

**THE NEW YORK CONVENTION ON THE RECOGNITION AND
ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: ANALYSIS OF
THE SEVEN DEFENSES TO OPPOSE ENFORCEMENT IN THE UNITED
STATES AND ENGLAND**

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I. INTRODUCTION

Imagine that an investor who is a U.S. resident buys a security issued by an English firm.¹ Assume that the U.S. Securities Exchange Act governs the transaction. The U.S. antifraud rules protect the U.S. investor, reducing the risk of investing in the security, but these antifraud rules expose the English issuer to risk. Suppose that the use of arbitration² is one way to avoid the application of the antifraud rules. Thus, when the issuer and investor negotiate the terms of the contract, the issuer will want to include an arbitration clause. However, the investor will agree to the arbitration clause only if he thinks that arbitration is preferable to litigation³ and if he knows that the arbitral award will be enforceable.

Parties to international commercial transactions often place arbitration clauses in their contracts in case disputes arise.⁴ The advantages of arbitration in the domestic context extend to the international arena. Arbitration quickly resolves disputes and is relatively inexpensive.⁵ Contracting parties are often unfamiliar with the rules of the various domestic court systems. Thus, with arbitration, parties choose

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1. This hypothetical is adapted from Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1298-99 (2000).

2. "Arbitration is a private dispute resolution method whereby the parties to a dispute choose a disinterested party, or arbitrator, to look at the facts of the dispute and render a decision." Kristin T. Roy, Note, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 FORDHAM INT'L L.J. 920, 926 (1995).

3. In this case, the investor may prefer arbitration to litigation because arbitration allows the parties to choose arbitrators knowledgeable in the area of securities law and foreign arbitral awards are easier to enforce than international judgments.

4. Guzman, *supra* note 1, at 1281.

5. Eloise Henderson Bouzari, Note, *The Public Policy Exception to Enforcement of International Arbitral Awards: Implications for Post-NAFTA Jurisdiction*, 30 TEX. INT'L L.J. 205, 209 (1995).

which procedural and substantive law will govern their dispute in order to avoid unfamiliar rules.⁶ In other words, the contracting parties choose where the arbitration will be held, which choice of law governs the arbitration, and even who can be an arbitrator.⁷ Moreover, the confidentiality of arbitration protects trade secrets that are common in international transactions, which in turn preserves long-term relationships and fosters international trade.⁸ But parties to international transactions choose arbitration mainly for practical purposes: arbitration is “the only effective means of securing and enforcing their rights in a forum which is both neutral and attuned to the realities of international commerce.”⁹ Even if an arbitral award is binding under the contract, there may be no incentive for the losing party to comply with the award. Therefore, it is imperative that winning parties have a mechanism to enforce the award in the court systems of the countries in which the losing parties have assets.¹⁰

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“New York Convention”) provides uniform standards to enforce arbitral awards.¹¹ These standards include seven grounds upon which a court may refuse to enforce an award.¹² As the globalization of the world market continues, the number of arbitration awards subject to the New York Convention will increase. Because English is now the main language of international commercial transactions, the United States and England have become important countries for resolving arbitration disputes. Although some articles have been written analyzing how the United States treats the seven defenses in the New York Convention, no article has fully explored how England treats the defenses.

This Note examines the manner in which the courts of the United States and England have dealt with the seven defenses to oppose enforcement of a New York Convention award. It also analyzes whether the two court systems have provided a uniform rule to which future parties can adhere when arguing these defenses. Part II provides an overview of the history of the adoption of the New York Convention in the United States and England. Part III analyzes the five procedural defenses and compares U.S. cases with English cases that have dealt with these defenses. Part IV

6. Susan Choi, Note, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT’L L. & POL. 175, 175 (1997).

7. Richard A. Cole, *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards*, 1 OHIO ST. J. ON DISP. RESOL. 365, 368 (1985).

8. *Id.* at 367.

9. L. Yves Fortier, *The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration – “A Few Plain Rules and a Few Strong Instincts,”* in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 396, 407 (Albert Jan van den Berg ed., 1999).

10. Choi, *supra* note 6, at 175.

11. *Id.*

12. *See id.* at 176; *see also infra* Parts III and IV for further discussion of the seven grounds.

analyzes the two substantive defenses and compares two U.S. cases with two English cases.

II. HISTORY OF THE NEW YORK CONVENTION

The countries ratifying or acceding to the New York Convention agreed to recognize and enforce foreign arbitral awards.¹³ The goal of the New York Convention “is to promote the enforcement of arbitral agreements and thereby facilitate international business transactions on the whole.”¹⁴ The Geneva Protocol of 1923 on Arbitration Clauses and the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards addressed foreign arbitration, but they were ineffective and the United States was not a party to them.¹⁵ In 1953, in response to an international business need for arbitration, the International Chamber of Commerce asked the United Nations Economic and Social Council to convene a meeting on the subject of international arbitration.¹⁶ At that time, the domestic law of the enforcing country usually governed the enforcement of foreign arbitral awards.¹⁷ Without international standards to govern enforcement, parties neither had a guarantee that the domestic courts would enforce their awards nor that the courts would treat foreign and domestic awards equally.¹⁸ In addition, the use of arbitration to settle disputes arising from international commercial transactions had increased, especially since no international agreement on the enforcement of court judgments existed.¹⁹ Thus, enacting the New York Convention would simplify the requirements for enforcing awards.²⁰ Despite the need for international agreement on how to enforce foreign arbitral awards, only twenty-four countries originally signed the New York Convention.²¹ However, over time, more countries have accepted the New York

13. Robert B. von Mehren, *Enforcement of Foreign Arbitral Awards in the United States*, 771 PLI/COMM 147, 156-57 (1998).

14. *Belship Navigation, Inc. v. Sealift, Inc.*, No. 1:95-CV-02748, 1995 WL 447656, at *5 (S.D.N.Y. July 28, 1995) (citing *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 248, 250 (2d Cir. 1991)).

15. Bouzari, *supra* note 5, at 209.

16. Cole, *supra* note 7, at 368.

17. Elisabeth M. Senger-Weiss, *Enforcing Foreign Arbitration Awards*, 53-WTR DISP. RESOL. J. 70, 72 (1998).

18. *Id.*

19. Guzman, *supra* note 1, at 1287.

20. See Senger-Weiss, *supra* note 17, at 72.

21. Daniel Berkowitz, Johannes Moenius & Katharina Pistor, *Legal Institutions and International Trade Flows*, 26 MICH. J. INT’L L. 163, 176 & n.46 (2004). The countries included Argentina, Belarus, Belgium, Bulgaria, Costa Rica, Ecuador, El Salvador, Finland, France, Germany, India, Israel, Jordan, Luxemburg, Monaco, the Netherlands, Pakistan, the Philippines, Poland, the Russian Federation, Sri Lanka, Sweden, Switzerland, and Ukraine. *Id.*

Convention's role in international commercial transactions.²² Currently, 137 countries have ratified it.²³

Under article I, the New York Convention applies to awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" or to awards "not considered as domestic awards in the State where their recognition and enforcement are sought."²⁴ Thus, the New York Convention applies to awards rendered in a country other than the enforcing country, whether the award is deemed domestic or international.²⁵ It also applies to all non-domestic awards in the enforcement country, whether or not the award may have been rendered in that country.²⁶ For example, if the award is rendered in England, then the United States considers it to be a New York Convention award when the winning party attempts to enforce it in the United States. However, countries interpret whether an award is non-domestic differently.²⁷ If the award does not fit the definition of a New York Convention award, then the winning party can try to enforce the award under other treaties governing international arbitration, such as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention").²⁸ To enforce a New York Convention award, the winning party supplies an original or certified copy of the award and the arbitration agreement to the enforcing court.²⁹ This is significantly different from the League of Nation's Geneva Treaties, which placed the burden of proof on the party seeking to enforce the award.³⁰ In addition, the New York Convention places the burden on the *defendant* to prove that the award is invalid under at least one of the seven grounds it enumerates.³¹

22. See Senger-Weiss, *supra* note 17, at 72.

23. UNCITRAL, Status on 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. The United States acceded in 1970 while the United Kingdom acceded in 1975. *Id.*

24. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

25. Senger-Weiss, *supra* note 17, at 73.

26. *Id.*

27. Choi, *supra* note 6, at 190-97 (indicating that U.S. and French courts interpret the term "non-domestic" broadly while German courts interpret it narrowly).

28. Joseph T. McLaughlin, *Enforcement of Arbitral Awards Under the New York Convention: Practice in U.S. Courts*, 477 PLI/COMM 275, 301 (1988).

29. von Mehren, *supra* note 13, at 158; Choi, *supra* note 6, at 188-89.

30. See Bouzari, *supra* note 5, at 209; Choi, *supra* note 6, at 188-89.

31. von Mehren, *supra* note 13, at 158; *Rosseel N.V. v. Oriental Commercial & Shipping Co. (U.K.) Ltd.*, (1991) 2 Lloyd's Rep. 625, 628 (Q.B.D. Comm. Ct.) (Eng.) (indicating that the losing party must discharge the burden on a balance of probabilities).

A. United States' Accession to the New York Convention

Although arbitration has been long accepted as a common form of alternative dispute resolution, U.S. courts did not formally recognize it until Congress enacted the Federal Arbitration Act (FAA) in 1925.³² Then, in 1958, the United States participated in the New York Convention negotiations, but did not sign it because the United States was concerned that the rules would conflict with U.S. procedural and substantive law.³³ In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, however, the U.S. Supreme Court held that arbitration agreements are irrevocable and enforceable under the FAA.³⁴ The *Prima* holding, in conjunction with growing support from various entities, led the United States to finally accede.³⁵ In 1970, the New York Convention became part of U.S. treaty and statutory law.³⁶ Article V of the treaty outlines the seven grounds for which a court can refuse to enforce a foreign arbitral award.³⁷ Article V(1) lists five procedural

32. Cole, *supra* note 7, at 368.

33. Senger-Weiss, *supra* note 17, at 72-73. These reasons were:

First, it was stated that if the Convention was accepted in a manner that would avoid conflicting with state laws, it would offer no meaningful advantage to the United States. Second, if accepted in a manner that assured such advantages it would override the arbitration laws of a majority of the states. Third, the United States lacked a sufficient domestic legal basis for acceptance of an advanced international convention dealing with this subject matter. Lastly, the Convention embodied principles of arbitration law that would not be desirable for the United States to endorse.

Id.

34. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); Bouzari, *supra* note 5, at 210.

35. See Stanley L. Levine, *United Nations Foreign Arbitral Awards Convention: United States Accession*, 2 CAL. W. INT'L L.J. 67, 70-72 (1971). These groups included the American Bar Association, American and Foreign Power Co., Inc., Aluminum Co. of America, Graver Tank and Mfg. Co., Inc., and B.F. Goodrich and Co. *Id.*

36. New York Convention, *supra* note 24; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-08 (2005).

37. Article V of the New York Convention provides:

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

defenses that only the parties can raise, while article V(2) lists two substantive defenses that either the parties or the enforcing court can raise.³⁸ These seven defenses ensure that parties do not misuse the arbitration process.³⁹ These defenses are also exhaustive.⁴⁰

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- subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, *supra* note 24, art. V.

38. *Id.*

39. *Cf.* Bouzari, *supra* note 5, at 210.

40. Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 20 (2d. Cir. 1997); Rosseel N.V. v. Oriental Commercial & Shipping Co. (U.K.) Ltd., (1991) 2 Lloyd's Rep. 625, 628 (Q.B.D. Comm. Ct.) (Eng.); von Mehren, *supra* note 13, at 175-78 (holding that the only allowable defenses to enforcement are those that are set forth in the New York Convention).

B. England's Accession to the New York Convention

Like the United States, the United Kingdom, which includes England, Scotland, Wales, and Northern Ireland, did not sign the New York Convention in 1958.⁴¹ As time passed, the United Kingdom recognized that the New York Convention improved upon the Geneva Convention, garnered the business community's support, and had reasonable provisions.⁴² Thus, the United Kingdom acceded to the New York Convention five years after the United States⁴³ and adopted its provisions in the 1975 U.K. Arbitration Act.⁴⁴ Although numbered differently, the same language regarding the seven defenses exists in both article V of 21 United States Treaty 2517 and section 5 of the 1975 U.K. Arbitration Act.⁴⁵ In order to

41. Roy Goode, *Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law*, 50 INT'L & COMP. L.Q. 751, 756 (2001) (U.K.). Possible reasons for the delay include the belief in the superiority of English law, lack of industry pressure, lack of parliamentary time, and lack of interest in servicing its own law. *Id.* at 756-58.

42. D. Rhidian Thomas, *International Commercial Arbitration Agreements and the Enforcement of Foreign Arbitral Awards – A Commentary on the Arbitration Act 1975*, 1 L.M.C.L.Q. 17, 18 (1981).

43. *Id.* at 19 (indicating that the United Kingdom acceded in 1975).

44. Arbitration Act, 1975, c. 3, § 5 (U.K.) [hereinafter 1975 U.K. Arbitration Act].

45. Quotations of the New York Convention will reference the U.S. Treaty for simplicity. The 1975 U.K. Arbitration Act (which is substantively the same as Arbitration Act, 1996, c. 23, pt. III, § 103 (U.K.) [hereinafter 1996 U.K. Arbitration Act]) provides:

1. Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
2. Enforcement of a Convention award may be refused if the person against whom it is invoked proves—
 - (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or
 - (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (c) that he 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
 - (d) (subject to subsection (4) of this section) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or
 - (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or

address some of the problems that arose when the U.K. courts interpreted the 1975 U.K. Arbitration Act,⁴⁶ the United Kingdom repealed the 1975 U.K. Arbitration Act in its entirety with the 1996 U.K. Arbitration Act.⁴⁷ The 1996 U.K. Arbitration Act does not distinguish between domestic and international arbitrations in order to comply with European Community law.⁴⁸ Also, it clarifies that a New York Convention arbitration award is “made” at the seat of the arbitration.⁴⁹ For example, if the seat of arbitration is in X (a New York Convention state) but the arbitrator signs the award in Y (a non-New York Convention state), then the award is “made” in X and, therefore, should be recognized and enforced.⁵⁰ On the other hand, if the parties present their cases to the arbitration panel in Y and the arbitrators sign the award in X, then the New York Convention would not apply to the arbitral award because Y is

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- (f) that 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, it was made.
 - 3. Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.
 - 4. A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

1975 U.K. Arbitration Act, *supra* note 44, § 5.

46. Jonathan Hill, *Some Private International Law Aspects of the Arbitration Act 1996*, 46 INT'L & COMP. L.Q. 274, 306-07 (1997) (U.K.).

47. 1996 U.K. Arbitration Act, *supra* note 45, § 103.

48. Andrew Hughes & Ben Pilling, *The Arbitration Act Five Years On*, 151 NEW L.J. 1432, 1432 (2001) (U.K.); Hill, *supra* note 46, at 276-80. Before the 1996 U.K. Arbitration Act, there were three distinctions between domestic and international arbitration cases. First, courts had discretion to stay proceedings for domestic cases but were required to stay proceedings for international cases. Second, in international cases, the right to appeal on points of law was more easily excluded. Third, courts could not enforce consumer arbitration agreements in domestic cases but could in international cases. Hill, *supra* note 46, at 276-80.

49. Hill, *supra* note 46, at 307. The seat of arbitration is the place that the parties have named in the contract in recognition that the law of that place will govern the proceedings unless otherwise noted. The seat does not necessarily have to be the place where the proceedings are physically conducted. Thus, the seat of arbitration is a legal fiction. For instance, the Olympic Sports arbitration tribunal's seat is in Switzerland with Swiss procedural law governing the proceedings, but the tribunal conducts the hearings and renders the awards at the site of the particular Olympic Games. See Gabrielle Kaufmann-Kohler, *Identifying and Applying the Law Governing the Arbitration Procedure – The Role of the Law of the Place of Arbitration*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 336, 336-65 (Albert Jan van den Berg ed., 1999).

50. Hill, *supra* note 46, at 307.

not a New York Convention state. Thus, to ensure the New York Convention applies, an arbitration agreement generally designates a New York Convention state as the arbitration seat.

III. PROCEDURAL DEFENSES

A. Importance of Procedure in Arbitration

Procedural rules are fewer and simpler in arbitration than in adjudication in a court system.⁵¹ In fact, arbitrating international disputes is effective because parties can choose procedural rules to best facilitate the arbitration proceeding.⁵² When deciding which procedural rules to use, parties prefer rules that provide adequate due process.⁵³ Procedural due process rules ensure that each party has an equal and fair opportunity to present its case,⁵⁴ which in turn means fewer objections to the award's validity. For this reason, the New York Convention, as well as the American Arbitration Association and the International Chamber of Commerce, refers to due process rules.⁵⁵ Arbitration panels are free to choose how to conduct a fair hearing because the New York Convention's standards are vague.⁵⁶ Through the New York Convention defenses, the enforcing court can use the enforcement stage to review the arbitration panel's procedures and to ensure the parties received sufficient due process.⁵⁷ Nonetheless, courts still defer to the arbitrators' decisions regarding procedural issues because refusing to enforce an award for minor procedural defects undermines the purpose of international arbitration.⁵⁸ Regardless of judicial scrutiny,

51. Trippe S. Fried, *Maintaining the Home Court Advantage: Forum Shopping and the Small Business Client*, 6 TRANSACTIONS: TENN. J. BUS. L. 419, 430 (2005).

52. Claude R. Thomson & Annie M.K. Finn, *Managing an International Arbitration*, 60-JUL DISP. RESOL. J. 74, 79 (2005).

53. See Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 455 (1996).

54. von Mehren, *supra* note 13, at 160.

55. *Id.* Article 16(1) of the 1997 International Arbitration Rules of the American Arbitration Association provides: "Subject to these rules, the tribunal may conduct the arbitration in whatever manner, it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." *Id.* Similarly, article 15(2) of the International Chamber of Commerce 1998 Rules provides: "In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case." *Id.*

56. See *id.*

57. See generally Kenneth-Michael Curtin, *Redefining Public Policy in International Arbitration of Mandatory National Laws*, 64 DEF. COUNS. J. 271, 275 (1997).

58. Choi, *supra* note 6, at 212 (stating that the purpose is to "afford efficient and complete resolution of disputes with minimal involvement of national courts"); Northrop Corp.

arbitration panels' adherence to procedural rules encourages parties to use arbitration.⁵⁹

B. Available Procedural Defenses

Under the New York Convention, a party may assert one or more of the five procedural defenses to oppose enforcement of the arbitral award.⁶⁰ However, the New York Convention does not specify which law applies when determining whether procedures were violated.⁶¹ The enforcing court could apply the procedural law chosen by the parties, the law of the arbitration seat (i.e., the country where the arbitration panel held the proceedings), or the law of the enforcing state.⁶² For instance, assume that in an arbitration agreement, the parties agree to hold the arbitration in England with Swiss law governing the proceedings. The winning party then wants to enforce the arbitral award in the United States. Thus, procedural arguments could be based on English, Swiss, or U.S. law.⁶³

Failing to assert procedural defenses to the arbitration panel usually results in a waiver of these defenses at the enforcement stage.⁶⁴ Even if parties timely assert these defenses, they should reserve them for serious discrepancies in the arbitration proceedings because repeated assertions of minor procedural violations could undermine the integrity of international arbitration.⁶⁵

v. Triad Int'l Mktg. S.A., 811 F.2d 1265, 1269 (9th Cir. 1987) (“[A]rbitrators’ conclusions on legal issues are entitled to deference . . .”).

59. See Elise P. Wheelless, Recent Development, *Article V(1)(B) of the New York Convention*, 7 EMORY INT’L L. REV. 805, 826 (1993) (stating that parties will only agree to arbitration if they know that their procedural rights will be protected); cf. Choi, *supra* note 6, at 212 (stating that parties may choose not to arbitrate if courts routinely refuse to enforce awards because of procedural violations).

60. The five defenses include the absence of a valid arbitration agreement or incapacity of a party, lack of a fair opportunity to be heard, matters not covered by the arbitration agreement, improper composition of the arbitration tribunal, and non-binding award. New York Convention, *supra* note 24, art. V.

61. Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards*, 70 YALE L.J. 1049, 1067 n.81 (1961).

62. *Id.*; see also von Mehren, *supra* note 13, at 156-57 (indicating that the United States applies the enforcing state’s standards of procedural due process).

63. Since the winning party is asking for enforcement in the United States, then according to U.S. interpretation of the New York Convention, U.S. procedural due process standards would apply. See von Mehren, *supra* note 13, at 156-57.

64. See Choi, *supra* note 6, at 210.

65. *Id.* at 212.

1. Invalid Arbitration Agreement and Beyond the Scope of Arbitration Agreement

The defense that an arbitration agreement is invalid is rooted in contract law.⁶⁶ This defense raises both choice-of-law⁶⁷ (i.e., what law should determine whether an arbitration agreement is valid) and substantive (i.e., whether the arbitration agreement is valid) issues.⁶⁸ Some parties have argued that an arbitration agreement is invalid because the underlying contract is invalid.⁶⁹ However, this argument usually fails in the United States due to the separability doctrine.⁷⁰ In other words, if a contract is invalid, the arbitration agreement is not automatically invalid.⁷¹ In contrast, the separability doctrine is not absolute in England: courts will uphold arbitration clauses unless doing so would clearly “offend the policy of the illegality rule.”⁷² Thus, parties arguing this defense are more likely to succeed in English courts.⁷³

A similar defense allows the party opposing enforcement to argue that the award is beyond the scope of the arbitration agreement—that is, the award concerns matters not covered by the agreement.⁷⁴ In fact, this defense is merely a reiteration of the invalidity defense⁷⁵ because both assume that the will and consent of the parties

66. New York Convention, *supra* note 24, art. V(1)(a) (“The parties to the agreement were . . . under some incapacity, or the said agreement is not valid under that law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”).

67. The choice of law is usually the law chosen by the parties, the law of the country where the award was made, or the law of the country where the contract was performed. von Mehren, *supra* note 13, at 165.

68. Gary B. Born, *International Commercial Arbitration in the United States: Commentary and Materials*, in *INTERNATIONAL LAW* 348, 348 (Barry E. Carter et al. eds., 4th ed. 2003).

69. *Id.* at 350.

70. According to the separability doctrine, an arbitration agreement is presumptively independent from the parties’ underlying contract because the parties provide separate consideration through their exchange of promises to arbitrate. *Id.*

71. *Id.*; William W. Park, *The New English Arbitration Act*, 13-6 MEALEY’S INT’L ARB. REP. 14, at II(B) (1998) (noting that the 1996 U.K. Arbitration Act codified this principle).

72. *Westacre Invs. Inc. v. Jugoimport-SPDR Holding Co.*, [1999] Q.B. 740, 757 (Comm. Ct.) (Eng.), *aff’d*, [2000] Q.B. 288 (C.A.) (Eng.). “Thus, saying that arbitration clauses, because separable, are never affected by the illegality of the principal contract is as much a case of false logic as saying that they must be.” *Id.* (quoting *Harbour Assurance Co. v. Kansa Gen. Int’l Ins. Co.*, [1993] Q.B. 701, 724 (C.A.) (Eng.)).

73. Curtin, *supra* note 57, at 277. Nonetheless, if the arbitration clause “was valid and not tainted by an illegality in the underlying contract,” then the English court will enforce the award. *Id.*

74. New York Convention, *supra* note 24, art. V(1)(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.”).

75. Quigley, *supra* note 61, at 1068.

create the bases for the arbitration and the arbitration panel's jurisdiction.⁷⁶ Thus, arbitrators lack the authority to decide matters that do not fall under the ambit of the arbitration agreement.⁷⁷ Although the scope defense is a common ground for challenging arbitral awards, it, like the other procedural defenses, typically fails because the enforcing courts do not want to second-guess panel determinations from their own jurisdictions.⁷⁸ Furthermore, the language of this defense⁷⁹ favors enforcing the award, giving a court the discretion to enforce the part of the award that is within the scope of the arbitration agreement.⁸⁰

2. Improper Composition of Arbitration Panel or Use of Improper Procedure

The court can also refuse to enforce an arbitral award if the arbitration panel was improperly composed or if the panel used improper procedure during the proceedings.⁸¹ For example, parties use this defense to claim an arbitrator is not qualified or is biased.⁸² While parties want knowledgeable arbitrators, sometimes the most knowledgeable arbitrators have had prior contact with the parties.⁸³ Courts are therefore reluctant to disqualify arbitrators based on prior contact.⁸⁴ Parties must thus introduce evidence beyond prior contact to prove the arbitrators are not partial.⁸⁵

Arbitration agreements may contain provisions on how the parties will select arbitrators and which rules the arbitrators will use.⁸⁶ Even if parties choose procedures illegal under the law of the seat of arbitration, the enforcing court will

76. von Mehren, *supra* note 13, at 164.

77. Thomas, *supra* note 42, at 35.

78. von Mehren, *supra* note 13, at 164.

79. New York Convention, *supra* note 24, art. V(1)(c) (“[I]f 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.”).

80. Senger-Weiss, *supra* note 17, at 77.

81. New York Convention, *supra* note 24, art. V(1)(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.”).

82. von Mehren, *supra* note 13, at 165.

83. *Id.* at 166; cf. Hong-Lin Yu & Laurence Shore, *Independence, Impartiality, and Immunity of Arbitrators – US and English Perspectives*, 52 INT’L & COMP. L.Q. 935, 967 n.5 (2003) (U.K.) (noting that the majority of arbitrators are lawyers and handle cases involving a particular industry, but most do not have experience as businessmen in any particular industry).

84. von Mehren, *supra* note 13, at 166.

85. *See generally id.*

86. Thomas, *supra* note 42, at 36.

have to enforce the award.⁸⁷ Nonetheless, the party opposing enforcement can still argue that the improper procedures constitute a breach of the arbitration agreement.⁸⁸

In *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica*, the U.S. Court of Appeals for the Second Circuit applied the literal meaning of the arbitration agreement's provision on the selection of arbitrators, accepted the defense of improper panel composition, and did not enforce the foreign arbitral award.⁸⁹ The provision in the agreement permitted Encyclopaedia Universalis ("EUSA") and Encyclopaedia Britannica ("EB") each to choose an arbitrator.⁹⁰ If the two arbitrators disagreed, they would consult to choose a third arbitrator.⁹¹ Furthermore, if the two arbitrators did not agree on the third arbitrator, then the provision required the President of the Tribunal de Commerce of Luxembourg to appoint one from a list of arbitrators maintained by the British Chamber of Commerce in London.⁹²

The problem began when the two arbitrators chosen by EUSA and EB disagreed over the procedural rules governing the proceedings.⁹³ Instead of first consulting with EB's arbitrator, EUSA's arbitrator contacted the Tribunal to request a third arbitrator.⁹⁴ The court found that the third arbitrator's appointment was premature because EUSA's arbitrator did not follow the procedures in the arbitration agreement.⁹⁵ Thus, the court held the panel's composition was improper.⁹⁶

In contrast, the English Commercial Court of the Queen's Bench Division in *China Agribusiness Development Corp. v. Balli Trading* did not read literally the provision regarding which procedural rules the arbitrators should use and held that the improper procedure defense did not apply.⁹⁷ The arbitration agreement provided that the parties would submit the arbitration to the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade ("FETAC") with the Provisional Rules of Procedure of FETAC governing the arbitration.⁹⁸ But, at the time of the dispute, FETAC had changed its name and was

87. Quigley, *supra* note 61, at 1068-69 n.84.

88. *Id.*

89. *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 91 (2d Cir. 2005).

90. *Id.*

91. *Id.*

92. *Id.* at 90.

93. *Id.*

94. *Id.* at 91.

95. *Encyclopaedia Universalis S.A.*, 405 F.3d at 91.

96. *Id.* at 91-92.

97. *China Agribusiness Dev. Corp. v. Balli Trading*, (1998) 2 Lloyd's Rep. 76, 79 (Q.B.D. Comm. Ct.) (Eng.).

98. *Id.* at 77. The arbitration provision provided:

All disputes in connection with this contract or the execution thereof shall be settled by friendly negotiation. If no settlement can be reached, the case in dispute shall then be submitted for arbitration to the Foreign Trade Arbitration Commission of the China Council for the Promotion of

using new provisional rules.⁹⁹ The defendant, Balli Trading, argued that the arbitration agreement required the arbitration panel to conduct the proceedings under the provisional rules of FETAC.¹⁰⁰ Alternatively, if that was not possible, then the arbitration agreement was null, and the plaintiff, China Agribusiness, would have to resort to the court system to resolve the dispute.¹⁰¹ The court considered the prejudice to Balli Trading from the new provisional rules and found insufficient prejudice to justify refusing to enforce the award.¹⁰² Moreover, the court agreed with China Agribusiness that the provision should be construed to permit arbitration, especially since the provision did not expressly require that the rules be the rules in effect when the parties signed the arbitration agreement.¹⁰³ Instead, the court held that an arbitration panel should use the existing rules at the time that a party invoked the arbitration clause.¹⁰⁴ Therefore, the arbitration panel in this case used the proper procedure.¹⁰⁵

3. Non-Binding Award

The party opposing enforcement can claim that the court should not enforce the award because it is non-binding.¹⁰⁶ In the United States, an arbitral award becomes binding when the arbitration panel has resolved all the issues before it, and no further recourse to another arbitration panel exists.¹⁰⁷ This does not mean, however, that the parties must exhaust all remedies in the awarding country before the award is binding.¹⁰⁸ Unlike the United States, England requires the award to be *binding and final* before a court will enforce it.¹⁰⁹ While a binding award implies that

International Trade in accordance with the Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade. The decision made by the Commission shall be accepted as final and binding upon both parties. The fees for arbitration shall be borne by the losing party unless otherwise awarded by the Commission.

Id.

99. *Id.*

100. *Id.* at 78.

101. *Id.*

102. *Id.* at 80.

103. *China Agribusiness*, (1998) 2 Lloyd's Rep. at 78.

104. *Id.* at 79.

105. *Id.*

106. New York Convention, *supra* note 24, art. V(1)(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.").

107. von Mehren, *supra* note 13, at 166-67.

108. *Id.*; Thomas, *supra* note 42, at 36.

109. Thomas, *supra* note 42, at 37.

the parties do not have further recourse to another arbitral tribunal,¹¹⁰ a final award signifies that no available proceeding exists for contesting whether an award is valid.¹¹¹

In *Baker Marine v. Chevron*, the U.S. Court of Appeals for the Second Circuit refused to enforce an award because the award had been set aside by a competent authority in the awarding country.¹¹² The winning party of the arbitration, Baker Marine, asked the Nigerian Federal High Court to enforce the award, but the High Court set the award aside because the arbitrators had acted improperly.¹¹³ Baker Marine then tried to confirm the award in the United States by arguing that the arbitral laws of the enforcing court (in this case, a U.S. court) should apply rather than the law governing the interpretation of the contract (in this case, Nigerian law).¹¹⁴ The court indicated that the arbitration agreement specified that the substantive laws of the Federal Republic of Nigeria would govern the arbitration and did not refer to U.S. law.¹¹⁵ Moreover, the court noted that it would seriously undermine award finality if a party could bypass a court's decision to set aside the award by simply filing a suit in another country to enforce the award.¹¹⁶

In *Rosseel N.V. v. Oriental Commercial & Shipping Co.*, the English Commercial Court of the Queen's Bench Division enforced a U.S.-made award even though the defendants argued that the plaintiffs had to first have a U.S. court confirm the award before the plaintiffs could enforce it in England.¹¹⁷ The plaintiffs contracted to buy barrels of oil from the defendants, but the defendants failed to perform the contract.¹¹⁸ After the arbitration panel found in favor of the plaintiffs, the defendants appealed the award.¹¹⁹ Then, the parties signed two joint stipulations stating that the parties had to bring any proceedings to confirm or vacate the arbitral

110. *Id.* at 36.

111. *Id.* at 37.

112. *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 197-98 (2d Cir. 1999).

113. *Id.* at 196. The improper acts included awarding punitive damages, going beyond the scope of the arbitration agreement, incorrectly admitting parol evidence, and making inconsistent awards. *Id.*

114. *Id.* at 196-97.

115. *Id.* at 197. The arbitration agreement provided that “[a]ny dispute, controversy or claim arising out of this Contract, or the breach, termination or validity thereof, shall be finally and conclusively settled by arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).” *Id.* at 196. Also, any part of the arbitration procedure that is not governed by UNCITRAL rules will be governed by the substantive laws of the Federal Republic of Nigeria. *Id.*

116. *Id.* at 197 n.2 (quoting ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 355 (1981)).

117. *Rosseel N.V. v. Oriental Commercial & Shipping Co. (U.K.) Ltd.*, (1991) 2 Lloyd's Rep. 625, 628-29 (Q.B.D. Comm. Ct.) (Eng.).

118. *Id.* at 626. The contract was subject to New York law and contained a New York City arbitration clause. *Id.*

119. *Id.* at 627.

award in the U.S. District Court for the Southern District of New York.¹²⁰ The issue was whether the joint stipulations changed the ordinary rule that an arbitral award is binding and continues to bind unless a competent authority sets it aside.¹²¹ To satisfy their burden of proof that the award was not yet binding, the defendants had to prove an agreement existed that “deprived the award of its prima facie binding character.”¹²² Also, the English court noted that under U.S. law, there is a difference between enforcing an award abroad and confirming an award.¹²³ Since the joint stipulations only addressed confirmation proceedings, the court held that the defendants failed to prove that the non-binding award defense applied in their case.¹²⁴ The award was binding and final; thus, it was enforceable under the New York Convention.¹²⁵ The fact that the New York Convention abolished the need to obtain leave to enforce in the awarding country, which the earlier Geneva Convention had required, supported the court’s holding.¹²⁶

C. The Heart of the Procedural Defenses: Lack of a Fair Opportunity To Be Heard

A fair opportunity to be heard is at the heart of the New York Convention defenses because it embodies the basic concept of procedural due process.¹²⁷ The defense that there was no fair opportunity to be heard actually encompasses two parts: (1) inability to present one’s case and (2) improper notice of an arbitrator’s appointment or arbitration proceeding.¹²⁸ Therefore, arbitration institutional rules,

120. *Id.* The first joint stipulation (the second joint stipulation is similar) states:

The undersigned hereby stipulate that the above captioned appeal is hereby withdrawn without costs and without attorneys fees pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure. The parties agree that any proceedings to confirm or vacate the arbitration award will be brought in the USDC, SDNY. In any appeal therefrom the issues sought to be raised herein can be raised at that time.

Id.

121. *Id.*

122. *Id.* at 628.

123. *Rosseel*, (1991) 2 Lloyd’s Rep. at 628. A party can ask for declaratory relief from the confirming court without also asking that the award be enforced. *Id.*

124. *Id.* at 629.

125. *Id.*

126. *Id.* at 628.

127. See Quigley, *supra* note 61, at 1067.

128. New York Convention, *supra* note 24, art. V(1)(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.”).

such as those of the International Chamber of Commerce, also include this defense.¹²⁹ It is important to note, however, that the provision only considers whether a party received notice and was able to present its case rather than the entirety of the law of procedural due process.¹³⁰ Like the other procedural defenses, a party's failure to object that it did not receive proper notice or that it was unable to present its case waives that objection at the proceedings to enforce the award.¹³¹ Otherwise, allowing the objection would "violate the goal and purpose of the [New York] Convention, that is, the summary procedure to expedite the recognition and enforcement of arbitration awards."¹³² Nevertheless, because an enforcing court can review the procedural due process of the arbitration, it can ensure the dispute was fairly resolved by an impartial arbitration panel.¹³³ In other words, this two-part defense is a way for parties to challenge the award when they believe that the panel has treated them unfairly.¹³⁴

Three circumstances can prevent a party from being able to present its case.¹³⁵ First, if the party opposing enforcement was not present at the arbitration proceeding either by choice or lack of notice, the party might argue that it did not have an opportunity to appear at the arbitration proceeding.¹³⁶ Second, the arbitration panel may not have allowed the party opposing enforcement the opportunity to present evidence.¹³⁷ Third, this defense may arise if the arbitration panel did not allow the party opposing enforcement an opportunity to object to the arbitration

129. von Mehren, *supra* note 13, at 160. Article 15(2) of the International Chamber of Commerce 1998 Rules provides: "In all cases, the Arbitration Panel shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case." *Id.*

130. Kirill P. Strounnikov, *Pre-Appearance Security Requirements for Unlicensed Reinsurers in the United States*, 7 CONN. INS. L.J. 465, 489 (2001).

131. *E.g.*, Choi, *supra* note 6, at 210.

132. Int'l Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, Industrial y Comerical, 745 F. Supp. 172, 180 (S.D.N.Y. 1990) (citing Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334, 335 (5th Cir. 1976)).

133. Sigvard Jarvin, *To What Extent Are Procedural Decisions of Arbitrators Subject to Court Review?*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 366, 366-68 (Albert Jan van den Berg ed., 1999).

134. *Cf.* von Mehren, *supra* note 13, at 160.

135. Osamu Inoue, *The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for a Standard*, 11 AM. REV. INT'L ARB. 247, 249 (2000).

136. *Id.* For instance, in *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133, 140 (D.N.J. 1976), the party opposing enforcement refused to appear at arbitration based on its interpretation of the merits. Inoue, *supra* note 135, at 249.

137. Inoue, *supra* note 135, at 249. For instance, in *Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123, 1129 (7th Cir. 1997), the arbitration panel did not allow the party opposing enforcement to cross-examine a witness. Inoue, *supra* note 135, at 249.

panel's procedural rulings.¹³⁸ The courts tend to reject these arguments in favor of the arbitrators' discretion in the arbitration procedures.¹³⁹

The concepts of reasonableness and adequacy govern decisions on proper notice.¹⁴⁰ When deciding the law that applies to due process objections, the enforcing court applies the enforcing state's standards of due process.¹⁴¹ For instance, U.S. law requires that "the opportunity to be heard [occur] at a meaningful time and in a meaningful manner."¹⁴² Regardless of which procedural due process standard courts use to evaluate the objection, courts tend to adopt a non-interventionist attitude—they will not intervene unless absolutely necessary.¹⁴³ This deference allows arbitrators to balance efficiency and due process in a manner appropriate to the circumstances of the case.¹⁴⁴

1. Cases in Which U.S. and English Courts Rejected the Due Process Defense

Although often used, the defense of a lack of opportunity to be heard is usually not successful.¹⁴⁵ In *Fitzroy Engineering, Ltd. v. Flame Engineering, Inc.*, the party opposing enforcement complained that a conflict of interest between its attorney and the other party undermined the award's validity.¹⁴⁶ Nonetheless, the court confirmed the award.¹⁴⁷ *Fitzroy Engineering and Flame Engineering* entered into a contract whereby Flame, as the subcontractor, would provide and install the incinerator for the Auckland International Airport on behalf of *Fitzroy*, the general contractor.¹⁴⁸ After disputes arose over flaws in the system and the parties' attempts to settle their disputes failed, *Fitzroy* asked for arbitration in accordance with the

138. Inoue, *supra* note 135, at 254. For instance, in *International Standard Electric Corp. v. Bidas Sociedad Anonima Petrolera, Industrial y Commercial*, 745 F. Supp. 172, 180 (S.D.N.Y. 1990), the opposing party did not adequately object when the arbitrator appointed an expert. Inoue, *supra* note 135, at 254.

139. Inoue, *supra* note 135, at 253.

140. Thomas, *supra* note 42, at 35.

141. *Fitzroy Eng'g, Ltd. v. Flame Eng'g, Inc.*, No. 94-C-2029, 1994 U.S. Dist. LEXIS 17781, at *15-16 (N.D. Ill. Dec. 2, 1994) (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)).

142. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal citations omitted) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

143. Jarvin, *supra* note 133, at 382.

144. Fortier, *supra* note 9, at 399.

145. von Mehren, *supra* note 13, at 161.

146. *Fitzroy*, 1994 U.S. Dist. LEXIS 17781, at *6.

147. *Id.* at *16-17.

148. *Id.* at *1.

arbitration clause in the contract.¹⁴⁹ As a result, Flame hired the firm of Bell Gully to represent it at the arbitration proceeding.¹⁵⁰ Bell Gully told Flame that no conflict of interest existed, but, after the arbitration, Flame discovered that Bell Gully had previously represented the incinerator-operating company in unrelated claims.¹⁵¹ Flame argued that this conflict not only caused Bell Gully to dismiss a potential defense based on the operating company's misuse of the incinerator, but it also led to Flame not appearing in front of the arbitrator.¹⁵² The court rejected these two arguments, stating that the defense of a party's inability to present its case¹⁵³ should be narrowly construed.¹⁵⁴ The court's rule requires the party to show that (1) an actual conflict existed and (2) the conflict affected the outcome of the arbitration before the court will consider vacating the arbitral award.¹⁵⁵ The court found that Flame was unable to present any evidence to satisfy this two-prong test.¹⁵⁶ Flame had proper notice of the proceedings and thus had no reason for failing to appear.¹⁵⁷ Also, the connection between Flame's attorney and the operating company was tenuous.¹⁵⁸

The defense is also mostly unsuccessful in English courts.¹⁵⁹ In a 1999 English case, *Omnium de Traitement et de Valorisation* ("OTV") argued, among other things, that it was unable to present its case.¹⁶⁰ OTV based this argument on two facts: (1) the second arbitrator who took over following the resignation of the initial arbitrator decided not to hear the oral evidence, and (2) the second arbitrator held only a short hearing to take closing submissions before making his decision.¹⁶¹ The court found that no evidence supported OTV's arguments.¹⁶² First, the initial arbitrator heard all the witnesses and took notes of the evidence.¹⁶³ Second, neither

149. *Id.* at *2-*3. The parties in *Fitzroy* agreed to submit disputes arising from the contract to arbitration and that the laws of New Zealand would govern the interpretation of the contract. *Id.* at *2.

150. *Id.* at *3.

151. *Id.* at *3, *6.

152. *Fitzroy*, 1994 U.S. Dist. LEXIS 17781, at *4, *14.

153. In this case, Flame claimed that it did not have the opportunity to be heard in front of the arbitrator. *Id.*

154. *Id.* at *16 (quoting *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co.*, 415 F. Supp. 133, 139 (D.N.J. 1976), and *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 976 (2d Cir. 1974)).

155. *Id.*

156. *Id.*

157. *Id.* at *16-17.

158. *Fitzroy*, 1994 U.S. Dist. LEXIS 17781, at *13.

159. *E.g.*, *Irvani v. Irvani*, (2000) 1 Lloyd's Rep. 412, 426 (C.A.) (Eng.).

160. *Omnium de Traitement et de Valorisation S.A. (OTV) v. Hilmarton Ltd.*, (1999) 2 Lloyd's Rep. 222, 225 (Q.B.D. Comm. Ct.) (Eng.).

161. *Id.*

162. *Id.* at 226.

163. *Id.* at 225.

OTV nor Hilmarton, the enforcing party, asked to supplement its evidence.¹⁶⁴ Third, neither party alleged new facts after the appointment of the second arbitrator.¹⁶⁵ Lastly, the second arbitrator based his procedural decisions on the need for procedural economy and efficiency.¹⁶⁶ The court noted that with complaints of this kind (i.e., inability to present one's case), "a careful reading of the award itself" would indicate whether a due process violation affected the award; by looking at the arbitrator's reasoning for the award, the court can easily determine if either fact or law supported the award.¹⁶⁷ If there is support for the award, it is unlikely that a court will find that one of the parties was unable to present its case.¹⁶⁸ Therefore, when a party alleges it could not present its case, both U.S. and English courts will examine if this defense actually affected the outcome.¹⁶⁹

2. Cases in Which U.S. and English Courts Accepted the Due Process Defense

In *Iran Aircraft Industries v. Avco*, a U.S. court refused to enforce an award because one of the parties was unable to present its case.¹⁷⁰ Avco entered into several contracts with Iran Aircraft in which Avco agreed to repair and replace several helicopter engines.¹⁷¹ After the Iranian Revolution of 1978-1979, however, Avco and Iran Aircraft disputed over whether Avco performed and whether Iran paid.¹⁷² As a result of the Algiers Accords between the United States and Iran,¹⁷³ all existing disputes went to binding arbitration with the Iran-U.S. Claims Tribunal at The Hague.¹⁷⁴ At a pre-hearing conference, Avco asked the Tribunal for guidance on the appropriate methods for proving its claims since the proof involved voluminous invoices.¹⁷⁵ The Tribunal told Avco that it could submit audited accounts of its invoices rather than the invoices themselves.¹⁷⁶ After Avco submitted the audited

164. *Id.*

165. *Id.*

166. *OTV*, (1999) 2 Lloyd's Rep. at 225.

167. *Id.*

168. *See generally id.*

169. *See generally id.*; *Fitzroy Eng'g, Ltd. v. Flame Eng'g, Inc.*, No. 94-C-2029, 1994 U.S. Dist. LEXIS 17781, at *16 (N.D. Ill. Dec. 2, 1994).

170. *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992).

171. *Id.* at 142.

172. *Id.*

173. The United States and Iran agreed to the Algiers Accords, which provided for the release of hostages seized at the American Embassy in Tehran. *Id.*

174. *Id.* at 142-43 n.4. The Claims Settlement Declaration of the Algiers Accords vested the Tribunal with jurisdiction to hear "official claims arising out of contractual arrangements between them for the purchase and sale of goods and services," and "dispute[s] as to the interpretation or performance of any provision" of the General Declaration." *Id.* at 143 n.4.

175. *Id.* at 143.

176. *Iran Aircraft*, 980 F.2d at 143.

accounts of its invoices, one of the judges from the Tribunal resigned and was replaced.¹⁷⁷ Thereafter, a hearing on the merits was held at which Avco was asked about the audited accounts, but was not asked to produce the actual invoices.¹⁷⁸ During its deliberation, the Tribunal refused to consider Avco's submission of the audited accounts.¹⁷⁹ As a result, the Tribunal rejected Avco's claim.¹⁸⁰ When Iran Aircraft attempted to enforce the award in a U.S. district court, Avco raised the defense that it was unable to present its case to the Tribunal.¹⁸¹ The district court agreed with Avco and refused to enforce the award.¹⁸² The U.S. Court of Appeals for the Second Circuit affirmed the refusal, finding that Avco did not have the opportunity to present its claims in a meaningful manner as required by U.S. procedural due process laws because the Tribunal had misled Avco into thinking that it had used a proper method to prove its case.¹⁸³

The dissent argued that this defense should be narrowly construed since due process only requires that the parties have proper notice and an opportunity to respond.¹⁸⁴ The dissent maintained that because Avco had notice of the replacement judge's concerns about the proof and could have brought the actual invoices to the arbitration proceedings, Avco was able to present its case.¹⁸⁵ This case demonstrates that, at least in the United States, "due process rights are [still] entitled to full force under the [New York] Convention as defenses to enforcement" even when narrowly construed.¹⁸⁶

English courts also seriously consider claims of due process violations.¹⁸⁷ In *Irvani v. Irvani*, two brothers, Ali and Bahman, orally created a partnership, which later ended due to Ali's addiction to heroin.¹⁸⁸ After the termination, disputes arose over the distribution of partnership assets.¹⁸⁹ Ali and Bahman agreed to arbitrate the

177. *Id.* at 144.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 145.

182. *Iran Aircraft*, 980 F.2d at 142.

183. *Id.* at 146.

184. *Id.* at 147 (Cardamone, J., dissenting).

185. *Id.* at 147-48.

186. *Id.* at 145-46 (internal citations omitted) (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 975-76 (2d Cir. 1974)).

187. *E.g.*, *Irvani v. Irvani*, (2000) 1 Lloyd's Rep. 412, 426 (C.A.) (Eng.).

188. *Id.* at 414-15. The partnership was to develop various real estate and commercial ventures in the United States and abroad. *Id.*

189. *Id.* When the partnership began to encounter problems, Bahman took full control over the partnership's assets, but Ali continued to contribute funds to the partnership. *Id.* Also, Ali continued to refer corporate opportunities, such as the Softblox Investment, to Bahman. *Id.* One dispute was regarding whether Ali should receive some of the assets from the Softblox Investment. *Id.*

disputes with their sister, Mrs. Khosrowshahi, as the sole arbitrator.¹⁹⁰ After Mrs. Khosrowshahi ruled in favor of Bahman,¹⁹¹ Ali filed a lawsuit against Bahman in the U.S. District Court for the Northern District of Georgia to dissolve the partnership and distribute assets.¹⁹² While the case was pending, Bahman brought a suit in the English courts to obtain a definitive statement on the arbitral award to use in his motion to dismiss in the U.S. proceedings.¹⁹³ As one of his defenses, Ali argued that he was unable to present his case in front of Mrs. Khosrowshahi.¹⁹⁴ The appellate court first noted that the meaning of the phrase “otherwise unable to present his case” in the New York Convention should have an international meaning since it is in an international document.¹⁹⁵ The court then found that Mrs. Khosrowshahi’s conclusions regarding the distribution of assets were neither based on reason nor

190. *Id.* at 417. The arbitration agreement provided that “[a]ny decision rendered by the Arbitrator is absolutely enforceable in the courts of law having jurisdiction over the arbitrating parties.” *Id.*

191. *Id.* at 420. Specifically, the arbitral award rendered by Mrs. Khosrowshahi read:

The Partnership Agreement

I have found the principle of unlimited partner withdrawals, regardless of the individual contributions, to be invalid. Similarly, the so called new worth equalisation is not supported by facts. I would like to state that these principles are contrary to common business practice and common sense and I do not accept the partnership was entered into on this basis. The principle which I have followed in this arbitration is equal contribution, equal exposure and equal right to profits from joint activities.

Okabashi Liquidation

I have examined the accounts and circumstances of the liquidation of the Okabashi business and have found that this was conducted fairly and in a business like fashion and [Ali] does not have any claim to results of the work-out.

Softblox (I) Investment

Since [Ali] did not put any funds into the Softblox Investment, he would not have been exposed to potential losses and cannot be treated as a participant in profits.

Id.

192. *Id.* at 414, 421. Ali claimed that when he entered into the arbitration agreement, he was not competent due to his substance abuse. *Id.* at 414. He further asserted that his sister was biased toward Bahman. *Id.*

193. *Irvani*, (2000) 1 Lloyd’s Rep. at 414, 426. The English court treated Bahman’s request for a declaration as a request to recognize and enforce the award under the New York Convention. *Id.*

194. *Id.* at 426. Ali’s argument was partially based on his belief that his father was influencing his sister to rule against him. *Id.*

195. *Id.*

based on information available to Ali.¹⁹⁶ The court pointed to the insufficient record and questioned how much information Ali had about the business or about the details of the conversations between the parties at the arbitration meeting.¹⁹⁷ Although some evidence demonstrated that Ali had not taken advantage of all the due process opportunities available to him, the court could not be certain without further investigation.¹⁹⁸ Because of the insufficient record, the court gave Ali the benefit of the doubt and quashed the lower court's finding of a valid and binding arbitral award.¹⁹⁹ Despite the quashing of the award, the holding gave Bahman the option to go back to the lower court to seek a declaration to uphold the arbitral award.²⁰⁰ Rather than relying on direct evidence that Ali was unable to present his case, the court based its decision on the *lack of evidence* that Ali was able to present his case.²⁰¹ This reasoning appears to contradict the requirement that the burden of proof is upon the party presenting the defense to show that he was unable to present his case.²⁰² Thus, instead of construing the due process defense narrowly, the court seems to have construed the defense liberally to ensure that the arbitrator did not violate Ali's due process rights.

D. The Five Procedural Defenses Summarized

Arbitration allows parties to choose which procedural law should govern their disputes. In order to enforce the parties' choices, the New York Convention's five procedural defenses provide minimum due process protections. First, the arbitration agreement must be valid. Because of the separability doctrine, arbitration agreements will more likely be valid even if the underlying contract is invalid. Second, the arbitral award should only cover matters under the scope of the arbitration agreement. Third, the arbitration panel should be composed according to the arbitration agreement, and the panel should use the proper procedure during the arbitration proceedings. Fourth, the arbitral award must be binding before a court will enforce it. Lastly, the parties must have a fair opportunity to be heard. If any of these procedural elements are violated, the party opposing enforcement may raise the relevant procedural defense. In deciding the claim, the enforcing court, whether a

196. *Id.* The conclusions were regarding the Okabashi business and the Softblox investment. *Id.*

197. *See id.*

198. *Id.* at 426.

199. *Irvani*, (2000) 1 Lloyd's Rep. at 426-27.

200. *Id.* at 427. Bahman informed the court that he would not seek to retry the case if the court found that the award was not valid and binding. *Id.* Also, should Mrs. Khosrowshahi preside as the arbitrator again for Ali and Bahman, the court suggested that she take the court's decision into consideration. *Id.*

201. *See id.* at 426.

202. *See von Mehren, supra* note 13, at 158; *Rosseeel N.V. v. Oriental Commercial & Shipping Co. (U.K.) Ltd.*, (1991) 2 Lloyd's Rep. 625, 628 (Q.B.D. Comm. Ct.) (Eng.).

U.S. court or an English court, will look to the enforcing country's notions of procedural law. Both U.S. and English courts narrowly construe the procedural defenses.

IV. SUBSTANTIVE DEFENSES

A. Two Parts of the Substantive Defenses: Arbitrability and Public Policy

Unlike the procedural defenses, which only a party may raise, either a party or the enforcing court *sua sponte* may raise either of the two substantive defenses.²⁰³ One substantive defense is whether the subject matter can be arbitrated.²⁰⁴ This defense can occur when the enforcing court finds that the law governing the enforcing country does not allow arbitration as a way to resolve the dispute.²⁰⁵ For instance, in *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamabirya*, the U.S. court refused to enforce the arbitral award because the subject matter of the dispute, the validity of Libya's nationalization of Libyan American Oil's petroleum rights, was not arbitrable.²⁰⁶ Under U.S. standards, arbitrating this dispute violated the Act of State Doctrine.²⁰⁷ Thus, local standards of arbitrability could determine whether a court will enforce an award.²⁰⁸ As a result, the winning party may forum shop to find a country whose laws allow for arbitration of that dispute.²⁰⁹

The enforcing country's public policy may also provide a basis for refusal to enforce.²¹⁰ Consequently, if enforcing the award would violate the enforcing country's public policy, then the enforcing court *may* vacate the award.²¹¹ On a practical basis, the public-policy defense represents both of the substantive defenses.²¹² Because the public-policy defense can cover a wide range of issues, parties opposing enforcement attempt to argue this defense when they have no other basis for asking the court to vacate the award.²¹³ For this reason, many have characterized the public-policy defense as the "escape clause"²¹⁴ or "safety valve"²¹⁵

203. New York Convention, *supra* note 24, art. V.

204. *Id.* art. V(2)(a) ("The subject matter of the difference is not capable by arbitration under the law of that country.").

205. Senger-Weiss, *supra* note 17, at 77.

206. *Id.*; *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamabirya*, 482 F. Supp. 1175, 1179 (D.D.C. 1980), *vacated without opinion*, 684 F.2d 1032 (D.C. Cir. 1981).

207. Senger-Weiss, *supra* note 17, at 77. The Act of State Doctrine states that a nation's domestic actions should not be questioned in the courts of another nation. *Cf. id.*

208. Quigley, *supra* note 61, at 1070.

209. *Id.*

210. New York Convention, *supra* note 24, art. V(2)(b) ("The recognition or enforcement of the award would be contrary to the public policy of that country.").

211. *Id.*

212. von Mehren, *supra* note 13, at 167.

213. *Cf.* Senger-Weiss, *supra* note 17, at 77.

214. Cole, *supra* note 7, at 374.

of the New York Convention. Like the procedural defenses, however, enforcing courts often construe the public-policy defense narrowly²¹⁶ and, thus, parties arguing this defense are often unsuccessful.²¹⁷

B. Defining Public Policy

Although losing parties typically default to the argument that enforcement would violate the enforcing country's public policy,²¹⁸ they usually argue it incorrectly.²¹⁹ Defining public policy thus becomes important in formulating the public-policy defense. Public policy has been defined as the "final parameter of the law that, while it is reflected in and often expressed by statutory and constitutional statements of law, also dictates either consent or constraint, permission or prohibition, when statutes and constitutions are silent."²²⁰

Public policy has three distinct levels: domestic, international, and transnational.²²¹ When only one country is associated with the arbitration, then the laws and standards that form the domestic public policy of that country apply.²²² As an extension of domestic public policy, international public policy consists of the rules of a country's domestic public policy applied in an international context.²²³ When the arbitration proceedings have international elements, such as parties from different countries, enforcing courts look to international public policy.²²⁴ In other words, the enforcing court balances the interests of its own domestic public policy with the "public policy of interested nations and the needs of international

215. Choi, *supra* note 6, at 197. It is called the safety valve because it is subject to the enforcing country's interpretation. *Id.*

216. von Mehren, *supra* note 13, at 167.

217. Andrew M. Campbell, Annotation, *Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds*, 144 A.L.R. FED. 481 (2005).

218. *Deutsche Schachtbau-und Tiefbohrergesellschaft M.B.H. (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil)*, (1987) 2 Lloyd's Rep. 246, 254 (C.A.) (Eng.) (quoting *Richardson v. Mellish*, (1824) 2 Bing. 229, 252 (Eng.) for the proposition that public policy "is never argued at all, but when other points fail").

219. *See, e.g., Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974) (indicating that it is incorrect to equate national policy with U.S. public policy); *Belship Navigation, Inc. v. Sealift, Inc.*, No. 1:95-CV-02748, 1995 WL 447656, at *6 (S.D.N.Y. July 28, 1995) (indicating that public policy and national policy are not synonymous).

220. Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J. 511, 513 (1988).

221. *Id.*; Curtin, *supra* note 57, at 281.

222. Curtin, *supra* note 57, at 281. For instance, when one party is from New York, the other party is from Arizona, and the subject matter of the dispute occurred in California, domestic policy would apply because there are no international components. *Id.*

223. Buchanan, *supra* note 220, at 514.

224. *See* Curtin, *supra* note 57, at 281.

commerce.”²²⁵ A country’s international public policy may or may not be the same as its domestic public policy.²²⁶ For instance, U.S. courts differentiate between “public” and “national” policy, which is another way of phrasing the difference between domestic and international public policy.²²⁷ Therefore, although national policy may prohibit a certain transaction, the public-policy defense “was not meant to enshrine the vagaries of international politics under the rubric of ‘public policy.’”²²⁸ In practice, courts are more likely to recognize the public-policy defense if the award is domestic rather than foreign.²²⁹

Unlike international public policy, which relies on the laws and standards of specific countries, transnational public policy represents the international consensus on accepted norms of conduct.²³⁰ Thus, transnational public policy is more flexible than domestic and international public policy when parties do not want a particular country’s laws to apply to the arbitration and to the enforcement of the arbitral award.²³¹ However, because international consensus is debatable at best,²³² transnational public policy is unpredictable and difficult to apply.²³³ As a result, the New York Convention refers to the public policy of the country where enforcement is sought rather than to transnational public policy.²³⁴ In some rare instances, arbitration panels incorporate transnational public policy into their decisions so that enforcing courts have to take it into consideration when deciding whether to enforce an award.²³⁵ Even if the distinctions between these three levels of public policy are

225. *Id.*

226. *See* Buchanan, *supra* note 220, at 524. Brazil, for example, does not distinguish, whether in law or in practice, between domestic and international public policy. *Id.*

227. Curtin, *supra* note 57, at 282.

228. *Belship Navigation, Inc. v. Sealift, Inc.*, No. 1:95-CV-02748, 1995 WL 447656, at *6 (S.D.N.Y. July 28, 1995) (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)). In *Belship*, U.S. national policy prohibited dealing with Cuba, but *Belship* could place any arbitral award in a blocked account until relations improved with Cuba, at which time *Belship* could receive the award. *Id.*

229. *See* Bouzari, *supra* note 5, at 215; Robert E. Sullivan, *Dispute Resolution in International Transactions*, 951 PLI/CORP 543, 560 (1996) (“In the international context, U.S. courts have enforced a wide variety of clauses to arbitrate such disputes because of the need for more order in international business transactions, even if in the domestic context they would not be subject to arbitration.”).

230. Buchanan, *supra* note 220, at 530. Sometimes the domestic public policy of various states make up the international consensus, but that is not always the case. *Id.* at 529-30.

231. *See* Curtin, *supra* note 57, at 282.

232. *See* Buchanan, *supra* note 220, at 529.

233. *See* Curtin, *supra* note 57, at 283.

234. Buchanan, *supra* note 220, at 515-16; New York Convention, *supra* note 24, art. V(2)(b) (“The recognition or enforcement of the award would be contrary to the *public policy of that country.*” (emphasis added)).

235. *See* Buchanan, *supra* note 220, at 514, 530.

not explored in actual practice generally, the distinctions are still present and may affect a party's argument.²³⁶

C. U.S. and English Standards for Public Policy

Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA) is the landmark U.S. public-policy case.²³⁷ Parsons, an American company, contracted to construct and manage a paperboard mill in Egypt for RAKTA, an Egyptian manufacturer.²³⁸ In addition, the U.S. Agency for International Development (USAID), a branch of the U.S. State Department, would finance the project by offering RAKTA funds to purchase letters of credit in Parsons' favor.²³⁹ The contract included two relevant provisions: an arbitration clause and a force majeure clause.²⁴⁰ Although the work on the mill began as planned, the majority of the Parsons work crew left Egypt as a result of the Arab-Israeli Six Day War.²⁴¹ The problem compounded when the Egyptian government broke diplomatic ties with the United States and ordered all Americans expelled from Egypt unless they applied and qualified for special visas.²⁴² The dispute that led to arbitration arose as a result of Parsons invoking the force majeure clause to excuse abandoning the project.²⁴³ The arbitration tribunal held Parsons liable to RAKTA because Parsons did not make a good faith effort to secure a special visa and RAKTA would be able to finance the project even if USAID could not.²⁴⁴ At the enforcement stage, Parsons challenged the arbitral award by arguing, among other things, that enforcing the award would violate the public policy of the United States.²⁴⁵ The U.S. Court of Appeals for the Second Circuit rejected Parsons's arguments and affirmed the arbitral award.²⁴⁶

236. *See id.* at 514-15, 531.

237. *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974); Bouzari, *supra* note 5, at 211.

238. *Parsons*, 508 F.2d at 972.

239. *Id.*

240. *Id.* The arbitration clause provided that the parties would use arbitration if any dispute arose in the course of performance. *Id.* The force majeure clause "excused delay in performance due to causes beyond [Parsons'] reasonable capacity to control." *Id.*

241. *Id.* Since the United States was the principal ally of the Israeli enemy, Egyptian hostility toward Americans was prevalent. *Id.*

242. *Id.* at 972.

243. *Id.*

244. *Parsons*, 508 F.2d at 972 n.3.

245. *Id.* at 972-73. Specifically, Parsons claimed that since the U.S. government withdrew its financial support and U.S. diplomatic ties with the Egyptian government were severed, it was required as a loyal American citizen to abandon the project. *Id.*

246. *Id.* at 978.

According to the *Parsons* court, the public-policy defense should be narrowly construed²⁴⁷ lest it become a “major loophole in the [New York] Convention’s mechanism for enforcement.”²⁴⁸ Therefore, the rule states that “[e]nforcement of foreign arbitral awards may be denied . . . only where enforcement would violate the *forum state’s most basic notions of morality and justice*.”²⁴⁹ Now, U.S. courts use this standard to evaluate public-policy arguments in enforcement cases.²⁵⁰ Although the *Parsons* decision and its progeny do not provide any explicit guidance regarding what constitutes a “forum state’s most basic notions of morality and justice,” various U.S. cases have indicated some parameters for the defense.²⁵¹ First, the *Parsons* court specifically noted the difference between “national” and “public” policy²⁵² because reading the public-policy defense to protect national political interests would undermine the value of the New York Convention.²⁵³ An action that violates American public policy does not necessarily violate international public policy. Second, the public policy “must be well defined and dominant.”²⁵⁴ Lastly, the public-policy defense “must be construed in light of the overriding purpose of the [New York] Convention, which is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”²⁵⁵ These parameters are consistent with the pro-enforcement bias of the New York Convention.²⁵⁶

247. *Id.* at 973. Prior to the New York Convention, the Geneva Convention had a public-policy exception for awards contrary to the “principles of the law” and awards violating “fundamental principles of the law.” *Id.* The New York Convention drafters’ decision not to include that language indicates an intention to narrow the public-policy defense. *Id.*

248. *Id.* at 974.

249. *Id.* at 973 (emphasis added).

250. See Bouzari, *supra* note 5, at 211 (indicating that subsequent courts have followed this rule); Campbell, *supra* note 217 (summary of multiple cases that have applied the *Parsons* rule).

251. See Campbell, *supra* note 217.

252. Subsequent cases have upheld this distinction. See, e.g., *Antco Shipping Co. v. Sidermar S.p.A.*, 417 F. Supp. 207, 216-17 (S.D.N.Y. 1976); *Nat’l Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 819-20 (D. Del. 1990); *Belship Navigation, Inc. v. Sealift, Inc.*, No. 1:95-CV-02748, 1995 WL 447656, at *5 (S.D.N.Y. July 28, 1995).

253. *Parsons*, 508 F.2d at 974 (“In equating ‘national’ policy with United States ‘public’ policy, the appellant quite plainly misses the mark.”).

254. *Northrop Corp. v. Triad Int’l Mktg. S.A.*, 811 F.2d 1265, 1271 (9th Cir. 1987) (internal citations omitted) (quoting *W.R. Grace & Co. v. Local 759, Int’l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)) (holding that the policy of paying commissions adopted by the Department of Defense was not sufficiently well-defined and dominant to justify refusal to enforce the arbitral award).

255. *Waterside Ocean Navigation Co. v. Int’l Navigation Ltd.*, 737 F.2d 150, 152 (2d Cir. 1984) (internal citations omitted) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

256. *Parsons*, 508 F.2d at 973.

The English standard comes from *Deutsche Schachtbau-und Tiefbohrergesellschaft M.B.H. (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil)*.²⁵⁷ In this case, disputes arose over an oil exploration agreement entered into by D.S.T. and Rakoil.²⁵⁸ Since the agreement contained an International Chamber of Commerce (I.C.C.) arbitration clause,²⁵⁹ D.S.T. submitted its claims to the I.C.C. arbitration panel.²⁶⁰ However, Rakoil sought to rescind the agreement in the Court of Ras Al Khaimah by arguing that D.S.T. obtained the agreement by misrepresentation.²⁶¹ D.S.T. succeeded in the arbitration and Rakoil succeeded in the court proceedings because neither party participated in the proceedings initiated by the other party.²⁶² The I.C.C. arbitration tribunal referred to the common practices of international arbitrations in the field of oil drilling concessions²⁶³ and to arbitrations located in Switzerland.²⁶⁴ Rakoil argued that it was contrary to English public policy for the arbitration panel to use “some unspecified, and possibly ill defined, internationally accepted principles of law”²⁶⁵ rather than a particular country’s law.²⁶⁶ The court disagreed with Rakoil and held that it was not contrary to English public policy for an arbitration panel to use a “common denominator of principles underlying the laws of the various nations governing contractual relations,” especially when the parties had the opportunity but failed to specify which system of law would apply.²⁶⁷ Furthermore, the court found that the parties had intended to create legally

257. *Deutsche Schachtbau-und Tiefbohrergesellschaft M.B.H. (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil)*, (1987) 2 Lloyd’s Rep. 246, 254 (C.A.) (Eng.).

258. *Id.* at 248.

259. *Id.* at 249. The arbitration provision provided:

1. All disputes arising in connection with the interpretation or application of this Agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the Rules.
2. The arbitration shall be held in Geneva, Switzerland and shall be conducted in the English language.

Id.

260. *Id.*

261. *Id.* at 248.

262. *Id.*

263. The arbitration panel looked at transnational public policy, or accepted international practices, when deciding the case. *D.S.T.*, (1987) 2 Lloyd’s Rep. at 252.

264. *Id.* Since the arbitration agreement did not specify which law the arbitrators should apply but indicated that Switzerland would be the site of arbitration, Swiss law should govern the arbitration. *Id.* at 250.

265. This sounds like transnational public policy.

266. *D.S.T.*, (1987) 2 Lloyd’s Rep. at 252.

267. *Id.* at 252-54.

enforceable rights and obligations, the agreement was an enforceable contract, and no illegality was present that would injure the public good.²⁶⁸

Therefore, in order for an English court to vacate an arbitral award on the basis of the public-policy defense, the advocating party must show that there is “some element of illegality or that the enforcement of the award would be *clearly injurious* to the public good or, possibly, that enforcement would be *wholly offensive* to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.”²⁶⁹ Although this standard is less ambiguous than the U.S. standard, it still does not define what “clearly injurious” or “wholly offensive” means.²⁷⁰ *D.S.T.*’s progeny makes clear that English courts do distinguish between English public policy and English domestic public policy.²⁷¹ The English standard is nonetheless a strict one, which means that English courts will rarely refuse to enforce an award on public-policy grounds.²⁷²

While the language of the U.S. and the English standards are different, U.S. and English cases interpreting the countries’ respective standards all construe the public-policy defense narrowly.²⁷³ This narrow construction exists mainly because of international comity.²⁷⁴ Both U.S.²⁷⁵ and English²⁷⁶ courts have recognized the doctrine of international comity. International comity in the arbitration context occurs, for example, when country X’s courts recognize and enforce country Y’s arbitral awards because X wants Y’s courts to enforce X’s arbitral awards.²⁷⁷ Due to increasing globalization, companies are more likely to enter into international agreements, which in turn increases the number of arbitrations and enforcement proceedings.²⁷⁸ Since the world is more interconnected, one country’s laws cannot

268. Choi, *supra* note 6, at 206.

269. *D.S.T.*, (1987) 2 Lloyd’s Rep. at 254 (emphasis added).

270. *See id.*

271. *Omnium de Traitement et de Valorisation S.A. (OTV) v. Hilmarton Ltd.*, (1999) 2 Lloyd’s Rep. 222, 225 (Q.B.D. Comm. Ct.) (Eng.) (“[T]here is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might taken a different view.”).

272. Curtin, *supra* note 57, at 277.

273. *See id.* (stating that other national courts such as Canada and Australia have also adopted similarly strict standards).

274. Bouzari, *supra* note 5, at 215-16.

275. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (concerns of international comity required the court to enforce the parties’ agreement); *Gulf Petro Trading Co. v. Nigerian Nat. Petroleum Corp.*, 288 F. Supp. 2d 783, 794 (N.D. Tex. 2003) (international comity required enforcement of foreign arbitral award).

276. *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd.*, [1999] Q.B. 740, 772 (Comm. Ct.) (Eng.), *aff’d*, [2000] Q.B. 288 (C.A.) (Eng.) (recognizing international comity); *IPCO (Nig.) Ltd. v. Nigerian Nat’l Petroleum Corp.*, [2005] EWHC (QB) 726 [16] (Eng.) (recognizing the doctrine of comity).

277. *See Bouzari, supra* note 5, at 216.

278. *See id.*

govern international trade and commerce.²⁷⁹ Thus, courts must be sensitive to the international commercial system's need to have disputes resolved with predictability.²⁸⁰ Resolving disputes effectively in international commerce requires countries to respect each other²⁸¹ and the foreign and international tribunals' abilities.²⁸²

Five other reasons exist for why U.S. and English courts narrowly construe the public-policy defense. First, the doctrine of stare decisis requires courts to look to precedent.²⁸³ Because case law involving enforcement of foreign arbitral awards is scarce, U.S. courts often cite to *Parsons* and English courts often cite to *D.S.T.* when resolving public-policy arguments.²⁸⁴ Second, courts usually respect the parties' freedom to contract, including the freedom to decide whether to submit to arbitration and which law should apply to the arbitration.²⁸⁵ Third, courts may believe that "resolution of private economic disputes does not have any public-policy ramifications."²⁸⁶ Fourth, parties should be able to rely on the finality of awards.²⁸⁷ Finally, enforcing arbitral awards enhances the acceptance of arbitration as a valid alternative dispute resolution mechanism and encourages parties to use arbitration in international commercial disputes.²⁸⁸ Regardless of the reasons, U.S. and English courts will rarely refuse to enforce an award on the ground that enforcement would be contrary to public policy.

D. Public-Policy Arguments in U.S. and English Case Law

1. U.S. and English Courts' Pro-Enforcement Bias

In many U.S. cases, courts have enforced a foreign arbitral award under the New York Convention despite the public-policy argument.²⁸⁹ However, *Northrop Corp. v. Triad International Marketing S.A.* illustrates the importance of a choice-of-

279. *See id.* at 215.

280. *Mitsubishi Motors Corp.*, 473 U.S. at 629.

281. Bouzari, *supra* note 5, at 216.

282. *Mitsubishi Motors Corp.*, 473 U.S. at 629.

283. *See* Bouzari, *supra* note 5, at 216. Stare decisis is particularly important in common law countries such as the United States and England because their courts rely on precedent when making their decisions.

284. *See id.*; *cf.* Choi, *supra* note 6, at 206.

285. Choi, *supra* note 6, at 207.

286. *Id.*

287. *Westacre Investments Inc. v. Jugoinport-SPDR Holding Co. Ltd.*, [1999] Q.B. 740, 773 (Comm. Ct.) (Eng.), *aff'd*, [2000] Q.B. 288 (C.A.) (Eng.). Finality of international arbitral awards is important in England since it is the venue of more international arbitration than anywhere else in the world. *Id.*

288. Choi, *supra* note 6, at 207.

289. *See* Campbell, *supra* note 217 (listing cases where one of the parties has argued that enforcement would be contrary to public policy).

law clause in an arbitration agreement, as well as which country's public policy should apply in evaluating public-policy arguments.²⁹⁰ In *Northrop*, the U.S. Court of Appeals for the Ninth Circuit narrowly construed the public-policy defense and enforced the arbitral award.²⁹¹ Northrop, a U.S. arms supplier and the party opposing enforcement, entered into a marketing agreement with Triad, which dictated that Triad would solicit contracts for sale of military equipment to the Saudi Arabian Air Force in return for commissions on the sales.²⁹² After Triad had already successfully solicited the contracts for Northrop, Saudi Arabia issued a decree that prohibited the payment of commissions for arms contracts.²⁹³ Consequently, Northrop stopped paying commissions to Triad, and Triad submitted the dispute to arbitration as required by the marketing agreement.²⁹⁴ Because the arbitration panel entered an award for Triad, Triad sought to confirm the award in the U.S. courts.²⁹⁵

290. *Northrop Corp. v. Triad Int'l Mktg. S.A.*, 811 F.2d 1265 (9th Cir. 1987).

291. *Id.* at 1271.

292. *Id.* at 1266.

293. *Id.* at 1266-68. The decree provided:

First: No company under contract with the Saudi Arabian government for the supply of arms or related equipment shall pay any amount as commission to any middleman, sales agent, representative or broker irrespective of their nationality, and whether the contract was concluded directly between the Saudi Arabian government and the company or through another state. Any commission arrangement already concluded by any of these companies with any other party shall be considered void and not binding for the Saudi Arabian government;

Second: If any of the foreign companies described [above] were found to have been under obligation for the payment of commission, payment of such commission shall be suspended after notifying the concerned companies of this decision.

Id. at 1267 n.1.

294. *Id.* at 1266-67. The arbitration clause provided:

The validity and construction of this Agreement shall be governed by the laws of the State of California in the United States of America . . . Any controversy or claim between the parties hereto arising out of or in connection with this Agreement . . . shall be settled by arbitration . . . under the rules then obtaining of the American Arbitration Association. The award of a majority of the arbitrators . . . shall be final and binding upon the parties

Id. at 1267 n.3.

295. *Id.* at 1267.

Northrop argued that the marketing agreement was invalid under section 1511 of the California Civil Code²⁹⁶ since the Saudi decree made it illegal to pay commissions.²⁹⁷ Thus, enforcement of the agreement and the award (to pay the commissions) would violate public policy.²⁹⁸ Northrop had three public-policy arguments. First, Northrop argued that California public policy required the court to refuse to enforce contracts that are unenforceable in other jurisdictions.²⁹⁹ Second, Northrop claimed that enforcement was contrary to the public policy of Saudi Arabia as announced in the decree.³⁰⁰ Third, Northrop maintained that the U.S. Department of Defense had the same public policy as the Saudi decree.³⁰¹

The U.S. Court of Appeals for the Ninth Circuit rejected all three arguments.³⁰² According to the court, the issue was whether the California law prohibited the payment of the commissions, and the answer turned on whether the existence of the Saudi decree excused performance under section 1511 of the California Civil Code.³⁰³ Even though Saudi law prohibited the payment of such commissions, the relevant law was that of California since the parties chose that law to govern the arbitration.³⁰⁴ Because Northrop did not introduce any evidence of a California law that prohibited the payment of commissions, California public policy did not apply in this context.³⁰⁵ Furthermore, because the U.S. Department of Defense's policy toward Saudi Arabia was not "well defined and dominant,"³⁰⁶ U.S. public policy was absent as well.³⁰⁷ Accordingly, the court held that it would not be contrary to public policy to enforce the arbitral award and to require Northrop to pay Triad the owed commissions.³⁰⁸ Therefore, the relevant public policy was not that of the country of performance but rather that of the country of enforcement, taking into consideration the governing law of the arbitration.³⁰⁹

296. Section 1511 of the California Civil Code provides that when operation of law prevents performance of an obligation, that performance is excused. *Northrop*, 811 F.2d at 1267.

297. *Id.* at 1267, 1270.

298. *Id.* at 1270.

299. *Id.*

300. *Id.* at 1271.

301. *Id.*

302. *Northrop*, 811 F.2d at 1270-71.

303. *Id.* at 1270.

304. *Id.* at 1267, 1269.

305. *Id.* at 1271.

306. *Id.* While the U.S. Department of Defense wanted to accommodate Saudi Arabian interests, it also wanted to encourage sales to Saudi Arabia of American-manufactured military equipment. *Id.*

307. *Id.*

308. *Northrop*, 811 F.2d at 1270-71.

309. *See id.* at 1266.

The Court of Appeal of England and Wales, in *Westacre Investments, Inc. v. Jugoinport-SPDR Holding Co. Ltd.*, considered a similar public-policy argument.³¹⁰ The Yugoslavian directorate hired Westacre, a Panamanian company, to use its personal influence and to pay bribes, if necessary, in order to procure contracts for the sale of military equipment to the Kuwaiti government.³¹¹ After Westacre secured a sale contract with the Kuwaiti government for the Yugoslavian directorate, the directorate repudiated the contract and refused to pay Westacre the contracted commission.³¹² Pursuant to the arbitration agreement,³¹³ Westacre submitted the dispute to arbitration, and the arbitration tribunal entered an award for Westacre.³¹⁴

When Westacre attempted to enforce the arbitral award in England, the directorate argued that enforcing it would be contrary to public policy.³¹⁵ Specifically, the directorate maintained that since the underlying contract to purchase personal influence was illegal in Kuwait, the country of performance, as well as in England, the country of enforcement, enforcing the award would be contrary to the doctrine of international comity.³¹⁶ Put another way, an arbitral award enforcing an illegal contract violates public policy.

Both the lower court and the Court of Appeal of England and Wales disagreed with the directorate's arguments.³¹⁷ First, the lower court noted that an agreement to purchase personal influence was not illegal under the Swiss law, the law governing the arbitration.³¹⁸ In fact, English law permitted an English court to enforce an agreement that was contrary to the public policy of the place of performance as long as enforcing the agreement was *not* contrary to the public policy

310. *Westacre Invs. Inc. v. Jugoinport-SPDR Holding Co. Ltd.*, [1999] Q.B. 740, 757 (Comm. Ct.) (Eng.), *aff'd*, [2000] 1 Q.B. 288 (C.A.) (Eng.). Since the "majority of the Court of Appeal's decision upheld the [Commercial Court's] decision almost without comment," this Note will refer to the Commercial Court's decision unless otherwise indicated. Shai Wade, *Westacre v. Soleimany: What Policy? Which Public?*, INT'L ARB. L. REV. 1999, 2(3), 97, 97.

311. *Westacre Invs. Inc. v. Jugoinport-SPDR Holding Co. Ltd.*, [2000] Q.B. 288, 294 (C.A.) (Eng.).

312. *Id.*

313. The arbitration clause provided:

The terms and provisions of this agreement shall be governed by and construed under the laws of Switzerland. Any disputes arising out of the present agreement shall be settled in accordance with the rules provided for in the Arbitration Rules of the International Chamber of Commerce with seat in Geneva. The decision of the arbitration shall be binding on the parties hereto.

Westacre, [1999] Q.B. at 749-50.

314. *Id.*

315. *Id.* at 746.

316. *Id.* at 773.

317. *Id.* at 772.

318. *Id.* at 753.

of the governing law or of England.³¹⁹ Next, “only the most serious universally condemned activities such as terrorism, drug trafficking, prostitution and paedophilia and in any event nothing less than outright corruption and fraud would offend against English public policy.”³²⁰ The lower court found that an agreement to purchase personal influence did not fit in this list.³²¹ Additionally, the lower court evaluated which public policies the agreement actually implicated.³²² On the one hand, it is important to promote the “public policy against enforcement of corrupt transactions.”³²³ On the other hand, it is also important to advance the “public policy of sustaining international arbitration agreements.”³²⁴ After balancing these two public policies, the lower court held that the public policy of sustaining international arbitration agreements outweighed the public policy of discouraging corruption.³²⁵ Thus, the lower court, construing the public-policy defense narrowly, enforced the award.³²⁶

2. U.S. and English Courts’ Infrequent Refusal to Enforce an Arbitral Award

Despite the narrow construction of the public-policy defense,³²⁷ U.S. courts have, in very rare circumstances, refused to enforce an arbitral award on the basis that enforcement would be contrary to public policy.³²⁸ For instance, in *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, a U.S. court refused to enforce part of the arbitral award for being contrary to public policy.³²⁹ Laminoirs, a French company, agreed to manufacture and sell galvanized steel wire according to the world market price for steel wire to Southwire, a Georgia company.³³⁰ Disputes arose over the interpretation of the world market price, alleged corrosion of the goods, and alleged flaking of the zinc coating on the wire.³³¹ Laminoirs submitted the disputes

319. Wade, *supra* note 310, at 100 (emphasis added).

320. *Id.* at 98; see *Westacre*, [1999] Q.B. at 775.

321. *Westacre*, [1999] Q.B. at 753.

322. *Id.* at 769.

323. *Id.*

324. *Id.*

325. *Id.* at 773. The Court of Appeal of England and Wales affirmed the lower court’s findings and holding. *Westacre Invs. Inc. v. Jugoinport-SPDR Holding Co. Ltd.*, [2000] Q.B. 288 (C.A.) (Eng.).

326. *Westacre*, [1999] Q.B. at 776.

327. “Almost all U.S. courts have enforced arbitral awards, even in egregious circumstances . . .” Choi, *supra* note 6, at 200.

328. Senger-Weiss, *supra* note 17, at 77 n.88.

329. *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1069 (N.D. Ga. 1980).

330. *Id.* at 1065.

331. *Id.*

to arbitration in accordance with the arbitration clause,³³² and the arbitration panel held that Southwire owed Laminoirs for the higher world market price plus interest at the French legal interest rate.³³³

When Laminoirs attempted to enforce the award, Southwire argued that the French interest rate violated the enforcing forum's public policy because it was usurious.³³⁴ Although the French interest rate was higher than that of Georgia,³³⁵ the court concluded that it was not so high as to constitute a violation of the "forum country's most basic notions of morality and justice."³³⁶ Thus, the application of the French interest rate was not contrary to public policy.³³⁷ However, the court went further and analyzed the additional increase of 5% interest per year.³³⁸ The court noted that the purpose of interest is to make whole a person who is deprived of the use of his money rather than to penalize the wrongdoer.³³⁹ According to Georgia public policy, "[a] foreign law will not be enforced if it is penal only and relates to the punishing of public wrongs as contradistinguished from the redressing of private injuries."³⁴⁰ Thus, the additional 5% interest was contrary to public policy because it was not reasonably related to the damage Laminoirs suffered due to the delay in receiving the awarded sums.³⁴¹ While the court enforced the award so far as the application of the French interest rate, it refused to enforce the additional 5% interest.³⁴² Thus, the U.S. court accepted the public-policy defense with some limitations.

English courts, on the other hand, have been more accommodating of the public-policy defense.³⁴³ In *Soleimany v. Soleimany*, the Court of Appeal of England and Wales accepted the public-policy argument of the party opposing enforcement and refused to enforce the arbitral award.³⁴⁴ Sion Soleimany asked his son Abner Soleimany to return to Iran to recover some carpets that Iranian customs authorities

332. The arbitration clause contained a governing law clause that Georgia law, to the extent that it is in accordance with French law, would govern the arbitration. *Id.* at 1065.

333. *Id.* at 1066.

334. *Id.*

335. The French interest rate ranged from 9.5% to 10.5% per year. *Laminoirs*, 484 F. Supp. at 1069. The Georgia interest rate was 7% per year, but rates of interest as high as that of the French were not prohibited by Georgia law. *Id.*

336. *Id.* at 1068-69 (citing *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)).

337. *Id.* at 1069.

338. *Id.*

339. *Id.*

340. *Id.* (citing two Georgia cases).

341. *Laminoirs*, 484 F. Supp. at 1069.

342. *Id.*

343. *See Lemenda Trading Co. v. African Middle East Petroleum Co.*, [1988] Q.B. 448, 456 (Comm. Ct.) (Eng.) (indicating that on grounds of public policy, English courts have refused to enforce an agreement in a number of cases).

344. *Soleimany v. Soleimany*, [1999] Q.B. 785, 804 (C.A.) (Eng.).

had seized.³⁴⁵ After Abner discovered that he could profit from exporting Persian carpets for sale in England, he entered into an arrangement with Sion to split the profits.³⁴⁶ The exportation of these carpets constituted smuggling because it contravened Iranian revenue laws and export controls.³⁴⁷ Eventually, disputes arose between Sion and Abner over the division of profits.³⁴⁸ Consequently, they agreed to arbitrate their differences in front of the Beth Din, a Judaism court, with Jewish law governing the arbitration.³⁴⁹ Subsequent to the arbitral award in favor of Abner, Abner attempted to enforce the award in England.³⁵⁰

Sion opposed enforcement of the award on the ground that it was contrary to English public policy to enforce an award resulting from an illegal contract.³⁵¹ The Court of Appeal of England and Wales first addressed the separability doctrine: not all illegal contracts will infect and void an arbitration agreement, and not all arbitration agreements will be valid regardless of a valid contract.³⁵² Next, the court set forth the rule that “it is contrary to public policy for an English award . . . to be enforced if it is based on an English contract which was illegal when made.”³⁵³ The court reasoned that public policy would not allow parties to override the judicial process by using arbitration to hide their illegal contract.³⁵⁴ Unlike the *Westacre* contract,³⁵⁵ both the arbitration panel and the court in *Soleimany* found that the contract was blatantly illegal.³⁵⁶ Accordingly, the court refused to enforce the award as contrary to public policy.³⁵⁷

345. *Id.* at 789.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* at 789. The arbitration agreement provided:

We . . . hereby agree to refer to arbitration the claim or cause which [Abner Soleimany] alleges that he has against [Sion Soleimany] for decision by Beth Din (Court of Chief Rabbi), according to the rules of procedure established for or customarily employed in references to arbitration before the said Beth Din . . . and we the undersigned, hereby do further agree each for himself to accept and perform the award of the said Beth Din touching the said claim or cause.

Id.

350. *Soleimany*, [1999] Q.B. at 791.

351. *Id.* at 787-88.

352. *Id.* at 797.

353. *Id.* at 799.

354. *Id.* at 800.

355. The arbitrators in *Westacre* held that the underlying contract was not illegal. *Id.* at 802.

356. *Soleimany*, [1999] Q.B. at 792.

357. *Id.* at 804.

E. Public-Policy Defense Summarized

Parties opposing enforcement use the broad public-policy defense to convince a court to vacate an arbitral award. The enforcing court considers the three types of public policy: domestic, international, and transnational.³⁵⁸ If a party opposes enforcement in a U.S. court, it must demonstrate that enforcement would violate the most basic American notions of morality and justice under the *Parsons* standard.³⁵⁹ Conversely, if a party opposes enforcement in an English court, then it must demonstrate that enforcement would clearly injure the public or be wholly offensive to the public under the *D.S.T.* standard.³⁶⁰

In *Northrop*, the U.S. court chose to enforce the award in spite of the argument that the contract to pay commissions was illegal in the place of performance.³⁶¹ Using similar reasoning, the English court in *Westacre* enforced an award that gave effect to a contract to influence officials that was illegal in the place of performance.³⁶² Both courts reasoned that enforcing an arbitral award, whether or not the underlying contract was illegal under a certain country's laws, would not be contrary to public policy. In both cases, the enforcing country narrowly construed the public-policy defense.

Even though U.S. and English courts rarely refuse to enforce an award under the public-policy defense, they did accept the defense in *Laminoirs* and *Soleimany*. In *Laminoirs*, the U.S. court refused to enforce part of the award that required payment of a usurious interest rate.³⁶³ In *Soleimany*, the English court accepted the argument that enforcing a blatantly illegal contract was contrary to English public policy.³⁶⁴ Both cases demonstrate how strict the public-policy standard really is.

V. CONCLUSION

Disputes over international commercial agreements can be resolved more efficiently and effectively because of the New York Convention. The five procedural defenses and two substantive defenses protect parties who use arbitration. Although U.S. and English courts generally construe these seven defenses narrowly and do not

358. Buchanan, *supra* note 220, at 513; Curtin, *supra* note 57, at 281.

359. *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974).

360. *Deutsche Schachtbau-und Tiefbohrergesellschaft M.B.H. (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil)*, (1987) 2 Lloyd's Rep. 246, 254 (C.A.) (Eng.).

361. *Northrop Corp. v. Triad Int'l Mktg. S.A.*, 811 F.2d 1265, 1270-71 (9th Cir. 1987).

362. *Westacre Investments Inc. v. Jugoinport-SPDR Holding Co. Ltd.*, [1999] Q.B. 740, 772-73 (Comm. Ct.) (Eng.), *aff'd*, [2000] Q.B. 288 (C.A.) (Eng.).

363. *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1069 (N.D. Ga. 1980).

364. *Soleimany v. Soleimany*, [1999] Q.B. 785, 804 (C.A.) (Eng.).

provide much guidance on which arguments have a greater chance of success, it is still possible for a party opposing enforcement to successfully argue one of these defenses. The pro-enforcement bias of both these countries is not meant to discourage parties from arguing these defenses. Rather, it is meant to encourage parties to carry out arbitral awards and to deter parties from raising frivolous arguments for the purpose of avoiding the obligations of the awards. As the number of international commercial transactions rises, U.S. and English courts will be forced to better define these seven defenses to assure predictability for parties that use arbitration to resolve disputes.