 F.3d at 277.} An arbitration was conducted in China, before the China International Economic and Trade Arbitration Commission.\footnote{\textit{334 F.3d 274} (3d Cir. 2003).} 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 Goods and Materials Trading Corp. of Shantou S.E.Z. ("Shantou"). China Minmetals was victorious. China Minmetals moved to confirm and enforce the arbitration award. Chi Mei opposed China Minmetals' motion to confirm and also cross – moved to deny China Minmetals' requests. Additionally, Chi Mei requested the court rule on the validity of the underlying arbitration agreement. The District Court entered an order granting Minmetals' motion to confirm and enforce the award and denying Chi Mei's cross-motion. Chi Mei appealed the District Court’s decision to the Third Circuit.

The Third Circuit observed:

[t]he 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.

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." China Minmetals argued that the general provisions in Art. 1 of the FAA and the NY Convention are different. 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. 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.

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 agreement to arbitrate."

In analyzing the two questions, the Third Circuit first examined 9 U.S.C. § 207. It then laid out the vacatur provisions in Art. V of the NY Convention.

\[\text{References:}\]
199 China Minmetals, 334 F.3d at 276-77.
200 Id. at 278.
201 Id.
202 Id.
203 Id.
204 Id.
205 Id.
206 China Minmetals, 334 F.3d at 279 (this issue is arguably resolved by Art. II (3) of the NY Convention).
207 Id. at 279.
208 Id. at 279.
209 Id. at 279.
210 Id. at 278.
211 Id. at 279.
observed pursuant to 9 U.S.C. § 208, 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.\textsuperscript{215}

The court next recognized that the grounds of review under Art. V of the NY Convention are construed narrowly.\textsuperscript{216} Relying on \textit{Yusef}\textsuperscript{217} 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 Art. V of the NY Convention are the only grounds available for setting aside an arbitral award."\textsuperscript{218} This narrow construction is consistent with 9 U.S.C. §207,\textsuperscript{219} which states an award \textit{shall} be confirmed unless one of the grounds specified in the NY Convention is satisfied.\textsuperscript{220} 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."\textsuperscript{221}

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.\textsuperscript{222} In reaching its conclusion, the court distinguished \textit{Yusef}\textsuperscript{223} 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."\textsuperscript{224} Finally, the court held that "a district court should refuse to enforce an arbitration award under the Convention where

\begin{itemize}
\item \textsuperscript{212} \textit{See infra} at n. 242; \textit{China Minmetals}, 334 F.3d at 279.
\item \textsuperscript{213} \textit{See supra} at n. 9; \textit{China Minmetals}, 334 F.3d at 279-80.
\item \textsuperscript{214} \textit{See supra} at n. 32; \textit{China Minmetals}, 334 F.3d at 280.
\item \textsuperscript{215} \textit{China Minmetals}, 334 F.3d at 280 citing 9 U.S.C. §208.
\item \textsuperscript{216} \textit{China Minmetals}, 334 F.3d at 283; \textit{see infra} at pp. 37-38 for a more detailed discussion on how the grounds of review in Art. V of the NY Convention were meant to be narrowly construed.
\item \textsuperscript{217} \textit{See supra} at pp. 19-22.
\item \textsuperscript{218} \textit{China Minmetals}, 334 F.3d at 283 (citations omitted)(emphasis added).
\item \textsuperscript{219} \textit{See infra} at n. 242.
\item \textsuperscript{220} \textit{China Minmetals}, 334 F.3d at 283 (emphasis added).
\item \textsuperscript{221} \textit{Id.} at 283.
\item \textsuperscript{222} \textit{Id.} at 286. The \textit{China Minmetals} court does not rely on Art. II(3) of the NY Convention, which arguably resolves this issue. This section states that:
\begin{quote}
\textbf{[t]he 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 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. (emphasis added).}
\end{quote}
\item \textsuperscript{223} \textit{See supra} at pp. 19-22.
\item \textsuperscript{224} \textit{China Minmetals}, 334 F.3d at 286.
\end{itemize}
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.”


In 2003, the Fifth Circuit addressed the Expansion Issues for the first time in Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi. The dispute before the court involved an arbitration that took place 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. The arbitration panel rendered a substantial award in favor of KBC.

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. In opposing KBC’s request for confirmation in the U.S. District Court, Perusahaan filed a motion to vacate the award. In its motion to vacate, Perusahaan 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.”

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225 Id. at 286.
226 335 F.3d 357 (5th Cir. 2003)(hereinafter “Karaha Bodas I’); see also, Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi, 364 F.3d 274, 287-88, 309 (5th Cir. 2004) (hereinafter referred to as ”Karaha Bodas II”)
227 Karaha Bodas II, 364 F.3d at 288.
228 Id. at 360-61.
229 Id. at 361.
230 Id. at 361.
Perusahaan relied on four grounds of review enumerated in the NY Convention. The District Court granted KBC’s request for confirmation and Perusahaan appealed. 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.

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.

Relying on Yusuf, the Fifth Circuit first observed that “[t]he 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.’” The court also observed a country has primary jurisdiction over an award if it is faced with an award in "the country in which, or under the [arbitration] law of which, [an] award was made." 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."

Based on this two pronged approach, Perusahaan argued that “[t]he limitation of being a court of secondary jurisdiction [...] also deprives the district court of the competence to issue injunctive relief here." 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 antisuit injunction.

IV. Analysis

231 Karaha Bodas I, 335 F.3d. at 361
232 Id. at 361.
233 Id. at 362 (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 at pp. 19-22.
237 Karaha Bodas I, 335 F.3d. at 365 (emphasis added).
238 Id. at 365 (emphasis added).
239 Karaha Bodas, 335 F.3d. at 365.
240 Id. at 365.
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. The Consensus, clear from courts' resolution of the Expansion Issues, is erroneous for various reasons.

Initially, the operative/material provisions in §207 of the NY Convention have virtually the same meaning as the operative/material provisions in §9 of Ch. 1 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 is extremely limited. Significantly, however, despite the similarities in the operative/material language, only courts addressing the grounds of vacatur in §§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 §208 of Ch. 2 of the FAA and/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. In sidestepping the Consensus resulting from the resolution of the

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241 The Consensus, initially referred to supra at p. 7, is arguably undermined by various Courts, including the China Minmetals court. 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. 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.” 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/vacatur stage, should make an independent determination about the enforceability of an arbitration clause.

242 Section 207 of the NY Convention states, "[i]f 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." (emphasis added).

243 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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards is very limited to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation").

244 See supra at n. 32.

245 The only Circuit Court that has questioned the conclusion about Art. V(1)(e) is the Industrial Risk court. This court's decision is discussed supra at pp. 25-27.
Expansion Issues, courts, through Art. V(1)(e), apply 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. To reach this conclusion, courts ignore how the material/operative language in Art. V(1)(e) of the NY Convention is in the past tense.

Additionally, many of the same courts also ignore how all the NY Convention’s vacatur provisions have historically been narrowly construed.

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*, 250 *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 251 and *First Options of Chicago, Inc. v. Kaplan*, 252; (ii) various cases addressing whether parties can contract to expand the judicial review provisions in §§10 and 11 of Ch. 1 of the FAA and (iii) commentators’ writings addressing the same issue.

The majority of the courts and commentators addressing whether parties can contract to expand the judicial review provisions in §§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 § 2 of Art. 1 of the FAA and § 202 of Art. 2 of the FAA – and the efficiency arbitration as a form of dispute resolution compared to litigation is supposed to provide.

As a result of the Consensus, however, courts addressing whether parties can contract to expand the judicial review provisions in Art. V of the Convention will downplay or completely ignore how 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,

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247 *See supra* at n. 9.
248 *See infra* at pp. 38-39.
249 *See infra* at pp. 37-38.
254 *See infra* at pp. 40-48. 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.
and accordingly, whether parties can contract to expand the judicial review provisions applicable to the NY Convention and Art. 2 of the FAA.

A. The Similarities Between the Operative/Material Language in §207 of Ch. 2 of the FAA and §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 §207 of Art. 2 of the FAA and §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:

[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. (emphasis added).

Section 9 of Art. 1 of the FAA states:

[i]f 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.

Although 9 U.S.C. § 207 and 9 U.S.C. § 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." Likewise, "must" is defined as "be required by law, custom, or moral conscience" or "be commanded or requested". As both terms describe something that has to be done without exception, their meanings are virtually identical. Since 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. §207 includes the operative/material term "specified" and 9 U.S.C. § 9 uses the operative/material term "prescribed", before laying out the provisions parties have to rely upon when addressing a motion to confirm or vacate. The term

256 9 U.S.C § 9 (emphasis added).
"specified" means "to name or state explicitly or in detail",\(^{259}\) 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."\(^{260}\) 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, as 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."\(^{261}\) 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" and/or "must", and "prescribed" and/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. § 9\(^{262}\) seems to mandate that vacatur provisions outside of §§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\(^{263}\) can be relied upon although it is not a ground of review enumerated in §§10 and 11 of Art. 1 of the FAA. Additionally, most federal circuit courts have recognized other implied grounds of review outside of those specified in §§10 and 11 of Ch. 1 of the FAA.\(^{264}\)

To the contrary, despite language with a virtually identical meaning, courts construing the grounds of vacatur applicable under the NY Convention have concluded

\(^{259}\) See Merriam Webster Dictionary at http://www.m-w.com/dictionary/specifed.

\(^{260}\) See Merriam Webster Dictionary at http://www.m-w.com/dictionary/prescribed.

\(^{261}\) See Merriam Webster Dictionary at http://www.m-w.com/cgi-bin/dictionary.

\(^{262}\) See supra at n. 19.


\(^{264}\) Manion v. Nagin, 392 F.3d 294, 298-99 (8th Cir. 2004) (citations omitted)(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)(same); Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 779 (11th Cir. 1993)(recognizing an "arbitrary or capricious" extra-statutory ground of review); United States Postal Serv. v. National Ass'n of Letter Carriers, 847 F.2d 775, 778 (11th Cir. 1988)(same); Manville Forest Products Corp. v. United Paperworkers International Union, 831 F.2d 72, 74 (5th Cir. 1987)(same); Safeway Stores v. American Bakery and Confectionery Workers, Local 111, 390 F.2d 79, 82 (5th Cir.1968)(same); Hruban v. Steinman, 40 Fed. Appx. 723, 724 (3d Cir. 2002)(recognizing a "public policy" extra-statutory ground of review); Exxon Corp. v. Baton Rouge Oil & Chemical Workers Union, 77 F.3d 850, 853 (5th Cir. 1996)(same); Delta Air Lines, Inc. v. Airline Pilots Ass'n, 861 F.2d 665, 671 (11th Cir. 1988), cert. denied, 493 U.S. 871 (same); Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc., 138 F.3d 160, 165 (referring to holding in Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1320 (5th Cir. 1994) (recognizing an extra-statutory ground of review where the award "fails to draw its essence from the underlying contract"); Anderman/Smith Operating Co., 918 F.2d 1215, 1218 (5th Cir. 1990) (same).
that only those grounds of review enumerated in Art. V of the NY Convention can be relied upon.\textsuperscript{265} 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 virtually identical meaning operative/material language. As a result of this failure, those courts reaching the conclusion that the grounds of review in Art. V of the NY Convention are exclusive, are incorrect.\textsuperscript{266} Since the courts addressing the Expansion Issues do not acknowledge how the meaning of the material/operative language in the two provisions is 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 §208 of the NY Convention is Misconstrued and/or Ignored

Pursuant to §208\textsuperscript{267} 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" with the provisions in the NY Convention. 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 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.\textsuperscript{268}

When these definitions are applied in the context of §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

\textsuperscript{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.

\textsuperscript{266} As will be discussed in more detail infra, the majority of these courts circumvent this prohibition in certain instances through their interpretation of Art. V(1)(e) of the NY Convention.

\textsuperscript{267} See supra at n. 32.

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?269

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.270

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 §§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 it can apply to actions governed by the NY Convention in certain situations is superfluous, as the grounds would apply anyway.271

As such, the failure of courts to sufficiently address the actual meaning of the term "conflict", will most likely lead court's 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.

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269 Analogously, §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, §2-207 concerns documents exchanged by contracting parties, which cover the purchase/sale of goods, but do not contain the same terms. In other words, §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.

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. 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 how the use of the word "shall" in 9 U.SC. § 207 is 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. However, this interpretation of § 207 of Art. 2 of the FAA is arguably incorrect, as those courts addressing an analogous 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 at pp. 33-35. In fact, all the Circuit Courts addressing the same argument under §9 of Art. 1 of the FAA have at least recognized manifest disregard of the law, a ground of review not enumerated in §§10 and 11 of Art. 1 of the FAA.

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\textsuperscript{272} 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. Courts reach this conclusion despite how an analogous 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\textsuperscript{273} – can be pigeon holed 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.\textsuperscript{274}

Despite numerous courts concluding that the NY Convention's review provisions were intended to be narrowly construed, the Second Circuit in \textit{Yusef},\textsuperscript{275} and its progeny, have still tried to pigeon hole the manifest disregard of the law ground of review – and the other vacatur provisions enumerated in, and implied under §§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 §§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 §§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\textsuperscript{276} – \textit{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

Art. V(1)(e) allows an arbitration award to be vacated when:

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\textsuperscript{272} \textit{See supra} at n. 9.
\textsuperscript{273} \textit{See supra} at n. 10.
\textsuperscript{274} \textit{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....'").
\textsuperscript{275} \textit{See supra} at pp. 19-22.
\textsuperscript{276} \textit{See supra} at p. 7.
the award has not *yet become binding on the parties*[^1], 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]

Courts attempting to pigeon hole the vacatur provisions from §§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 *Yusef* court, its progeny, and certain commentators argue, for 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."

Significantly, the awards addressed by *Yusef* 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.

Additionally, an interpretation that recognizes the significance of the past tense is consistent with the legislative history behind the NY Convention, case law interpreting

[^1]: 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 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.

[^2]: See supra at n. 9.
the NY Convention, and commentator's writings, all stressing the uniformity that the NY
Convention was intended to provide. 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 is identical to §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 contracts. 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. (emphasis added).

In addition to §2 of Ch. 1 of the FAA, courts analyzing whether parties can
contract to expand the judicial review provisions in §§10 and 11 of Art. 1 of the FAA rely
on Byrd280, Volt281 and First Options282, 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.283

Courts allowing parties to contract to expand the judicial review provisions in
§§10 and 11 of Art. 1 of the FAA, argue that treating parties’ contracts containing an
arbitration clause the same as any other contracts trumps any other policy underlying Art.
1 of the FAA.284 On the other hand, those courts concluding parties cannot contract to
expand judicial review under §§10 and 11, note that enforcing parties arbitration
agreements according to their terms, like any other contracts, does not trump, but must

279 See supra at n. 146.
283 The efficiency arbitration as an institution is supposed to provide distinguishes it from litigation and
makes it a truly alternative form of dispute resolution. Other purposes underlying Art. 1 of the FAA, Art. 2
of the FAA and the NY Convention will be discussed in less detail infra.
284 See, Chafetz, supra n. 24, at 3, 16-25.
co-exist with, other policies underlying Art. 1 of the FAA, especially the efficiency arbitration as an institution provides.  

Only select cases addressing confirmation or vacatur proceedings under the NY Convention and Art. 2 of the FAA, and/or the Expansion Issues, address Byrd, Volt or First Options. 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, Jr. Univ. 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." 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 is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." Courts concentrate on certain language from Volt when addressing whether contractual agreements to expand the judicial review provisions in §§10 and 11 of Art. 1 of the FAA are enforceable. The relevant language begins as follows:

[i]n 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." [Southland] (finding pre-empted a state statute which rendered agreements to arbitrate certain franchise claims unenforceable); [Perry] (finding pre-empted a state statute which rendered unenforceable private agreements to arbitrate certain wage collection claims).

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285 See, Chafetz, supra n. 24, at 3, 25-36.
286 See e.g., Encyclopaedia Universalis S.A., 403 F.3d at 91 (relying on Volt); Czarina, L.L.C., 358 F.3d at 1293-94 (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, 2005 WL 1118130 at *7, *9 (relying on First Options); Jacada I, 255 F.Supp.2d at 750 (relying on Volt).
288 Volt, 489 U.S. at 469, 109 S.Ct. at 1250.
The Supreme Court continued:

[b]ut 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, [see Mitsubishi], 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, [see Byrd], we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.²⁹⁵

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 §§10 and 11 of Art. 1 of the FAA.²⁹¹ 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 §2 of Ch. 1 of the FAA – including all contracts to expand Art. 1 of the FAA's judicial review provisions.²⁹²

²⁹⁰ Volt, 489 U.S at 479, 109 S.Ct. at 1255-56 (emphasis added).
²⁹¹ Chafetz, supra. n. 24 at 11-13, 43-47.
²⁹² Volt, 489 U.S at 479, 109 S.Ct. at 1255-56
²⁹³ Volt, 489 U.S. at 477-78, 109 S.Ct. at 1255.
²⁹⁴ Id at 478-79, 109 S. Ct. at 1255-56 (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 CTLR 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 Enkishev, 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.").

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"²⁹³ or "do[ ] violence to the policies behind the FAA."²⁹⁴ 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."\textsuperscript{295} 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."\textsuperscript{296}

It is not clear from \textit{Volt} what limiting language the Supreme Court wishes for the lower courts to apply to a given case.\textsuperscript{297} There is no indication that the Supreme Court intended for all the limiting language to mean the same thing and it does not.\textsuperscript{298} 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.\textsuperscript{299}

While stressing the importance of enforcing parties' agreements according to their terms – §2 of Ch. 1 of the FAA – the \textit{Volt} court unquestionably determined Art. 1 of the FAA was not intended to completely preempt state arbitration schemes.\textsuperscript{300} 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 §§10 and 11 of Art. 1 of the FAA, argue that \textit{Volt}’s premise concerning parties' intent also can be applied to parties' agreements to expand Art. 1 of the FAA’s judicial review provisions.\textsuperscript{301} Thus, if parties intend for more judicial review than provided for in §§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.\textsuperscript{302}

Due to parties' reliance on various aspects of \textit{Volt} in the context of Art. 2 of the FAA and the NY Convention\textsuperscript{303}, parties will also rely on \textit{Volt} when arguing that contracts to expand the judicial review provisions in Art. V of the NY Convention should be enforced.\textsuperscript{304} However, the qualifying/limiting language in \textit{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 the FAA, despite the contracting parties’ intent.\textsuperscript{305}

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

\textsuperscript{296} \textit{Id.} at 478-79, 109 S. Ct. at 1255-56 (emphasis added).
\textsuperscript{297} Chafetz, \textit{supra} n. 24, at 11-13, 43-47.
\textsuperscript{298} \textit{Id.}
\textsuperscript{299} \textit{Id.}
\textsuperscript{300} \textit{Id.}
\textsuperscript{301} \textit{Id.}
\textsuperscript{302} Chafetz, \textit{supra} n. 24, at 11-13, 43-47.
\textsuperscript{303} See \textit{supra} at n. 286.
\textsuperscript{304} As discussed \textit{supra}, these contracts under the NY Convention could include agreements to apply the vacatur provisions, in and implied under §§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.
\textsuperscript{305} Chafetz, \textit{supra} n. 24, at 11-13, 43-47.
expand the judicial review provisions in the NY Convention, like it does under §§10 and 11 of Art. 1 of the FAA. 306

ii. Byrd and First Options

Various courts also rely on Dean Witter Reynolds, Inc. v. Byrd307 and First Options of Chicago, Inc. v. Kaplan,308 when analyzing whether parties can contract to expand the judicial review provision in §§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 §§ 10 and 11 of Art. 1 of the FAA, depends, among other things, on the balance between two of the main purposes underlying the FAA: (i) enforcing parties' agreements according to their terms and (ii) maintaining arbitral efficiency.309

1. Byrd

In Byrd, Lamar Byrd ("Mr. Byrd") opened a securities account with Dean Witter Reynolds Inc. ("Dean Witter").310 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."311 Mr. Byrd sued Dean Witter in Federal Court and alleged violations of the federal securities laws and also certain pendant state claims.312 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.313 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.314 The District Court denied this request and the Ninth Circuit Court of Appeals affirmed.315

The question presented to the Supreme Court in Byrd was "whether, when a complaint raises both federal securities claims and pendant 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."316 The Supreme Court held that "the Arbitration Act requires district courts to compel arbitration of pendant 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."317 In reaching this

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306 Id.
309 Chafetz, supra. n. 24, at 11-13, 43-47.
310 Byrd, 470 U.S. at 214, 105 S.Ct. at 1239.
311 Id. at 215, 105 S.Ct. at 1239 (quoting App. to Pet. for Cert. 11).
312 Id. at 214, 105 S.Ct. at 1239.
313 Id. at 215, 105 S.Ct. at 1239.
314 Id. at 215-216, 105 S.Ct. at 1239.
315 Id. at 216, 105 S.Ct. at 1239.
316 Id. at 217, 105 S.Ct. at 1239.
317 Id. at 217, 105 S.Ct. at 1239.
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. However, "this is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes."  

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. The court observed:

[w]e 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.

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. Kaplans’ wholly owned investment company, MK Investments Inc. ("MKI"). MKI and the Kaplans incurred substantial amounts of debt to First Options after the 1987 Stock Market Crash. The Kaplans and MKI entered into a four document "workout" agreement to alleviate the Kaplans’ debt load. Of the four documents, only the workout agreement signed by MKI contained an arbitration clause. 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. Since only MKI signed the workout document containing the arbitration clause, the Kaplans refused to arbitrate.

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

320 _Id._ at 221, 105 S.Ct. at 1242-1243 (emphasis added).
321 _First Options_, 514 U.S. at 940, 115 S.Ct. at 1922.
322 _Id._ at 940, 115 S.Ct. at 1922.
323 _Id._, 115 S.Ct. at 1922.
324 _Id._ at 941, 115 S.Ct. at 1922.
325 _Id._ at 940, 115 S.Ct. at 1922.
326 _Id._ at 941, 115 S.Ct. at 1922.
parties agree[d] to submit the arbitrability question[ ] itself to arbitration.

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. The second and third counter-arguments are relevant to balancing the importance of arbitral efficiency and enforcing parties' agreements according to their terms. 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." 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."

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." 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."

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."

F. Distinguishing Byrd and First Options From Cases Addressing Contractual Expansion of the Vacatur Provisions in §§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 §§10 and 11 of Ch. 1 of the FAA – which numerous courts have addressed – and Art. V of the NY Convention.

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327 Id. at 943.
328 Id. at 943.
329 Id. at 946.
330 Id. at 946-947, 115 S.Ct. at 1925.
331 First Options, 514 U.S. 938, 946, 115 S.Ct. 1920, 1925.
332 Id., 115 S.Ct. at 1925.
333 Id. at 947, 115 S.Ct. at 1925.
334 Id., 115 S.Ct. at 1925 (internal quotations and citations omitted).
335 Id., supra n. 24, at 15-16, 54-57.
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.\(^{337}\) 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.\(^{338}\) 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.\(^{339}\) In other words, a concurrent arbitration and litigation between the same parties addressing different issues and causes of action.\(^{340}\) Likewise, First Options addressed whether parties were allowed to decide who should decide the issue of arbitrability,\(^{341}\) or in other words, who should decide which issues and causes of action are arbitrable.\(^{342}\) 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.\(^{343}\) Although the First Options court did cite Byrd, it did not cite it for this purpose, even though it was called on to balance the two policies.\(^{344}\) 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.\(^{345}\)

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. 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.\(^{346}\)

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

\(^{337}\) *Id.*  
\(^{338}\) *Id.*  
\(^{339}\) *Id.*  
\(^{340}\) *Id.*  
\(^{341}\) *Id.*  
\(^{342}\) *Id.*  
\(^{343}\) *Id.*  
\(^{344}\) *First Options*, 115 S.Ct. at 1925, 514 U.S. at 945.  
\(^{345}\) *Chafetz*, supra n. 24, at 15-16, 54-57.  
\(^{346}\) *Id.; see supra* at pp. 45-46.
resolution process would be slowed down.\textsuperscript{347} 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.\textsuperscript{348}

There is irrefutable evidence that the dispute resolution process is slower and less efficient when parties contract to expand the judicial review provisions in §§10 and 11 of Art. 1 of the FAA.\textsuperscript{349} 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.\textsuperscript{350} Second and more importantly, without expanded judicial review, the confirmation of arbitration awards would be limited to the restrictive judicial review provisions in §§10 and 11 of Art. 1 of the FAA, and other implied grounds of review, like manifest disregard of the law.\textsuperscript{351} All standards courts are intimately familiar with.

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 \textit{First Options}, which concluded that arbitral efficiency was not compromised. 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 \textit{First Options}' resolution of argument two and argument three in the context of parties contracting to expand the judicial review provisions in §§10 and 11 of Art. 1 of the FAA.\textsuperscript{352}

Moreover, since courts addressing the NY Convention rely on \textit{First Options} in certain contexts, those same courts will also rely on \textit{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 §§10 and 11 of Ch. 1 of the FAA.\textsuperscript{353}

\textbf{G. Conclusion}

\begin{itemize}
\item \textsuperscript{347} \textit{Id.}
\item \textsuperscript{348} \textit{Id.}
\item \textsuperscript{349} \textit{Id.}
\item \textsuperscript{350} \textit{Chafetz, supra} n. 24, at 15-16, 54-57.
\item \textsuperscript{351} \textit{Chafetz, supra} n. 24, at 15-16, 54-57.
\item \textsuperscript{352} \textit{Id.}
\item \textsuperscript{353} \textit{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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards is very limited to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation"); \textit{see also}, \textit{Chafetz, supra} n. 24, at 15-16, 54-57.
\end{itemize}
The majority of courts construing whether parties can contract to expand the judicial review provisions in §§10 and 11 of Art. 1 of the FAA, among other sources, rely on §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. Despite acknowledging the importance of this policy, the courts addressing whether parties can contract to expand the judicial review provisions in §§10 and 11 of Art. 1 of the FAA are split on the issue. This split exists despite how all the federal courts addressing this issue have concluded that grounds of vacatur outside of those enumerated in §§10 and 11 of Ch. 1 of the FAA, including manifest disregard of the law and/or certain other implied grounds of vacatur, can be relied upon in vacatur proceedings. 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, 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 too, like courts addressing the issue under Art. 1 of the FAA, will rely upon §202 of the FAA, Volt, Byrd and First Options. 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. 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 §§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.

354 See supra at n. 25.
355 Id.
357 See supra at pp. 8-9.
358 See supra at n. 25.
359 See supra at p. 7 for a discussion of the Consensus.
360 As discussed supra, this section is identical to §2 of Art. 1 of the FAA.
361 See supra at pp. 40-48 for a discussion of these three decisions.
362 See supra at n. 25.
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. 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.