

PARTIES' POWER TO VARY STANDARDS FOR REVIEW OF INTERNATIONAL COMMERCIAL ARBITRATION AWARDS

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I. BACKGROUND: THE FEDERAL ARBITRATION ACT

In every area of the law there are core questions touching the essence of the enterprise. In arbitration law, two such questions are (1) When is a transaction “arbitration” within the scope of relevant treaties and statutes dealing with arbitration agreements and awards?; and (2) If the parties have agreed to arbitrate disputes between them, to what extent can they vary by agreement the effect of applicable arbitration treaties and legislation?¹ More precisely, can parties agree to expand the scope of judicial review of arbitral awards to include review for errors of fact or law?

Unfortunately, neither of these questions is clearly answered under contemporary arbitration law, whether domestic or international.

Under one view of the enterprise, arbitration involves both a commitment by the parties to submit agreed disputes to third parties for a decision on the merits *and* an explicit or implicit agreement that the award shall be final and binding between them on the merits. Under this view, if the parties have agreed to arbitration, they have no power to vary the effect of the rules that determine the enforceability of arbitration agreements and awards. These rules (on the enforceability of agreements to arbitrate and the finality of awards) are mandatory rather than default rules. Thus, an agreement between the parties to expand the scope of judicial review is not enforceable² within the framework of

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¹ A distinction should be drawn between mandatory arbitration law and mandatory rules of substantive law, such as a right created by statute. The effect of rules in the first category cannot be varied by agreement. Substantive rules in the second category are related to arbitration in that they may not be “capable” of arbitration or, if decided by an arbitration panel, may be more susceptible to judicial review on the merits. See Phillip J. McConaughay, *The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration*, 93 Nw. U. L. REV. 453 (1999).

² This was the result in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 1000, 1002 (9th Cir. 2003) (en banc), cert. denied, 540 U.S. 1098 (2004). The court severed the illegal clause from the agreement, leaving the arbitration award to stand or fall under the provisions of section 10 of the Federal Arbitration Act, as interpreted by the courts. In addition to the Ninth Circuit, the Seventh and the Tenth Circuits also adhere to this view. See *Int’l Bhd. of Elec. Workers Local 1985 v. Hoover Co.*, No. 5:05-CV-2780, 2006 WL 1876588, at *8 n.2 (N.D. Ohio July 5, 2006) (Sixth Circuit undecided).

applicable arbitration law.³ This approach, which denies “freedom of contract,” necessarily assumes that there are public interests beyond those of the parties to the arbitration agreement that would be adversely affected. Those interests include the need to maintain a legal framework that ensures that the presumed objectives of arbitration—achieving a relatively quick, informal, inexpensive, and final decision of the dispute—are achieved.

Another view of the enterprise is less concerned about the definition of arbitration or how the line between mandatory and default rules should be drawn. Chapter 1 of the Federal Arbitration Act (“FAA”), which applies in interstate commerce, neither defines arbitration nor states which provisions are mandatory and which are default.⁴ Thus, it is not clear whether the FAA applies if the parties have committed themselves to submit a dispute to arbitrators but have stated that the award is not final on the merits.⁵ Some courts⁶ and commentators⁷ have, without clearly resolving the definitional problem, concluded that the FAA is a collection of default rules, the effect of which can be varied by agreement. If the parties agreed to arbitrate and a dispute between them has been resolved by an arbitral award, the court, within the framework of the FAA, should enforce the agreement to expand the scope of review and either vacate the award or remand the case to the arbitrators if there are errors of fact or law.

Three different types of arguments are mustered to support this conclusion.

³ See Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123 (2002). In a careful and well reasoned article, Professor Schmitz argues both that arbitration means commitment to arbitrate and finality of the award and that the provisions of section 10 of the FAA are mandatory rules. Thus, an agreement to expand the scope of judicial review cannot be enforced under the FAA but might be enforceable as a non-arbitration dispute procedure under the common law.

⁴ Section 10, stating the grounds for vacating awards, simply says that a court with jurisdiction and venue “may make an order vacating the award” where one or more of the stated grounds are found. The Revised Uniform Arbitration Act (“RUAA”) does not define arbitration. It does, however, attempt to state which rules are mandatory and which can be varied by agreement. Although the statutory grounds for vacating an award cannot be varied, the RUAA took no position on whether the parties could expand those grounds by agreement. See Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419 (2003).

⁵ See, e.g., *Dluhos v. Strasberg*, 321 F.3d 365 (3d Cir. 2003). In *Dluhos*, the court held that the ICANN Dispute Resolution Procedure, called “arbitration,” was not subject to the FAA when either party could go to court at any stage of the proceeding. On the other hand, the court suggested that a procedure might be arbitration if the parties were committed to send the dispute to arbitrators for a decision and the “arbitration at issue . . . might realistically settle the dispute.” *Id.* at 370 (quoting *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 349 (3d Cir. 1997) (procedure not arbitration if neither party committed to arbitrate)).

⁶ See *P.R. Tel. Co. v. U.S. Phone Mfg. Co.*, 427 F.3d 21, 30-31 (1st Cir. 2005) (Parties may vary standard of review “only by clear contractual language.”), *cert. denied*, 547 U.S. 1071 (2006). The First, Third, Fourth, and Fifth Circuits follow this approach. See Kristen M. Blankley, *Be More Specific! Can Writing a Detailed Arbitration Agreement Expand Judicial Review Under the Federal Arbitration Act?*, 2 SETON HALL CIRCUIT REV. 391 (2006) (supporting clear agreements defining and limiting power of arbitrators).

⁷ See, e.g., Drahozal, *supra* note 4; Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429 (2004).

First, since arbitration is a “creature of contract,” the parties should be able to craft an enforceable procedure that responds to their particular needs. If they have submitted a dispute to arbitration but are concerned about the quality of the award, why not let them consent to broader judicial review? Put differently, why deny them the protection of applicable arbitration law simply because they have agreed to vary it?

Second, the intent of Congress when it enacted the FAA in 1925 was to protect the agreement to arbitrate by providing strong enforcement remedies, not to create a set of mandatory rules. Arguments to the contrary are generated more from the Supreme Court’s purposive and, to some, improper interpretation of the FAA rather than the legislative history of the statute.⁸

Third, there is no persuasive evidence that enforcing agreements expanding the scope of review will thwart the traditional purposes of arbitration, namely to obtain a relatively quick, informal, and inexpensive award that will settle the dispute fairly between the parties. Whether those purposes are being achieved under current arbitration law and practice is open to question. Moreover, further damage is done (arguably) by the judicially created “manifest disregard of law” standard, which creates incentives for losers to attack arbitration awards even though the odds of success are virtually nil.⁹

In sum, these arguments support the conclusion that, at a minimum, parties can “opt in” to an arbitration treaty or statute by agreeing in writing to arbitrate a dispute and, once into the statute (and committed to arbitrate), can vary the grounds for reviewing the award without losing the benefits and protections of the statute.¹⁰

II. INTERNATIONAL COMMERCIAL ARBITRATION: THE NEW YORK CONVENTION

How do these two questions play out in the enforcement of international commercial arbitration agreements and awards?¹¹ In this arena, the dominant treaty is the Convention on Recognition and Enforcement of Foreign Arbitral

⁸ See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 134-55 (1992); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 *LAW & CONTEMP. PROBS.* 5 (2004).

⁹ For strong arguments supporting the “default rule” conclusion, see EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 111-23 (2006) [hereinafter Brunet ET AL., *ARBITRATION LAW IN AMERICA*]. See also Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 *TEX. INT’L. L.J.* 449, 453-57 (2005) (critiquing reasons offered to deny power to vary).

¹⁰ For example, if there was a “valid provision” to settle the dispute by arbitration, see 9 U.S.C. § 2 (2000), a party might petition for an order compelling arbitration, § 4, and an injunction against a lawsuit pending arbitration, § 3. Similarly, after the award the winning party could petition the court for an order confirming the award, which order would be granted unless the other party invoked the agreement expanding the scope of judicial review. § 9.

¹¹ Professor Moses has discussed some of the complexities under the New York Convention. See Moses, *supra* note 7, at 456-65. She assumes that an agreement to expand the scope of judicial review is enforceable under section 10 of the FAA.

Awards (the "New York Convention"),¹² now ratified by 134 countries, including the United States. In the United States, the New York Convention ("NYC") is implemented by Chapter 2 of the Federal Arbitration Act (the "Convention Act") and, to the extent not in conflict with the Convention Act, Chapter 1 of the FAA.¹³

The implementing legislation varies from country to country. Thus, in England the NYC is implemented by the English Arbitration Act of 1996. Other countries have enacted in whole or in part the UNCITRAL Model Law on International Commercial Arbitration of 1985.¹⁴ Unfortunately, none of these documents define arbitration, and, except for the English Arbitration Act,¹⁵ none clearly state which arbitration rules are mandatory and which are not.

Let us work through these problems with a simple hypothetical.

Suppose that an American seller ("S") and a British buyer ("B") enter into an international contract for the sale of goods. Against all odds, they choose the United Nations Convention on Contracts for the International Sale of Goods ("CISG") as the governing law. They also agree to arbitrate all disputes arising under or relating to the contract. Under the agreement, if S commences arbitration, the place of arbitration is New York City under the AAA International Arbitration Rules. If B commences arbitration, the place of arbitration is London under the rules of the London Court of International Arbitration ("LCIA"). Finally, after some serious discussion, they also agree that at the option of the losing party, any arbitration award "shall be reviewed by a court at the place of arbitration for errors of fact or law." In short, in a contract to arbitrate subject to the NYC they have agreed to expand the scope of judicial review of an international arbitral award.¹⁶

¹² See United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

¹³ 9 U.S.C. § 208.

¹⁴ See BRUNET ET AL., *ARBITRATION LAW IN AMERICA*, *supra* note 9, at 191-98. Professor Richard E. Speidel wrote Chapter Six on International Commercial Arbitration.

¹⁵ Section 1(b) of the EAA states that the "parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest." English Arbitration Act § 1(b) (1996). The "mandatory" provisions, which are stated in Schedule 1, include sections 66-68, dealing with enforcement of the award, challenging the award, and challenging the award for serious irregularity, but not section 69 which deals with "[a]ppeal on point of law." English Arbitration Act sched. 1.

The UN Model Law is less explicit but reaches the same general result: The provisions of the act cannot be varied by agreement unless the phrase "unless otherwise agreed" or the word "may" appears in a particular section. See BRUNET ET AL., *ARBITRATION LAW IN AMERICA*, *supra* note 9, at 219. It is clear that the grounds for denying recognition and enforcement to an award are not subject to variance by agreement. See UNCITRAL Model Law on International Commercial Arbitration art. 36(1) (1985) ("Recognition or enforcement of an arbitral award . . . may be refused only" if the grounds stated in art. 36(1)(a) & (b) are satisfied.)

¹⁶ See BRUNET ET AL., *ARBITRATION LAW IN AMERICA*, *supra* note 9, at 210-13 (discussing when an arbitration is international).

A. *Enforcement of Foreign Awards*

1. *English Award Enforced in the United States*

Assume first that a dispute arose and B commenced arbitration in London. In situations like this, the arbitration is subject to the English Arbitration Act of 1996 and (let us say) the LCIA arbitration rules.¹⁷ Suppose that after a full and fair hearing the tribunal decided that (1) S had breached the contract of sale; (2) B had properly avoided the contract for fundamental breach; and (3) B was entitled to consequential damages in the amount of \$1,000,000. Shortly thereafter, B filed a motion in the federal district court of the Southern District of New York seeking recognition and enforcement of the award under the NYC.¹⁸ S, invoking the contract clause, defends on the ground that the arbitral tribunal made a serious error of law in finding that the contract was properly avoided for fundamental breach and serious errors of fact in calculating consequential damages. B responds that the contract clause expanding the scope of review under Article V of the NYC is not enforceable. S counters with the argument that under Chapter 1 of the FAA at least some courts have held, and most commentators have opined, that agreements to expand the scope of review are enforceable and urges the court to adopt that position and thus review the award for errors of law and fact within the framework of the NYC.

Let us assume that the Second Circuit would agree that such agreements are enforceable under Chapter 1 of the FAA.¹⁹ Should the court adopt S's position when the recognition and enforcement of a foreign arbitral award is involved? In my opinion, the court should reject S's argument.²⁰

The NYC does not define arbitration or clearly state whether the effect of its provisions can be varied by agreement. Nevertheless, it is hard to believe that private parties have power to vary the effect of an international treaty that is the Supreme Law of the Land and was designed to promote uniformity in the enforcement of arbitration agreements and awards in commercial transactions and to minimize the effect of domestic arbitration law.²¹ In particular, Article III provides that "[e]ach Contracting State *shall* recognize arbitral awards as binding and enforce them . . . under the conditions laid down in the following

¹⁷ The English Arbitration Act ("EAA") applies, in general, when the "seat of the arbitration is in England . . ." English Arbitration Act § 2(1). The EAA does not explicitly distinguish between domestic and international arbitration when the arbitration is held in England, although language from the agreement enforcement provision of the NYC is used. *See, e.g.*, § 9(4).

¹⁸ *See* 9 U.S.C. § 207; United Nations Conference on International Commercial Arbitration, *supra* note 12. It is assumed that there are no objections to jurisdiction or venue.

¹⁹ This is still an open question in the Second Circuit.

²⁰ *See* BRUNET ET AL., *ARBITRATION LAW IN AMERICA*, *supra* note 9, at 200-02.

²¹ The Supreme Court has stressed the importance of arbitration in "truly international" agreements to achieve order and predictability and to avoid the submission of claims to hostile or uninformed forums. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515-16 (1974); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). In *Mitsubishi*, the Court enforced an international agreement to arbitrate a dispute that was not arbitrable under domestic law. The Court stressed the "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of international commercial systems for predictability in the resolution of disputes" to support the decision. *Id.*

articles.” Article V states the grounds upon which recognition and enforcement of an award “may be refused” but “*only if* that party furnishes to the competent authority . . . proof that” one of the listed grounds in Article V(1) has been satisfied. Although courts have some discretion in the application of these grounds, the better reasoned cases (in the United States) have held that the specified grounds in Article V are the exclusive grounds for denying recognition and enforcement to foreign awards.²² This means that the grounds for vacating awards stated in section 10 of the FAA, including the judicially created and disruptive ground of “manifest disregard of law,” are not applicable in this setting. Although nothing is certain, it is a safe bet that a private agreement attempting to expand the “exclusive” grounds stated in Article V would not be enforced by American courts. This bet is consistent with two of the most important reasons why private parties agree to international arbitration: (1) to obtain reliable enforcement of international arbitration awards; and (2) to secure the advantages of a neutral forum.²³ In sum, this is the result that should follow when recognition and enforcement of an international arbitration award made in England is sought in the United States.

2. *United States Award Enforced in England*

Assume, instead, that S commenced arbitration in New York under the AAA Rules and obtained an award against B. No recourse against the award was taken by B in the United States. S then sought recognition and enforcement of the award under the NYC in London, and B invoked the agreement and asked the Commercial Court to review the award for errors of fact or law.

The English Arbitration Act applies the same standards to international arbitrations “seated” in London as it does to domestic arbitrations. Foreign arbitration awards, i.e., international arbitration awards made in another country, are treated specifically under Article V of the New York Convention.²⁴ In particular, section 103(1) of the English Arbitration Act provides that “[r]ecognition or enforcement of a New York Convention award shall not be refused except . . .” in the cases stated in section 103(2), (3), and (4)—cases that follow those stated in Article V of the NYC. This does not mean that domestic arbitration law is irrelevant to the enforcement process. For example, section 103(3) provides that an award may be denied recognition and enforcement if the court finds that the subject “matter . . . is not capable of settlement by arbitration” under the law of the country where recognition and enforcement is sought. Similarly, recognition and enforcement can be denied if the award is “contrary to [the] public policy” of the country where recognition and enforcement is sought. In these cases, domestic law is relevant but only through the

²² See, e.g., *Yusuf Ahmed & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998).

²³ See BRUNET ET AL., *ARBITRATION LAW IN AMERICA*, supra note 9, at 188-89. Although the parties in particular transactions may have different objectives, their agreement to expand the scope of review under Article V in effect contracts out of the New York Convention.

²⁴ Section 100(1) provides that a “‘New York Convention Award’ means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.” English Arbitration Act § 100(1) (1996).

application of Article V of the NYC, not because of some doctrine or agreement apart from the grounds stated in Article V. Thus, if section 103, incorporating Article V of the NYC, states the exclusive grounds for denying recognition and enforcement, it seems clear to me that an agreement expanding the scope of judicial review would not be enforceable under section 103 of the English Arbitration Act even though such an agreement might be enforceable under English arbitration law.²⁵

B. Enforcement of Non-Domestic Award in the Country Where Made

As others have noted,²⁶ the issue is more complicated when recognition and enforcement of a non-domestic award made in the United States or in England is sought in the country where the award is made.

Assume that S and B arbitrated in New York City, and B obtained an award on issues of liability and remedy. Article II of the NYC, as implemented by section 202 of the FAA, extends protection of the Convention to both non-domestic arbitration agreements and awards made in the country where enforcement is sought.²⁷ The clearest example is our hypo where an award is made in New York in an arbitration between S, doing business in the United States, and B, doing business in England. This is a non-domestic as opposed to a foreign arbitration award.

Now suppose that S files a motion to vacate the award in favor of B in a federal district court under section 10 of the FAA. Or, in the alternative, suppose that B files a motion for recognition and enforcement of the award under the NYC, and S, in addition to the defenses in Article V of the NYC, asserts the grounds to vacate under section 10. In addition to the statutory grounds, S claims that the award was in “manifest disregard of the law” and also asserts that under the agreement between the parties the court should review the award

²⁵ An agreement to expand the scope of review of a point of law in the award would be enforceable in England if it complied with the requirements for appealing on a “point of law” in section 69 of the EAA. Section 69 does not establish a mandatory rule. *See* English Arbitration Act sched. 1. Rather, the parties can agree to appeal or not “to the court on a question of law arising out of an award made in the proceedings.” § 69(1). All of the parties to the proceeding must agree to the appeal. If there is disagreement, appeal may be had “with the leave of the court.” § 69(2)(b). The grounds for granting leave to appeal are stated in section 69(3). § 69(3).

²⁶ *See* Moses, *supra* note 7.

²⁷ Article I(1) of the NYC first states that the Convention applies 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 then states that the Convention also applies to “arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.” United Nations Conference on International Commercial Arbitration, *supra* note 12; 9 U.S.C. § 207 (2000). Section 2 of the FAA excludes from the Convention an “agreement or arbitral award arising out of [a commercial,] legal relationship . . . which is entirely between citizens of the United States” unless their relationship has specified contacts with “one or more foreign states.” 9 U.S.C. § 202. By implication, an award between citizens or businesses with places of business in different states is a non-domestic award and is subject to the Convention. *See* BRUNET ET AL., *ARBITRATION LAW IN AMERICA*, *supra* note 9, at 303-05 (discussing cases).

for errors of fact and law. Is section 10 and its domestic law baggage relevant to the enforcement of non-domestic awards?²⁸

At first glance the answer appears to be “no.” The “manifest disregard” defense is not listed in Article V of the Convention, and agreements expanding the scope of judicial review are, as suggested earlier, unenforceable under the Convention. After a second glance, however, the answer is actually “yes.” The better reasoned cases in the United States have held that FAA section 10 and the “manifest disregard” defense are available to vacate a non-domestic award made in the United States.²⁹ The reason is Article V(1)(e) of the Convention, which provides that a court “may” deny recognition and enforcement if the “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.” Fairly read, it recognizes that a non-domestic award might be set aside under the domestic arbitration law of the country in which the award was made or under the arbitration law chosen by the parties.³⁰ By extension, a court might conclude that an award set aside for errors of law by a court where the award was made under an enforceable agreement to expand judicial review fits within Article V(1)(e). Put differently, if the Second Circuit enforced agreements to expand the scope of judicial review under section 10 of the FAA, those agreements would limit the enforcement of the non-domestic award.

Under this analysis, both a court in England and a federal district court in the United States could deny B recognition and enforcement of a non-domestic award under Article V(1)(e) of the Convention because it had been vacated under domestic arbitration law, broadly conceived. If S has no assets outside of the United States, B is stymied. Even if S has assets in other countries, an effort by B to seek recognition and enforcement of the award there would be subject to the defense in Article V(1)(e) that the award “has been set aside . . . by a competent authority of the country in which, or under the law of which, that award was made.”³¹

²⁸ These arguments make the most sense where the arbitrators or the parties have selected an identified body of substantive law for the merits of the case. Suppose the parties selected New York law. If the arbitrators, instead, applied Ohio law, the award could be vacated on the ground that the arbitrators had “exceeded their powers.” 9 U.S.C. § 10(a)(4). If the arbitrators, in applying New York law, knew that a specific rule applied to the case, and then ignored or refused to apply it, this would be a “manifest disregard” of the law. If, however, the arbitrators knew of and applied the rule, but made an error in application, the award could not be vacated under FAA section 10 unless the agreement permitting expanded judicial review were enforceable.

²⁹ *Toys “R” Us* is the leading case. *Yusuf Ahmed & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998); *see also* BRUNET ET AL., *ARBITRATION LAW IN AMERICA*, *supra* note 9, at 303-05.

³⁰ *See* *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287-93 (5th Cir. 2004). In *Karaha*, the court held that an award set aside under the law of a country not chosen by the parties or under the law of a country other than where the award was made did not fit under Article V(1)(e). *Id.* at 309. The court reasoned that courts under Article V(1)(e) had primary jurisdiction over the proceedings. *Id.* at 287. Courts in other countries had secondary jurisdiction and their efforts to set aside the award were not effective under the Convention. *Id.*

³¹ *See* English Arbitration Act § 103(2)(f) (1996).

C. Discretion of Court Where Foreign Arbitration Award Has Been Set Aside in Country Where Made

To take the next step in the labyrinth, would England or any other country have any discretion to grant recognition of a foreign award even though it had been set aside in the country where made? After all, B is a citizen of Great Britain and has been denied access to the assets of S in the United States.

From the standpoint of an English court, there is some discretion in cases like this. Even if the award has been vacated in the United States, Article V is permissive: recognition and enforcement “may be refused” even if grounds are established under Article V(1)(e).³² Moreover, Article VII(1), in bold language, declares that the “provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”³³

Finally, to protect B, a British corporation with no recourse in the United States, the court might be persuaded to interpret the word “law” in Article V(1)(e) to exclude an enforceable agreement to expand the scope of review. On the other hand, a decision to deny recognition because of Article V(1)(e) supports the Convention in a case where an agreement authorizing a court to review points of law in an award is permitted under section 69 of the English Arbitration Act.³⁴

To put the shoe on the other foot, suppose a non-domestic English award was made in London in favor of S, an American corporation, against B, a corporation doing business in England. B, either under an enforceable agreement to expand the right of appeal or under domestic arbitration law, succeeded in getting the award vacated due to alleged errors of law. S then sought recognition and enforcement in the United States in a jurisdiction that does not recognize the validity of agreements expanding the power of courts to review awards and adheres to the notion that courts have no power under the Convention or the FAA to review awards for errors of fact or law.³⁵ Is this a case where recognition and enforcement should be denied under Article V(1)(e) or is this a

³² See § 103(2).

³³ United Nations Conference on International Commercial Arbitration, *supra* note 12; 9 U.S.C. § 207 (2000). This language, from the NYC, is not repeated in sections 99-104 of the EAA. Rather, section 104 provides: “Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66 [dealing with ‘enforcement of the award’].” English Arbitration Act § 104. Commentators have puzzled about how section 66 and sections 99-104 “work together” and noted that recognition and enforcement can be denied only on grounds set out in section 103(2) and that enforcement under section 66 provides “greater opportunity for possible refusal.” BRUCE HARRIS ET AL., *THE ARBITRATION ACT OF 1996: A COMMENTARY* § 104(D) (2d ed. 2000).

³⁴ Suppose the award in the United States was not vacated and B sought recognition and enforcement against S in England. S, citing an agreement to permit an appeal on points of law, seeks to suspend enforcement under section 69 of the EAA until the appeal is completed. This, of course, is not a ground to deny recognition and enforcement under Article V of the New York Convention, and unless the court is prepared to say that such agreements validly expand the scope of Article V, S’s effort should be rejected.

³⁵ For such a case, see *Baxter International, Inc. v. Abbot Laboratories*, 315 F.3d 829 (7th Cir.), *reh’g denied*, 325 F.3d 954 (7th Cir.), *cert. denied*, 540 U.S. 963 (2003).

case where S, under Article VII(1), should be entitled to enforcement because of a “right” S has under “the law or treaties of the country where such award is sought to be” enforced?

In my opinion, a signpost in the right direction is the *Baker Marine* case,³⁶ where the court refused to give recognition and enforcement to an international award made in Nigeria that had been vacated under the arbitration law of that country. The court conceded that the grounds for vacating an award under Nigerian law differed from those in the United States, but noted that the parties had chosen Nigerian arbitration law by agreement and there was no evidence that the Nigerian court had misapplied that law. Moreover, the court was concerned that a “mechanical application” of Article VII(1) would undercut the goal of finality in international arbitration.³⁷

III. SOLUTIONS

In sum, the problem discussed here arises where non-domestic arbitration awards are vacated by enforcing an agreement between the parties expanding the scope of review to include errors of law or fact. These agreements are, in my opinion, not enforceable under the NYC or the Model Law but may become relevant under Article V(1)(e) of the NYC. What are the possible solutions to this problem?

In my opinion, a complete solution to the disconnect between Article V(1)(e) of the Convention and section 10 of the FAA is for Congress to enact a provision like Article 34 of the Model Law to supplant section 10 of the FAA as the law for the enforcement of non-domestic arbitral awards in the United States. The grounds for a successful recourse against a non-domestic award under Article 34 are, in essence, the same as in Article V of the NYC. Thus, a parity would be achieved for the recognition and enforcement of “foreign” and non-domestic arbitration awards. More importantly, agreements to expand the scope of review of international awards would not be enforceable,³⁸ and the “manifest disregard” defense would be consigned to the trash can.

A less complete solution is for the Supreme Court to resolve the disagreement among the circuits on the enforceability of agreements expanding the scope of judicial review under section 10 of the FAA. One wonders why this did not occur in the *Kyocera* case,³⁹ where the petition for certiorari was dismissed. If the Court agreed with the result in *Kyocera*, it could have affirmed the en banc judgment and resolved the question once and for all—private agreements expanding the scope of review under section 10 of the FAA are not enforceable. A decision like this would be predictable, given the Court’s pur-

³⁶ *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999).

³⁷ A much maligned case applying Article VII(1) is *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996). See Ray Y. Chan, Note, *The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy*, 17 B.U. INT’L L.J. 141 (1999).

³⁸ I have argued elsewhere that the award enforcement articles of the Model Law, based as they are on the New York Convention, cannot be varied by agreement. See BRUNET ET AL., *ARBITRATION LAW IN AMERICA*, *supra* note 9, at 200-02.

³⁹ *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000, 1002 (9th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1098 (2004).

positive, regulatory, pro-arbitration interpretations of the FAA. Apart from any impingement on freedom of contract, an affirmation of the *Kyocera* result would facilitate ex ante planning by commercial parties and protect finality in international arbitration by precluding agreements to expand judicial review from sneaking in through the back door provided by Article V(1)(e) of the Convention.

A final part of the solution requires improved certainty about a working definition of arbitration. This need for certainty is reduced if agreements expanding the scope of judicial review are not enforceable. Arbitration (and thus the scope of applicable treaties and statutes) can be defined as requiring both a commitment to submit disputes to arbitrators for decision and an express or implied intent that decisions on the merits are final. But if such agreements are enforceable, the finality dimension is impaired. Rather than tossing the entire procedure to law outside of the scope of those treaties and statutes, I would ask whether the parties have agreed to submit the dispute to the arbitrators on the merits and, if so, what are the chances finality will be achieved even though the contract contains an agreement expanding judicial review? In other words, the parties should be entitled to some of the protections of the statute consistent with the agreement to arbitrate even though the award enforcement procedures are not available.

Here is a proposed legislative solution to part of the problem.

Section 30. Enforcing the Arbitral Award.

(a) Within three years after an arbitral award falling under the Convention is made in conformance with applicable law, any party to the arbitration may apply to the court for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in Article V of the Convention.

(b) Sections 9-13 of Chapter 1 of the Federal Arbitration Act shall not apply to a motion to confirm made or any defense to confirmation raised under this Act. In particular, it is not necessary for confirmation of the award that the parties have agreed that a judgment shall be entered by a court on the award or have specified the court.

Section 31. Recourse Against the Arbitral Award.

(a) The grounds stated in Article V of the Convention for denying recognition and enforcement to a non-domestic award shall also apply to any motion to vacate or obtain recourse against the award, regardless of whether a motion to confirm the award has been made.

(b) To vacate or obtain recourse against an award made in the United States or its territories, the award must be a non-domestic award subject to the Convention and this Act. An application to vacate or obtain recourse against the award must be made within three months from the date which the party making the application received the award or if a request has been made for action under Section 29 of this Act, the date when any correction, interpretation, or additional award were made.

(c) If a timely motion to confirm an arbitral award is made after a timely motion to vacate or obtain recourse against the award has been made, the court shall proceed as if the motion to confirm had been made first. In any case where defenses permitted under Article V are raised, the court may, where appropriate and so requested by a party, suspend the proceedings for an appropriate period of time to give the tribunal

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an opportunity to resume the arbitral proceedings or to take such other action as in the tribunal's opinion will eliminate the grounds for setting the award aside.

In sum, this legislative solution explicitly removes Chapter 1 of the FAA from the process of recognition and enforcement of arbitration awards under the NYC, whether the awards are foreign or non-domestic. It both eliminates the uncertainty created by different standards under and interpretations of Chapter 1 and promotes the de-localization of international arbitration law and procedure.