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## The New York Convention: Concrete Jungle Where International Commercial Arbitration Dreams are Made of

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THE NEW YORK CONVENTION:  
CONCRETE JUNGLE WHERE INTERNATIONAL  
COMMERCIAL ARBITRATION DREAMS ARE  
MADE OF\*

LIZZIE KLINK\*\*

I. NEW YORK STATE OF MIND: INTERNATIONAL COMMERCIAL ARBITRATION  
AND NATIONAL COURTS

Since it first began gaining popularity following the end of World War II, international commercial arbitration remains the preferred way for professionals in the business and trade sector to settle disputes that arise from international transactions.<sup>1</sup> In both the domestic and international settings, arbitration provides parties with a private means to adjudicate disputes before a neutral arbitrator.<sup>2</sup> International commercial arbitration is a subset of arbitration whereby parties agree, often via contract beforehand, to have their transnational business disputes decided by an independent arbitrator as opposed to a judge in the traditional litigation process.<sup>3</sup>

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\* The title and headings used throughout this Comment were inspired by the following songs: JAY-Z & ALICIA KEYS, *EMPIRE STATE OF MIND* (Roc the Mic Studios, Oven Studios 2009); BILLY JOEL, *NEW YORK STATE OF MIND* (Ultra Sonic Studio 1976); FRANK SINATRA, *THEME FROM NEW YORK, NEW YORK* (Reprise Records 1977); BOB DYLAN, *HARD TIMES IN NEW YORK TOWN* (The Bootleg Series Volumes 1–3 1961); TAYLOR SWIFT, *WELCOME TO NEW YORK* (Big Machine Records 2014); LCD SOUNDSYSTEM, *NEW YORK I LOVE YOU BUT YOU'RE BRINGING ME DOWN* (Parlophone Records Ltd. 2017).

\*\* J.D. Candidate, 2024, Villanova University Charles Widger School of Law; B.A., 2020, Southern Methodist University. This Comment is dedicated to my mother without whom this Comment would have been an aspiration, and not a reality. This Comment is also dedicated to my father, step-father, sister, and Quinn for their unyielding support and encouragement. I would also like to thank the members of the *Villanova Law Review* for all of their guidance, dedication, and patience throughout this process.

1. See W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 50 *TEX. INT'L L.J.* 699, 699–701 (2016) (highlighting that following World War II there was an increase in international trade and commerce, which led to the growth of international commercial arbitration).

2. See Robert C. Bird, *Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a “New” New York Convention*, 37 *N.C.J. INT'L L. & COM. REG.* 1013, 1014 (2012) (describing arbitration as “a private system of adjudicating disputes through a neutral professional known as an arbitrator”).

3. See J. William Rowley QC, *Editor’s Preface to THE GUIDE TO CHALLENGING AND ENFORCING ARBITRATION AWARDS* ix (J. William Rowley QC, Emmanuel Gaillard & Gordon E. Kaiser eds., 2019) (discussing why parties choose the international commercial arbitration process). Interestingly, some authors have observed that arbitral institutions have become “‘de facto legislators’ of global trade and commerce.” C. J. W. Baaij, *Hiding in Plain Sight: The Power of Public Governance in International Arbitration*, 60 *HARV. INT'L L.J.* 135, 141 (2019).

This method of dispute resolution is becoming increasingly common; for example, in 2020, the International Chamber of Commerce (ICC) International Court of Arbitration, one of the world's leading arbitral tribunals, recorded its highest number of arbitration cases since 2016.<sup>4</sup> Moreover, governments in developed and developing nations recognize that arbitration provides a potential revenue stream and international investment opportunity, and have poured resources into creating new arbitration centers for international commercial disputes.<sup>5</sup>

For international commercial arbitration to operate successfully, those engaging in it must believe that the arbitration results are fair, reasonably predictable, and enforceable.<sup>6</sup> Because international commercial arbitration involves parties from different states and the award may be enforced in another state's national court, there is greater pressure on the system to gain the parties' trust that their awards will be enforced and not affected by the judicial bias of the court overseeing enforcement.<sup>7</sup> The enforcement of awards rendered in international commercial arbitration is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention).<sup>8</sup> The New York Convention is a multilateral treaty that establishes guidelines for courts to follow when determining whether to enforce awards by arbitral tribunals that are not domestic awards of that state's courts.<sup>9</sup>

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4. See *ICC Announces Record 2020 Caseloads in Arbitration and ADR*, INT'L CHAMBER COM. (Jan. 12, 2021), <https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/> [<https://perma.cc/D4A2-KNTU>] (noting that the ICC International Court of Arbitration announced 946 new arbitration cases in 2020). The ICC International Court of Arbitration is a non-governmental organization headquartered in Paris that resolves disputes regarding international commercial businesses. See *The ICC International Court of Arbitration*, HANGZHOU INT'L ARB. CT. (June 13, 2019), [http://www.ci-ca.org/English/caseShow\\_35.html](http://www.ci-ca.org/English/caseShow_35.html) [<https://perma.cc/K57B-QCTJ>]. It was first established in 1923 to be a permanent mediation and arbitration institution. *Id.*

5. See Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration is Re-Shaping its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 406 (2018) (explaining national governments established arbitration centers not only as a way to generate greater international investment but also to increase national revenue through hotels, transportation, job creation, etc.).

6. See Craig, *supra* note 1, at 701–02 (contending arbitration for international commerce is extremely important for parties to get reasonably predictable, effective, and fair results); see also Bird, *supra* note 2, at 1020–22 (characterizing arbitration as a way that global firms can manage legal risk). Global firms are exposed to great amounts of legal risk because there is the potential to be held liable in multiple jurisdictions. *Id.*

7. See Bird, *supra* note 2, at 1022 (noting international commercial arbitration is attractive because it provides a neutral forum for dispute resolution, as no party in the dispute can use the arbitral forum to their own advantage).

8. See generally U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21.3 U.S.T. 2517 [hereinafter *The New York Convention*].

9. See *The New York Convention*, *supra* note 8; see also Paolo Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and En-*

The New York Convention has been touted as “one of the most important and successful United Nations treaties in the area of international trade law, and the cornerstone of the international arbitration system.”<sup>10</sup> However, the New York Convention is not without its defects and limitations: one area at the center of controversy is the interpretation of the public policy exception, which allows courts to refuse enforcement of an arbitration award on the basis that enforcement would run contrary to public policy.<sup>11</sup> Evaluating the United States and French national courts’ different interpretations of the public policy exception highlights the problems that arise when national courts apply the exception inconsistently.<sup>12</sup>

This Comment argues that the vague language and lack of judicial standard laid out in the New York Convention regarding exceptions to enforcement based on public policy considerations hinder its ability to provide reasonable predictability and consistency, and therefore, the Convention must be modernized.<sup>13</sup> Part II of this Comment considers the history of international commercial arbitration, the formation of the New York Convention, its implementation by the United States legislature, and varying interpretations of the public policy exception. Part III critically analyzes the effectiveness of the public policy exception by examining scholarship on the topic. Then, Part IV discusses potential solutions to the issues with the New York Convention’s public policy exception. Finally,

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*forcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L., 283, 309 (1959) (“The Convention clearly reflects the concern of the majority at the Conference that the winning party in an arbitration proceeding should not be faced with insuperable obstacles when he seeks to have the award enforced.”).

10. See Emmanuel Gaillard & Benjamin Siino, *Enforcement Under the New York Convention*, in THE GUIDE TO CHALLENGING AND ENFORCING ARBITRATION AWARDS, *supra* note 3, at 86, 86 (quoting Renaud Sorieul, Secretary of UNCITRAL, *A Message from the Secretary of UNICTRAL*, in THE NEW YORK CONVENTION GUIDE (2013), [https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=729&opac\\_view=1](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=729&opac_view=1)) [<https://perma.cc/Y5V9-SJKY>]).

11. See Leon E. Trakman, *Aligning State Sovereignty with Transnational Public Policy*, 93 TUL. L. REV. 207, 208 (2018) (discussing the controversy over how the public policy exception of the New York Convention ought to be interpreted). The author notes that some argue it should be construed narrowly, while others argue it should be construed expansively. *Id.*

12. For a discussion of the varying interpretations of the public policy exception in the United States and France, see *infra* Section II.C.

13. See Elie Kleiman & Claire Pauly, *Arbitrability and Public Policy Challenges*, in THE GUIDE TO CHALLENGING AND ENFORCING ARBITRATION AWARDS, *supra* note 3, at 33, 34 (highlighting how vague the concept of public policy is and thus how difficult it is to distinguish what constitutes a matter of public policy and what does not); see also Rowley QC, *supra* note 3, at ix (highlighting two reasons why parties prefer arbitration as opposed to the national court system). One is due to parties’ lack of trust in foreign courts, and the second is the fact that arbitral awards are governed by “a series of international treaties that provide robust and effective means of enforcement,” specifically, the New York Convention. *Id.*

Part V discusses potential impacts on international commercial arbitration, international business, and international relations if the issues with the New York Convention are left uncorrected.

## II. NEW YORK, NEW YORK: THE NEW YORK CONVENTION

This section discusses the development of international commercial arbitration, the creation of the New York Convention, and case law in national courts dealing with the enforcement of such awards. Section A recounts the emergence of international commercial arbitration as the preferred means of dispute resolution. Section B then discusses the creation of multilateral treaties governing international commercial arbitration with a large focus on the New York Convention. Lastly, Section C explores subsequent interpretations and applications of the New York Convention by courts in the United States and France, specifically focusing on challenges to the enforcement of arbitral awards based on public policy considerations.

### A. *The Rise of International Commercial Arbitration*

In the aftermath of World War II, international trade and investment boomed as countries looked to rebuild with their new allies.<sup>14</sup> Multinational corporations became more common as companies began placing less emphasis on national boundaries and identities, instead focusing on the international growth and reach of their corporations.<sup>15</sup> As international businesses flourished, so too did the number of disputes and the need for a formal system to handle such disputes.<sup>16</sup> Arbitration quickly became the preferred way to handle these disputes because it allowed parties to circumvent domestic courts.<sup>17</sup>

International commercial arbitration can be extremely expensive and time-consuming; however, despite its costliness and often lengthy process, it is still preferred over national courts.<sup>18</sup> The neutrality of the arbitrator

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14. See Craig, *supra* note 1, at 700 (recounting that post-World War II there was an increase in international trade and commerce, as well as an increase in foreign investment).

15. See *id.* (explaining transnational and multinational corporations expanded while the judiciary in many jurisdictions remained stagnant, failing to keep up with the pace of the change and inform themselves of corporations' new commercial and financial practices).

16. See Hensler & Khatam, *supra* note 5, at 401 (noting that "the institutionalization of arbitration was also encouraged by the increased number of disputes following the Industrial Revolution, the resulting increased economic specialization, and development of new trade and industry associations").

17. See *id.* at 400–01 (discussing how, in the nineteenth century, merchants trading across state borders chose to settle their disputes via private arbitral tribunals as opposed to getting local courts involved because such courts were often outside their home territories and lacked knowledge about the specific mercantile matter in dispute).

18. See Bird, *supra* note 2, at 1020 (noting international commercial arbitration can be extremely expensive and time-consuming, yet it is still preferred be-

and the forum's apparent detachment from local courts is viewed as a large benefit by parties to the dispute, as there is always the fear that local courts may be biased against the parties' nationality.<sup>19</sup> Arbitration is also often viewed as functioning independently from the court system.<sup>20</sup> This independence is attractive because parties to a dispute can better manage legal risk than if the dispute were resolved through a national court's judicial system.<sup>21</sup>

On the other hand, disputes over the enforcement of an award rendered by an arbitral tribunal have the potential to involve national courts in a way that undermines these advantages.<sup>22</sup> Unlike a judge in the traditional judicial setting, arbitrators do not have access to the same state or federal resources to enforce their decisions.<sup>23</sup> Although the majority of

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cause it allows parties to manage their legal risk). For example, international commercial arbitration requires parties to pay for their experts, the arbitral institution, and travel costs to the arbitration site (i.e., transportation and lodging accommodations). *Id.* at 1018. Additionally, there are costs associated with the arbitration proceedings, such as evidence development, written submissions, and preparation for hearings. *Id.* Further, international commercial arbitration proceedings may take three years to reach a resolution, therefore undermining the quickness advantage commonly cited by advocates for domestic arbitration. *Id.* at 1019.

19. See Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 409 (2002) (concluding that those engaging in international business prefer arbitration because it allows them "[t]o avoid the potentially biased national courts of their opponents"); see also Andrew J. Tuck, Kristen Bromberek & Jamie George, *International Arbitration: The Role of the Federal Courts and Strong Support from the Eleventh Circuit*, 64 FED. LAW. 61, 61 (2017) (characterizing an advantage of international arbitration as allowing parties to "avoid[ ] national-court bias"). In describing the benefits of international commercial arbitration, scholars often echo the view that courts are biased. See, e.g., Rowley QC, *supra* note 3, at ix; Hensler & Khatam, *supra* note 5, at 401; Bird, *supra* note 2, at 1022.

20. See Craig, *supra* note 1, at 706 (categorizing international arbitration as a "self-contained process").

21. See Bird, *supra* note 2, at 1020 (defining legal risk management as "the process of gathering knowledge about legal risks, assessing the costs of such risks, and making efficient decisions within an ambiguous legal environment"). Arbitration helps manage legal risk because parties partaking in business transactions are aware that contractual disputes may arise; by agreeing to arbitration beforehand, they can better manage that risk. *Id.*

22. See Craig, *supra* note 1, at 706–07 (explaining that recourse to national courts may be necessary because arbitrators do not have the same enforcement mechanisms that judges in national courts possess). The necessity of judicial assistance to enforce awards creates the possibility that a national court will review the arbitral tribunal's procedures before it uses the judicial system's power to enforce the award. *Id.* This opens the door to greater judicial involvement, which is one reason that arbitration is preferred because it allows parties to avoid national courts. *Id.*

23. See *id.* at 707 (claiming that because arbitration is created through contract, parties can agree to abandon their right to settle the dispute via the court system). However, involving courts may become necessary "because only national courts have the power of the state to compel performance and execute against a party's assets." *Id.*

international commercial arbitration decisions are voluntarily honored by the parties, instances do arise in which one of the parties must seek enforcement of the award through the judicial system due to the other party's refusal to comply with the arbitral tribunal's decision.<sup>24</sup> Accordingly, it quickly became clear in the international business community that a formal system regulating the enforcement of awards was needed.<sup>25</sup>

### B. *The Emergence of the New York Convention*

In 1958, forty-five countries attended a conference organized by the United Nations in New York to discuss the enforcement of international arbitration awards.<sup>26</sup> Prior to the conference, the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927 (The Geneva Convention) was the relevant treaty governing international commercial arbitration.<sup>27</sup> The Geneva Convention enforced awards only if the award "followed the rules of procedure where the arbitration took place."<sup>28</sup> The Geneva Convention also required that the enforcement of the award not run contrary to public policy or the principles of the law of the forum state.<sup>29</sup> Following the Geneva Convention, the ICC proposed a draft treaty regarding the enforcement of foreign arbitral awards which focused heavily on separating the award from the laws of the nation where the

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24. *See id.* at 705–06 (noting voluntary enforcement of awards is based partially on moral and social norms, which may be insufficient to guarantee that such awards will be satisfied when the only relationship between the parties is formed via contract).

25. *See* Hensler & Khatam, *supra* note 5, at 403 (highlighting that as arbitration became an increasingly popular way to settle international commercial business disputes, a more formalized system to ensure the enforcement of arbitration awards was needed).

26. *See* Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 *GEO. WASH. INT'L L. REV.* 17, 29 (2002) (recounting the events leading up to the creation of the New York Convention); *see also* Contini, *supra* note 9, at 291 (stating the United Nations Conference on International Commercial Arbitration held a Convention in New York in 1958 that forty-five states participated in).

27. *See* Convention on the Execution of Foreign Arbitral Awards, League of Nations, Sept. 26, 1927, 92 *L.N.T.S.* 301–02 (claiming the Geneva Convention was established by the League of Nations and was entered into force on July 25, 1929). Interestingly, the United States was not a member to this treaty.

28. Bird, *supra* note 2, at 1026 (explaining the Geneva Convention included a stronger connection between the procedures of the state and where the arbitration took place, which made international commercial arbitration less detached from national legal systems than later treaties on the topic).

29. *See* Contini, *supra* note 9, at 289 (listing the Geneva Convention's requirements, including that "the recognition or enforcement of the award would not be contrary to public policy or the 'principles of the law' of the forum"). The Geneva treaties were highly criticized, especially because of their vague language, which could have been interpreted as inapplicable to the awards rendered in states that were not parties to the Convention. *Id.*

party sought enforcement.<sup>30</sup> Further, the United Nations Economic and Social Council (ECOSOC) produced a draft treaty on the topic which was much more conservative than the ICC's version.<sup>31</sup>

These three treaties set the stage for the conference in New York that resulted in the adoption of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards on June 10, 1958.<sup>32</sup> The procedures and stipulations of the New York Convention make clear that it maintains a pro-enforcement stance, as it puts forth terms that make it more advantageous to those seeking enforcement than those opposing it.<sup>33</sup> The New York Convention applies to the recognition or enforcement of foreign arbitral awards, even when recognition and enforcement of an arbitral award is being sought in a jurisdiction other than where the award was rendered.<sup>34</sup> As a safeguard against potential mistreatment of interna-

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30. See Bird, *supra* note 2, at 1026 (noting the ICC proposal sought to “denationalize[ ]” the arbitration process and did not allow for a strong connection between the award and the court enforcing the award’s national laws and processes); see also INT’L CHAMBER COM. [ICC], Enforcement of International Arbitral Awards, at 7, ICC International Court of Arbitration Bulletin vol. 9, no. 1 (May 1998), [https://library.iccwbo.org/content/dr/COMMISSION\\_REPORTS/CR\\_0011.htm?1=commission+Reports](https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0011.htm?1=commission+Reports) [<https://perma.cc/228V-W9W2>] (explaining the draft explicitly stated that an international award is one that is “completely independent of national laws”). The preliminary draft by the ICC stated that although there will always be some link to the law of the nation where the award was enforced, “the fact that an award settling a dispute arising in connection with this agreement will produce its effects in different countries, makes it essential that it should be enforced in all these countries the same way.” *Id.* at 7–8.

31. See Bird, *supra* note 2, at 1026 (characterizing the ECOSOC’s version as “quite conservative,” as it was more akin to the Geneva Convention’s version which tied enforcement of the award to the rules and procedures of the state where the arbitration occurred).

32. See *id.* (noting the conference at the United Nations headquarters in New York produced a treaty that was a “compromise between the ICC and ECOSOC versions”); see also Gaillard & Siino, *supra* note 10, at 86 (recounting the history of the New York Convention and its ratification on June 10, 1958, at the United Nations Headquarters in New York); Craig, *supra* note 1, at 708 (describing the ratification of the New York Convention and listing the parties that ratified the Convention, including, France, The Federal Republic of Germany, Russia, Morocco, India, and Egypt, among others).

33. See Contini, *supra* note 9, at 299 (explaining the New York Convention was more favorable to the party seeking enforcement of the award than its predecessor, the Geneva Convention). This is because under the New York Convention, the burden is on the party opposing the award to show cause for non-enforcement, whereas in the Geneva Convention, the plaintiff had the “main *onus probandi*” of showing that the requirements to enforce the award were met. *Id.* Further, unlike the Geneva Convention, the New York Convention dictates that the court may only refuse enforcement based on the explicit conditions listed. *Id.* The New York Convention further favors the party seeking enforcement of the award by “by omitting the reference to incompatibility with the ‘principles of the law’ of the Geneva Convention.” *Id.* at 304.

34. See The New York Convention, *supra* note 8, at 49 (“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . .”).



tional parties by national courts, the New York Convention prohibits states from imposing greater burdens or conditions on the enforcement of international arbitral awards than it typically would for domestic awards.<sup>35</sup>

The exceptions to enforcement of an arbitral award are expressed in Article V of the New York Convention.<sup>36</sup> Article V places the burden of proving that an award should not be enforced on the party opposing the award.<sup>37</sup> Under Article V, a competent authority hearing the dispute may deny enforcement if: (1) the opposing party shows one of the five procedural defenses is present, (2) it is not a subject matter that should be settled by arbitration under that country's law, or (3) if "recognition or enforcement of the award would be contrary to the public policy of that country."<sup>38</sup> The New York Convention's use of the phrase "may be refused" provides courts with discretion over the annulment of awards, as they are not required to annul an award even if one of the exceptions is present.<sup>39</sup>

The public policy exception is located in Article V(2)(b) and allows courts to refuse enforcement of an award based on public policy implications even if the public policy defense was not raised by any party.<sup>40</sup> In-

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35. *See id.* ("There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.")

36. *See generally id.* at 50 (providing for exceptions to the enforcement of arbitral awards).

37. *See id.* (stating it is the party whom the arbitration award is being invoked against that must prove to the competent authority that recognition and enforcement of the award should be refused).

38. *See id.* (listing the procedural defenses). According to the Convention, the procedural defenses may be used where:

(a) [T]he said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice . . . 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 . . . or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or . . . 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 . . . .

*Id.*

39. *See id.* (declaring "[r]ecognition and enforcement of the award may be refused"); *see also* Gaillard & Siino, *supra* note 10, at 94 (categorizing the language in the New York Convention as "discretionary," while also highlining that "[c]ourts have consistently found that the Convention does not allow for refusal of recognition and enforcement of an award on grounds other than those listed in Article V").

40. *See* Mingqiang Qian, Public Policy Defense in International Commercial Arbitration 21 (Aug. 23, 2000) (LLM Thesis, University of Georgia School of Law) (on file at [https://digitalcommons.law.uga.edu/stu\\_llm/274](https://digitalcommons.law.uga.edu/stu_llm/274) [<https://perma.cc/M6GK-9UCA>]) (explaining that it makes sense that the exception can be invoked by the court without any motion from the parties because the goal of the public

deed, the New York Convention allows the exception to be invoked by the court on its own motion.<sup>41</sup> At the conference, the inclusion of the public policy exception was deemed a “political tool” necessary to ensure certain member states agreed to its ratification.<sup>42</sup> The New York Convention provides no explanation as to whether the public policy exception refers to the public policy of the current state hearing the dispute, the state where the arbitration occurred, or international public policy.<sup>43</sup>

The United States not only participated in the convention that culminated in the New York Convention but also hosted the conference at the United Nations’ Headquarters in New York.<sup>44</sup> Yet, at first, the United States Delegation (The Delegation) to the Conference did not recommend its ratification because of concerns about its potential conflict with state law.<sup>45</sup> The Delegation suggested that to avoid such conflicts, Con-

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policy exception is to “protect national interests” as opposed to the parties’ interests). It is important to note that Articles V(1) and V(2) of the New York Convention serve “different functions.” *Id.* Article (V)(1) ensures the specific international commercial arbitration proceeding was operated fairly and justly; contrarily, Article V(2)(b) prevents injustice in the arbitration proceeding, as well as “to maintain the basic social and legal order in the enforcing state.” *Id.*

41. *See* The New York Convention, *supra* note 8, at 50 (“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 . . . recogni[zing] or enforc[ing] . . . the award would be contrary to the public policy of that country.”).

42. *See* Qian, *supra* note 40, at 22 (noting the public policy exception was necessary to get certain parties to sign onto the New York Convention because it acts as a “safeguard against unforeseen and unforeseeable divergences between domestic law and the laws of different jurisdictions” (quoting Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & Com. 211, 224 (1994))).

43. *See* The New York Convention, *supra* note 8, at 50 (stating only “[t]he recognition or enforcement of the award would be contrary to the public policy of that country”).

44. *See* Christopher R. Drahozal, *The New York Convention and the American Federal System*, 2012 J. Disp. Resol. 101, 102 (2012) (highlighting that although the United States was an active participant in the conference that led to the creation of the New York Convention, it did not ratify and incorporate the New York Convention into its domestic law until over ten years later).

45. *See* Karamanian, *supra* note 26, at 29–30 (explaining the United States Delegation did not recommend ratifying the New York Convention because it believed the Convention would conflict with state laws and that the United States lacked the legal basis to implement or carry out the New York Convention). Additionally, the United States Delegation reported that the New York Convention would provide no real advantages to the United States if it were adopted in a way that was consistent with state law and judicial procedures. *See* Drahozal, *supra* note 44, at 102.

gress should broaden the Federal Arbitration Act (FAA) before the United States ratified the Convention.<sup>46</sup> Congress did just that, and in 1970 the New York Convention was incorporated into Chapter Two of the FAA.<sup>47</sup>

Under Chapter Two, district courts are given original jurisdiction over actions arising under the New York Convention and must “confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”<sup>48</sup> The United States Supreme Court has interpreted Chapter Two as “encourag[ing] the recognition and enforcement of commercial arbitration agreements in international contracts and . . . unify[ing] the standards by which agreements to arbitrate are observed and arbitral awards are enforced.”<sup>49</sup>

### C. *Judicial Interpretations of the New York Convention*

Because Article V of the New York Convention provides courts with no instructions as to how or when the public policy exception should be applied, courts have construed their own interpretations.<sup>50</sup> As such, parties are, in theory, left to the mercy of the specific court reviewing their award.<sup>51</sup> Courts have interpreted public policy in a myriad of ways, but all

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46. See Drahozal, *supra* note 44, at 102–03 (explaining that three conditions must be satisfied for the New York Convention to be advantageous). First, Congress would need to broaden the breadth of the FAA. *Id.* at 102. Second, “more states [would] need[ ] to adopt their own arbitration laws.” *Id.* Third, the enforceability of foreign awards would need to be bolstered by courts or legislatures. *Id.* at 102–03.

47. See *id.* at 103 (summarizing the events leading up to the incorporation of the New York Convention into the FAA). In 1968, following an increase in “business interest in international arbitration,” President Johnson presented the New York Convention to the Senate, which ratified it the same year and enacted Chapter Two of the FAA. *Id.* The New York Convention then went into effect in 1970 after its acceptance by President Nixon. *Id.*

48. 9 U.S.C. § 207 (2018) (addressing the recognition and enforcement of foreign arbitration awards that fall under the New York Convention); see also 9 U.S.C. § 203 (2018) (granting United States district courts original jurisdiction over actions or proceedings, regardless of the amount in controversy, arising under the New York Convention).

49. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (explaining the goal of the New York Convention and the United States’ purpose in ratifying it). The Supreme Court in *Scherk* held that a contract provision between a United States corporation and a German citizen’s corporation to settle disputes via arbitration could not be ignored, despite the German citizen’s attempt to settle the dispute in a U.S. federal court on the grounds that the dispute involved an alleged violation of the Securities Exchange Act. *Id.* at 513–17. In reaching this conclusion, the Court noted that a benefit of arbitration is that it avoids the danger that a dispute may be “submitted to a forum hostile to the interests of one of the [other] parties.” *Id.* at 516.

50. See Gaillard & Siino, *supra* note 10, at 96 (highlighting that the New York Convention leaves the definition of public policy unanswered, so national courts have formulated their own varying definitions).

51. See Sherina Petit & Ewelina Kajkowska, *Grounds to Refuse Enforcement*, in THE GUIDE TO CHALLENGING AND ENFORCING ARBITRATION AWARDS, *supra* note 3, at

seem to share the general understanding that the exception is rooted in whether enforcement of the award would contradict the state's core values.<sup>52</sup> Scholars have criticized that there is still no prevailing unified definition of public policy in this context, and it is not clear whether the exception refers to notions of international or domestic public policy.<sup>53</sup> As a result of this lack of guidance, there are discrepancies in its application by national courts—as illustrated by the United States and French national courts' disparate jurisprudence.<sup>54</sup> Additionally, because there is no definition of public policy or criteria for evaluating a claim, parties have no way to gauge when a violation may rise to the level of impacting the enforcement of the award.<sup>55</sup>

The United States Supreme Court has acquiesced to the understanding that the intent behind the New York Convention was not only to provide stability for the enforcement of arbitral awards but also to encourage such enforcement.<sup>56</sup> The United States Court of Appeals for the Second Circuit articulated a legal standard for reviewing international arbitration

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125, 126 (noting the New York Convention does not require a state to deny enforcement of an award even if one of the exceptions in Article V exists). The authors point out that “[t]his notion of the enforcing court’s autonomy has far-reaching consequences. It allows the enforcing court to independently assess potential defects of the arbitral award and procedure and, in appropriate circumstances, enforce even those awards that were annulled at the seat.” *Id.*

52. See Gaillard & Siino, *supra* note 10, at 96 (reviewing case law on the public policy exception and finding that it has been interpreted to require a deviation from a core value of the state’s legal system). The authors highlighted the Swiss Federal Tribunal’s jurisprudence under which courts may refuse to enforce an arbitral award “if it disregards essential and widely recognised values which, according to the conceptions prevailing in Switzerland, should form the basis of any legal order.” *Id.* (quoting X S.p.A. v. Y S.r.l., Federal Tribunal (Switzerland), 8 Mar. 2006, Judgments of the Federal Court (2006) 132 III 389).

53. See Kleiman & Pauly, *supra* note 13, at 34–35 (explaining the distinction between internal public policy and international public policy in France). Whereas internal public policy deals with domestic rules that cannot be overridden via contract, international public policy is narrower, covering “only those universal rules that are considered by most nations as fundamental and mandatory.” *Id.* at 34. Regardless of the domestic law governing the matter, courts would be obligated to apply these rules. *Id.* However, the authors point out that this distinction does not clarify how such rules become so “fundamental and mandatory,” and attempts to clarify have created rules that are so broad that almost any law could fall under the category. *Id.* at 35.

54. For further discussion of the varying applications of the public policy exception in the United States and France, see *infra* notes 83–90 and accompanying text.

55. See Petit & Kajkowska, *supra* note 51, at 132 (characterizing the public policy exception as “the most unsettled” because it is not defined by the New York Convention and there is no agreed upon meaning). Further, the authors explain that public policy has been incapable of definition; given its vague language, one cannot easily discern whether a matter constitutes an issue of public policy. *Id.*

56. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (“The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts . . .”).

awards, which subsequent lower courts have relied upon as “a summary proceeding in nature, which is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmations or grounds for refusal to confirm.”<sup>57</sup> Lower courts have held that the party opposing enforcement has the burden of showing that an enumerated exception under the Convention is applicable.<sup>58</sup> Further, the Eleventh Circuit and lower courts have clarified that the defense must be construed narrowly, utilizing it only in instances where the forum state’s fundamental morality and notions of justice would be violated due to enforcement.<sup>59</sup> The Second Circuit and Third Circuit have also articulated that the public policy defense is available “only where enforcement would violate the forum state’s most basic notions of morality and justice.”<sup>60</sup>

In the litigation context, this high standard can be interpreted in a variety of ways.<sup>61</sup> For example, in *De Rendon v. Ventura*,<sup>62</sup> a conflict between two international parties was handled through arbitration at the ICC.<sup>63</sup> Although the seat of the arbitration was in Bogotá, Colombia, peti-

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57. See *De Rendon v. Ventura*, No. 17-CV-24380, 2018 U.S. Dist. LEXIS 134588, at \*6 (S.D. Fla. Aug. 8, 2018) (quoting *Chelsea Football Club Ltd. v. Mutu*, 849 F. Supp. 2d 1341, 1344 (S.D. Fla. 2012) (quoting *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007))). This standard was first announced by the Second Circuit in *Zeiler v. Deitsch*, which addressed an arbitral award deemed by the court to have been produced via non-domestic arbitration, and therefore governed by the New York Convention. See *Zeiler*, 500 F.3d at 164–69. Although *Zeiler* did not directly address the public policy exception, courts in the Southern District of Florida have applied the same standard in determining questions regarding public policy. See *De Rendon*, 2018 U.S. Dist. LEXIS 134588, at \*6.

58. See *KG Schiffahrtsgesellschaft MS Pac. Winter MBH & Co. v. Safesea Transp., Inc.*, No. 19-4869, 2019 U.S. Dist. LEXIS 166205, at \*4 (D.N.J. Sept. 26, 2019) (discussing the legal standard for opposing enforcement of an arbitral award based on Article V of the New York Convention).

59. See *De Rendon*, 2018 U.S. Dist. LEXIS 134588, at \*15 (citing *Costa v. Celebrity Cruises, Inc.*, 768 F. Supp. 2d 1237, 1241 (S.D. Fla. 2011), *aff’d*, 470 Fed. App’x 726 (11th Cir. 2012)) (clarifying the role of courts when reviewing public policy exceptions under the New York Convention).

60. See *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 308 (3d Cir. 2006) (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)). In *Admart*, the issue facing the court was not directly related to public policy; however, the Third Circuit’s opinion is important because in reviewing the award issued by a Swiss arbitral panel, the court surveyed past case law on the New York Convention. *Id.* As for the public policy exception, the Third Circuit relied on precedent from the Second Circuit to articulate a standard for when the public policy exception may apply. *Id.*

61. See *infra* notes 62–90 and accompanying text for a discussion of different interpretations.

62. 2018 U.S. Dist. LEXIS 134588 (S.D. Fla. Aug. 8, 2019).

63. See *id.* at \*2–5 (explaining how the parties disagreed over the ownership of certain shares in a Colombian pharmaceutical company). The parties eventually reached a settlement agreement, under which any future disputes arising from the agreement would be handled through private arbitration. *Id.* at \*2. Two years following the settlement, a dispute arose and arbitration was initiated at the ICC.

tioner submitted the award for confirmation in the Miami-Dade County Circuit Court after respondents failed to satisfy the award in Colombia.<sup>64</sup> Among other arguments, respondents asserted a public policy defense, arguing that because the settlement was allegedly based on false testimony, enforcement of the award would be perverse to the United States' public policy against awards based on fraud.<sup>65</sup> The court rejected the defense, concluding that the alleged fraud did not meet the "demanding threshold" of the public policy exception.<sup>66</sup> Relying on precedent from the Eleventh Circuit, the court roughly defined the phrase "contrary to . . . public policy" as being a violation of fundamental norms of the United States.<sup>67</sup> The court did not provide an example of what such a violation would be, yet it left the door open for the potential that fraud, depending on its degree, could constitute a violation of United States' public policy.<sup>68</sup>

Courts in the United States have not only adopted an extremely high standard to meet the public policy exception but also have taken a narrow view of what the court's role should be in reviewing enforcement cases. This is demonstrated by the United States District Court for the District of New Jersey's decision in *KG Schiffahrtsgesellschaft MS Pacific Winter MBH &*

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*Id.* at \*3. Arbitrators at the ICC found that respondents breached the settlement agreement and therefore petitioner was entitled to damages of \$900,000. *Id.* at \*4. Respondents did not voluntarily satisfy the arbitration award and instead initiated annulment proceedings in Colombia. *Id.*

64. *See id.* at \*5 (stating petitioners initiated proceedings to confirm the arbitration award in the Miami-Dade County Circuit Court). Further, the court clarified that it had original jurisdiction over this proceeding because the award was governed by Chapter 2 of the FAA and the New York Convention. *Id.*

65. *See id.* at \*16 (summarizing respondents' argument). Respondents contended that the matter involved fraudulent conduct because the settlement agreement and award were based on allegedly false testimony by petitioner regarding the company's valuation, and that there is a United States' public policy against confirming arbitration awards that were obtained based on fraud. *Id.*

66. *See id.* at \*17–18 (clarifying that the public policy exception does not apply every time a party is able to find that the arbitration award violates "some generally accepted principle," but instead "the award must be so misconceived that it compels the violation of law or conduct contrary to accepted public policy" (quoting *PDV Sweeny, Inc. v. ConocoPhillips Co.*, No. 14-CV-5183, 2015 U.S. Dist. LEXIS 116175, at \*12, (S.D.N.Y. Sept. 1, 2015), *aff'd*, 670 F. App'x 23 (2d Cir. 2016))).

67. *See id.* at \*15–16 (quoting *Costa v. Celebrity Cruises, Inc.*, 768 F. Supp. 2d 1237, 1241 (S.D. Fla. 2011), *aff'd*, 470 Fed. App'x 726 (11th Cir. 2012)) ("The Convention's public policy defense should be construed narrowly and applies where enforcement of the award would violate the forum state's most basic notions of morality and justice." (quoting *Costa*, 768 F. Supp. 2d at 1241)).

68. *See id.* at \*16 (suggesting there may be a public policy exception to enforcement of an arbitral award based on fraud). The court stated: "[t]o the extent the United States has a public policy in favor of vacating arbitral awards based on fraud, confirmation of this Award does not risk violating that public policy." *Id.* The alleged fraud at issue here was not shown to be of a sufficient degree to invoke the public policy exception, and respondents did not show sufficient evidence that the agreement was even procured by fraud. *Id.*

*Co. v. Safesea Transport*.<sup>69</sup> In *KG Schiffahrtsgesellschaft*, the court rejected respondents' argument that enforcement of the award would violate the public policy of the United States because the arbitrator did not adhere to policies regarding time bars.<sup>70</sup> Relying on precedent from the Second Circuit, the court narrowed the role of the judiciary in determining the enforcement of awards.<sup>71</sup> In its reasoning, the court stated: "it is not this Court's role to review the record of arbitral proceedings for potential errors."<sup>72</sup> Further, the court, relying on precedent from the Third Circuit, stated that "even manifest disregard of the law does not justify setting aside an arbitration award."<sup>73</sup>

Like the decisions above, the Ninth Circuit has also held that it is exceedingly difficult to prove an award is contrary to public policy.<sup>74</sup> *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*<sup>75</sup> concerned a dispute between an American corporation and the Iran Ministry of War, which was arbitrated by the ICC sitting in Switzerland.<sup>76</sup> The case was eventually referred to the Ninth Circuit after the American corporation failed to voluntarily satisfy the arbitral award.<sup>77</sup>

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69. No. 19-4869, 2019 U.S. Dist. LEXIS 166205 (D.N.J. Sept. 26, 2019).

70. *See id.* at \*5–\*6 (summarizing respondent's argument that the arbitrator's decision not "to enforce the time bar defense against Petitioner" during the arbitration proceeding violated the "basic notions of morality and justice in the United States").

71. *See id.* at \*7 (citing *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 308 (3d Cir. 2006)) (clarifying that there is a policy in favor of enforcing international arbitration awards and that courts apply Article V of the New York Convention strictly and narrowly).

72. *See id.* at \*6 (noting the New York Convention does not allow courts to second-guess the arbitrator's decision or interpretation of the arbitration agreement or contract in question, as this level of judicial review "frustrates the basic purpose of arbitration").

73. *See id.* (citing *Admart AG*, 457 F.3d at 308) (explaining that although the court found the arbitrator did not err in its decision, it would not warrant a refusal to enforce the arbitration award even if the arbitrator did erroneously decide in favor of respondents).

74. *See* *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091 (9th Cir. 2011).

75. *Id.*

76. *See id.* at 1094 (describing the events leading up to the dispute).

77. *See id.* at 1094–95 (summarizing the facts of the dispute). In 1977, an American corporation contracted with Iran's Ministry of War to sell and service air combat that were to be used by Iran's military. *Id.* at 1094. However, because of the Iranian Revolution, the contract was not performed and the corporation agreed to attempt to resell the equipment. *Id.* Iran's Ministry filed for a breach of contract claim, first at the Hauge, and then with the International Court of Arbitration of the ICC because the Hauge lacked jurisdiction over the dispute. *Id.* The arbitral tribunal found the corporation owed a net award of \$2,808,519 in damages, as well as pre-award interest favoring Iran's Ministry of War and \$60,000 for arbitration costs. *Id.* The Ministry first sought enforcement in a district court, which entered a judgment that the American corporation appealed to the Ninth Circuit. *Id.* at 1095.

The corporation argued that enforcement of the award was either legally prohibited or would run contrary to the United States' public policy because the United States had imposed sanctions on Iran at the time.<sup>78</sup> The Ninth Circuit held that the American corporation failed to show the alleged public policy consideration was "sufficient to overcome this strong policy favoring confirmation of the ICC's award."<sup>79</sup> The Ninth Circuit focused heavily on the United States government's submission of an amicus curiae brief, which supported enforcement of the arbitral award.<sup>80</sup> Although the brief itself was not determinative of a public policy violation, it received strong consideration by the court because of the tension between the Iranian and United States governments at the time.<sup>81</sup> The court's decision illustrated that even when the United States is in direct conflict with a government involved in the arbitration, enforcing the award may not violate public policy.<sup>82</sup>

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78. *See id.* at 1097 (explaining the corporation's argument rested on the assumption that the sanctions were evidence that confirming the arbitral award would be "contrary to a fundamental public policy of the United States against trade and financial transactions with the Islamic Republic of Iran"). The sanctions were issued by the United States Department of Treasury and prohibited specified transactions relating to Iran's use of weapons of mass destruction. *See* Iranian Transactions and Sanctions Regulations, 31 C.F.R. pt. 560 (2023); Weapons of Mass Destruction Proliferators Sanctions Regulations, 31 C.F.R. pt. 544 (2023).

79. *See Ministry of Def. & Support*, 665 F.3d at 1098 (stating there is a strong presumption in favor of enforcing international arbitration awards, which is part of the underlying purpose of the New York Convention). Through a four-point analysis, the Ninth Circuit first held that "although American relations with Iran are heavily regulated, the applicable sanctions regulations 'do not preclude the confirmation of the ICC award.'" *Id.* (quoting Br. of the United States as Amicus Curiae at 22, *Ministry of Def. & Support*, 665 F.3d at 1098). Second, the court concluded that there is a difference between payment and confirmation. "Confirmation, standing alone, transfers no wealth to Iran. Thus, even if Cubic is correct that the United States has a fundamental public policy against economic support for the government of Iran, confirmation does not violate that policy." *Id.* Third, "the difference between confirmation and payment is accentuated" where payment can be authorized by the government through a specific license. *Id.* at 1099. Finally, the relevant regulations provide general licenses to allow legal reservation of Iran in the United States; while the regulations "do not expressly authorize confirmation of foreign arbitration awards in favor of Iran," they do show that legal proceedings, like this one, do not contradict the sanctions policy. *Id.*

80. *See id.* at 1099–1100 (noting the United States government filed an amicus curiae brief in support of affirming the arbitration award rendered by the arbitrators at the ICC).

81. *See id.* (claiming an expression of national public policy is entitled to great weight but is not in and of itself determinative of whether there is a public policy violation under the Convention). In clarifying this, the Ninth Circuit referenced a Second Circuit opinion, which held that "[t]o read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility." *Id.* at 1099 (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)).

82. *See id.* at 1097–98 (rejecting the American corporation's argument that the sanctions imposed on Iran demonstrated that United States public policy pro-



Not all nations adopt the United States' international commercial arbitration jurisprudence, and there is variation among national courts regarding the annulment of awards based on public policy.<sup>83</sup> The French jurisprudence, for example, has evolved in recent years and now differs from the United States' approach.<sup>84</sup> In France, courts rely on the French Civil Code of Procedure when reviewing arbitration awards.<sup>85</sup> However, the French Civil Code provides courts the authority to deny recognition or enforcement of an award based on public policy considerations in a manner similar to Article V(b)(2) of the New York Convention.<sup>86</sup> While the New York Convention includes the phrase "public policy," French Code dictates that decisions are only rendered unenforceable if they are con-

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hibited economic support for Iran and therefore would not allow for the enforcement of the arbitration award).

83. See Kleiman & Pauly, *supra* note 13, at 41–42 (discussing the discrepancies between how French and English courts handle disputes over the annulment of arbitral awards based on public policy defenses involving corruption). The authors highlight that while French courts have taken allegations of corruption extremely seriously and reviewed both the facts and the legal elements of the award, English courts have been more deferential to the arbitral tribunal's findings regarding the existence of corruption. *Id.*

84. See *infra* notes 89–90 and accompanying text.

85. See Detlev Kühner, *Annulment and Enforcement of Arbitral Awards in France*, in ANNULMENT AND ENFORCEMENT OF ARBITRAL AWARDS FROM A COMPARATIVE LAW PERSPECTIVE 33, 34 (Wolters Kluwer ed., 2018) (highlighting that the New York Convention is not very influential in French courts because the French Code of Civil Procedure's provisions regarding the recognition and enforcement of international arbitral awards are more favorable and therefore apply instead of the New York Convention); see also Craig, *supra* note 1, at 732 (discussing the recognition of awards that have been set aside by the state where the arbitration took place). The author notes that French courts may recognize an award authorized by the New York Convention because French law does not have an automatic non-enforcement provision for when the award was set aside by the court that oversaw the arbitration. *Id.*

86. See Kühner, *supra* note 85, at 37–39 (explaining grounds for setting aside an arbitration award listed in Article 1520 of the French Code of Civil Procedure (CCP)). It is proper to set aside an arbitral award where:

- (a) The arbitral tribunal wrongly upheld or declined jurisdiction . . .
- (b) The arbitral tribunal was not properly constituted . . .
- (c) The arbitral tribunal ruled without complying with the mandate conferred upon it . . .
- (d) Due process was violated . . . [and]
- (e) Recognition or enforcement of the award is contrary to international public policy.

*Id.* Per CCP 1520, appeal courts may deny recognition or enforcement based on the defenses listed that "more or less incorporate[ ] the same grounds for refusal" as the New York Convention's Article V. *Id.* at 41.

trary to “international public policy.”<sup>87</sup> The Paris Court of Appeals defines the public policy exception in terms of the international public policy of the host state, not the state’s domestic public policies.<sup>88</sup>

Under French case law, the standard for an annulment based on public policy considerations is satisfied “when the violation of [international] public policy is ‘flagrant, effective and concrete.’”<sup>89</sup> In recent years, French courts reviewing public policy considerations have begun to assert their authority to review the factual and legal elements of the award.<sup>90</sup> This practice of looking into the facts of the dispute and reviewing the arbitral tribunal’s decision is very different from that of the United States, where courts have taken a much more limited role.<sup>91</sup>

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87. *See id.* at 46–47 (characterizing the public policy exception as a “catch-all provision,” with an extremely high standard that is difficult for parties to meet). The author highlights that under case law from the Paris Court of Appeals, the arbitral award must result in a “violation of French international public order” to meet this standard. *Id.*

88. *See* Kleiman & Pauly, *supra* note 13, at 36 (discussing that the Paris Court of Appeals only considers France’s international public policy, not its “internal public policy,” when examining a possible public policy exception to enforcement of the arbitral award). The Paris Court of Appeals defined France’s public policy in 1997 as “the body of rules and values whose violation the French legal order cannot tolerate even in situations of international character.” *Id.* (quoting Cour d’appel [CA] [Regional Court of Appeal] Paris, Oct. 16, 1997, 96/84842 (Fr.)).

89. *See id.* at 39 (quoting Cour d’appel [CA] [Regional Court of Appeal] Paris, Nov. 18, 2004, 2002/19606 (Fr.)). In applying this standard, French courts initially took a constrained approach in its review, believing that judicial review should be limited and should not involve an examination of the merits of the underlying dispute. *Id.* at 40.

90. *See id.* (citing Cour d’appel [CA] [Regional Court of Appeal] Paris, Jan. 16, 2018, 15/21703 (Fr.)) (noting French Courts review arbitration awards more strictly than they once had). The Paris Court of Appeals stated that when determining whether enforcement or recognition of an arbitral award would contradict French international public policy, the court has the authority to review the facts and legal elements of the award. *See* Kühner, *supra* note 85, at 47 (citing Cour d’appel [CA] [Regional Court of Appeal] Paris, Feb. 21, 2017, 15/01650 (Fr.)) (referring to a recent case involving transgressions of French penal law provisions where the Paris Court of Appeals reviewed the facts regarding the dispute, did not defer to the arbitral tribunal’s decision, and annulled the arbitration award).

91. *Compare* Kleiman & Pauly, *supra* note 13, at 40 (describing the Paris Court of Appeals’ holding that the court has the authority to examine “in law and in fact all the elements relating to the defects in question” (quoting Cour d’appel [CA] [Regional Court of Appeal] Paris, Jan. 16, 2018, 15/21703 (Fr.))), *with* KG Schiffahrtsgesellschaft MS Pac. Winter MBH & CO. v. Safesea Transp., Inc., No. 19-4869, 2019 U.S. Dist. LEXIS 166205, at \*6 (D.N.J. Sept. 26, 2019) (“The Convention does not sanction the second-guessing of an arbitrator’s interpretation of the parties’ agreement as this type of judicial review frustrates the basic purpose of arbitration.” (citing *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 308 (3d Cir. 2006))).

### III. HARD TIMES IN NEW YORK: THE CHALLENGES FACING THE NEW YORK CONVENTION

Scholars routinely point out that the public policy exception in the New York Convention is so vague and undefined that it provides courts with broad discretion to determine whether to accept or deny a defense.<sup>92</sup> One scholar noted that “[o]f all the grounds prescribed in Article V, the public policy exception is probably the most unsettled, owing to its indeterminate and evolving nature.”<sup>93</sup> After evaluating the differences between French and American courts’ handling of the exception, critics of the public policy exception may have cause for concern.<sup>94</sup> Both countries use relatively comparable standards for what constitutes a public policy violation, as both judicial systems evaluate whether enforcement of the arbitral award would fundamentally and flagrantly violate public policy.<sup>95</sup> Yet, in applying these standards, French courts take a much more active role in reviewing the merits of the underlying claim, whereas American courts are highly deferential to the conclusions drawn by the arbitral tribunal.<sup>96</sup>

Multiple scholars have criticized the lack of guidance provided by the New York Convention regarding the applicability of the public policy exception.<sup>97</sup> In 2008, renowned arbitration scholar Albert Jan van den Berg

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92. See Kleiman & Pauly, *supra* note 13, at 34 (“The notion of public policy is so vague that it may not appear to be easy to tell what constitutes a matter of public policy from what does not.”).

93. See Petit & Kajkowska, *supra* note 51, at 132 (commenting that parties to the New York Convention have come to define the public policy exception in various ways since there fails to be a definition in the New York Convention itself).

94. For a discussion of concerns over the application of the public policy exception, see *supra* Section II.C.

95. Compare *Admart AG*, 457 F.3d at 308 (stating the public policy exception in the New York Convention is applicable when enforcement of the arbitral award would “violate the forum state’s most basic notions of morality and justice” (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974))), with Kleiman & Pauly, *supra* note 13, at 39 (noting the Paris Court of Appeals held that refusing to enforce an arbitration award is appropriate when enforcement would result in a “flagrant, effective and concrete” violation of public policy (quoting *Cour d’appel [CA] [Regional Court of Appeal] Paris*, Nov. 18, 2004, 2002/19606 (Fr.))).

96. Compare *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007) (characterizing the court’s role in reviewing arbitration awards under the New York Convention as a “summary proceeding in nature, which is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to confirm”), with Kleiman & Pauly, *supra* note 13, at 40 (describing the Paris Court of Appeals’ statement that the court has the authority to examine “in law and in fact all the elements relating to the defects in question” (quoting *Cour d’appel [CA] [Regional Court of Appeal] Paris*, Jan. 16, 2018, 15/21703 (Fr.))).

97. See, e.g., Petit & Kajkowska, *supra* note 51, at 132 (highlighting that there have been many studies dedicated to cataloguing the “irregularities giving rise to public policy exceptions in different jurisdictions while underlining the open nature of this notion”); Bird, *supra* note 2, at 1029 (claiming the New York Conven-

proposed a revision of the New York Convention titled “Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards” (The Hypothetical Draft) which addressed many of these criticisms.<sup>98</sup> A common critique of the New York Convention centers on Article V’s inclusion of the word “may,” which allows courts to exercise discretion over whether to allow an exception to enforcement even if the conditions for the exception are satisfied.<sup>99</sup> In response, the Hypothetical Draft recommended replacing the word “may” with “shall” for all of the defenses laid out in Article V, including the public policy exception.<sup>100</sup> This change clears up the ambiguity over whether enforcement is permissive or mandatory.<sup>101</sup> However, the Hypothetical Draft still provides national courts with autonomy to refuse enforcement on public policy grounds through the court’s own motion.<sup>102</sup>

Additionally, the Hypothetical Draft recommended changing the language in the public policy exception to allow for refusal of enforcement if “enforcement of the award would violate international public policy as prevailing in the country where enforcement is sought.”<sup>103</sup> This version differs from the New York Convention by clarifying that the exception is only applicable to international public policy as opposed to domestic con-

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tion provides “insufficient guidance” as to when arbitration awards should be set aside based on an exception in Article V of the New York Convention).

98. See generally ALBERT JAN VAN DEN BERG, HYPOTHETICAL DRAFT CONVENTION ON THE INTERNATIONAL ENFORCEMENT OF ARBITRATION AGREEMENTS AND AWARDS I (2008) [hereinafter HYPOTHETICAL DRAFT], <https://www.newyorkconvention.org/11165/web/files/document/1/6/16017.pdf> [<https://perma.cc/D3Z8-63CQ>]; see also Bird, *supra* note 2, at 1054 (categorizing Professor Jan van den Berg’s Hypothetical Draft as “the most thoughtful and realistic proposal to date”).

99. See Bird, *supra* note 2, at 1054 (explaining how the mix of mandatory and permissive language in Article V of the New York Convention has caused “division and conflict across and within national jurisdictions”).

100. See HYPOTHETICAL DRAFT, *supra* note 98, at 3 (recommending changes to Article V of the New York Convention). One recommended change is to have the Convention state that “enforcement of an arbitral award shall be refused” if the party against whom the arbitration award is invoked can show that one of the exceptions is present. *Id.*

101. See ALBERT JAN VAN DEN BERG, HYPOTHETICAL DRAFT CONVENTION ON THE INTERNATIONAL ENFORCEMENT OF ARBITRATION AGREEMENTS AND AWARDS: EXPLANATORY NOTE 1, 19 (2008) [hereinafter EXPLANATORY NOTE], AJB/Rev06/29-May-2008 [<https://perma.cc/8SFY-R9AW>] (explaining that by making the language in Article V of the New York Convention mandatory, there will no longer be ambiguity as to whether a court must refuse to enforce an award if the party seeking annulment can successfully show one of the exceptions to enforcement is present). The Explanatory Note accompanies the Hypothetical Draft and provides more in-depth explanations on the changes made in the Hypothetical Draft. *Id.*

102. See HYPOTHETICAL DRAFT, *supra* note 98, at 4 (including similar language to the New York Convention, which states that courts may on their own motion—irrespective of whether either party raised the defense—consider if enforcement of the award would be contrary to the state’s public policy).

103. *Id.*

cerns.<sup>104</sup> Under the Hypothetical Draft, this exception would refer to a “narrower category of international public policy as developed by courts in many countries in relation to public policy, including arbitrability, under the New York Convention.”<sup>105</sup>

While there has been support for the Hypothetical Draft, such support has not been universal—scholar Emmanuel Gaillard articulates three main reasons why the New York Convention should not be modified.<sup>106</sup> First, Gaillard argues that the New York Convention does not warrant a revision solely because parts of its language are outdated and some of its provisions could be further clarified.<sup>107</sup> Second, Gaillard points out “[t]here is no hope, in the current environment, that a significant number of the 144 States parties to the Convention (at the time of this writing) would agree to make the enforcement process more efficient.”<sup>108</sup> Finally, Gaillard argues that “there is no danger in leaving the New York Convention in its current state” because it “sets only a minimum standard.”<sup>109</sup>

#### IV. WELCOME TO (THE NEW) NEW YORK: UNIFYING AND BOLSTERING THE PUBLIC POLICY EXCEPTION

The New York Convention has the authority and acquiescence of many states to make it a successful treaty; however, it is missing guidelines to ensure it is applied consistently.<sup>110</sup> Although updating the New York

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104. *Compare id.* (stating explicitly that a court may set aside an arbitration award if enforcement would violate the state’s international public policy), *with* The New York Convention, *supra* note 8, at 50 (“The recognition or enforcement of the award would be contrary to the public policy of that country.”).

105. *See* EXPLANATORY NOTE, *supra* note 101, at 24 (discussing a proposed revision to Article V(2)(b) of the New York Convention to change the exception’s focus from domestic public policy considerations to international public policy considerations).

106. *See* Bird, *supra* note 2, at 1054 (noting the Hypothetical Draft “updat[ed] language where required, clarif[ied] where ambiguity exists, and add[ed] new language that meets the needs of a modern business environment”). According to Bird, “[t]hese actions [we]re all accomplished while maintaining the basic integrity of the current Convention and sustaining its goal of encouraging the implementation of arbitration and encouraging prompt enforcement.” *Id.* *See also* Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, in 50 YEARS OF THE NEW YORK CONVENTION, ICCA CONGRESS SERIES NO. 14 689 (Albert Jan van den Berg ed., 2009) (advocating against the adoption of the Hypothetical Draft).

107. *See* Gaillard, *supra* note 106, at 690–91 (stating that regardless of suggested revisions, the public policy exception will always allow courts to “manipulate that ground to refuse enforcement”).

108. *See id.* at 692 (highlighting the impracticality of getting all the members of the New York Convention to agree to any revisions).

109. *See id.* (noting “the genius” of the New York Convention is that it allows for states to adopt their own approaches if they are more favorable to enforcement of international commercial arbitration awards).

110. *See* Bird, *supra* note 2, at 1029 (acknowledging that the drafters of the New York Convention could not have anticipated the issues and questions that have arisen over the applicability of exceptions to enforcement and recognition of an arbitral award). However, Bird points out that Article V and Article VII of the

Convention is an onerous task, it is a necessary one because its inconsistent application cripples the main advantage of arbitration, which is consistency and avoidance of national courts.<sup>111</sup> The correct path forward for the public policy exception is one that acknowledges that multilateral treaties are voluntary, but also provides the New York Convention with enough rigidity to ensure it is applied consistently regardless of which national court is reviewing the arbitral award.<sup>112</sup> Any changes to the public policy exception must reflect its history that it was originally a tool used during the convention in 1958 to get hesitant nations to sign and ratify the New York Convention.<sup>113</sup> With this hesitancy in mind, it is important that any changes to the public policy exception still provide members with the same level of autonomy and authority to ensure they remain parties to the New York Convention.<sup>114</sup>

To ensure that such autonomy is retained, the New York Convention should continue to provide courts with the option to invoke the public policy exception on their own motion regardless of whether or when it was raised in the course of the litigation.<sup>115</sup> At the same time, the New York Convention should be revised to replace the permissive “may” in Article V with “shall.”<sup>116</sup> This change would clarify any ambiguity as to whether enforcement of the exception is mandatory and allows parties to avoid en-

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New York Convention are especially problematic because they do not provide guidance for when refusing to enforce an arbitral award would be appropriate. *Id.*

111. For further discussion of why parties find international commercial arbitration advantageous, see *supra* notes 18–19 and accompanying text.

112. See EXPLANATORY NOTE, *supra* note 101, at 1 (acknowledging that the New York Convention needs to be modernized, while pointing out that some provisions are unclear). Citing the public policy exception as an example, the Explanatory Note recognizes that some provisions must be updated in accordance with the prevailing judicial interpretations of them. *Id.* See also Bird, *supra* note 2, at 1054 (explaining that a revision of the New York Convention is needed while also conceding that “not every nation’s representatives will likely hail the revision”).

113. See Qian, *supra* note 40, at 22 (describing the public policy exception as a “political tool” used to “quiet potential objections to ratification of the Convention by member states”).

114. See *id.* at 60 (stating the public policy exception has also been viewed by member states as a way to ensure their national courts are able to “protect the integrity of their national legal systems”); see also Gaillard, *supra* note 106, at 692 (hypothesizing that getting of all the members of the New York Convention to agree to the revision would be nearly impossible).

115. See Qian, *supra* note 40, at 21–22 (claiming the court’s ability to invoke the public policy exception on its own motion is important to the autonomy of member states, and therefore must remain a part of the New York Convention); see also EXPLANATORY NOTE, *supra* note 101, at 12 (noting the importance of maintaining court-invoked motions as part of the Hypothetical Draft “for reasons of its acceptability,” although in practice no court has on its own motion utilized the public policy exception).

116. See HYPOTHETICAL DRAFT, *supra* note 98, at 3–4 (recommending changes to the language of Article V of the New York Convention to state that “enforcement of an arbitral award shall be refused”). As it stands now, Article V(2) of the New York Convention states that “[r]ecognition and enforcement of an arbitral award may also be refused.” The New York Convention, *supra* note 8, at 50.

forcement of an award if they can successfully show enforcement would be contrary to public policy.<sup>117</sup> Continuing to include the permissive term “may” provides national courts with too much discretion to enforce or reject an arbitral award, which undermines a major reason why parties prefer international commercial arbitration—to avoid national biases.<sup>118</sup>

Consistent with the French Civil Code of Procedure and the Hypothetical Draft proposal, the New York Convention should be revised to clarify that the public policy exception applies specifically to international public policy.<sup>119</sup> Adopting the understanding of international public policy as articulated by the Paris Court of Appeals, this revision would refer to “the body of rules and values whose violation the French legal order cannot tolerate even in situations of international character.”<sup>120</sup> By explicitly stating that the exception applies to international public policy, this revision clarifies what policy implications courts should consider and constrains the amount of discretion national courts can exert over enforcement decisions.<sup>121</sup> Further, narrowing the exception to apply only to considerations of international public policy would align with the overarching goal of the New York Convention, which is to encourage the enforcement of arbitral awards.<sup>122</sup>

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117. See EXPLANATORY NOTE, *supra* note 101, at 19 (explaining that replacing “may” with “shall” relieves ambiguity as to whether refusing enforcement is mandatory); see also Bird, *supra* note 2, at 1029–30 (discussing the New York Convention’s use of the word “may” in the context of annulled awards). Bird concludes that “the Convention neither compels courts not to enforce annulled awards nor provides guidance as to when enforcement or non-enforcement would be appropriate.” *Id.*

118. See Rogers, *supra* note 19, at 408 (stating a main reason parties choose international arbitration is because the “parties presume . . . that the national courts of the opposing party would be biased against them”); see also Bird, *supra* note 2, at 1024 (“[A]ccording to one survey, seventy percent of respondents reported that the neutrality of the forum was ‘highly relevant’ in deciding whether to choose arbitration to resolve global disputes.” (quoting Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT’L L. 79, 95 n.83 (2000))).

119. See HYPOTHETICAL DRAFT, *supra* note 98, at 4 (revising the New York Convention to allow a court to refuse enforcement of an arbitral award if enforcement would constitute a violation of international public policy); see also Kleiman & Pauly, *supra* note 13, at 36 (explaining that under Article 1520 of the French Code of Civil Procedure, a court may set aside an arbitral award only if enforcing or recognizing the award would contravene global public order).

120. See Kleiman & Pauly, *supra* note 13, at 36 (quoting Cour d’appel [CA] [Regional Court of Appeal] Paris, Oct. 16, 1997, 96/84842 (Fr.)).

121. See EXPLANATORY NOTE, *supra* note 101, at 24 (explaining that the international public policy exception would be a narrower category focusing on international rather than national policy, which is in line with how the public policy exception has been developed by many parties to the convention).

122. See Qian, *supra* note 40, at 20 (noting the New York Convention takes a pro-enforcement stance, and therefore it is intended that the New York Convention’s public policy exception be interpreted narrowly).

Because crafting an explicit definition of international public policy would be impractical given its subjective and amorphous nature, there should be a uniform standard outlining which issues rise to the level of an international public policy violation.<sup>123</sup> The New York Convention should adopt the standard articulated by the Second and Third Circuits—which hold that enforcement shall be denied if enforcing the award constitutes a violation of the “most basic notions of morality and justice.”<sup>124</sup> This standard aligns with the pro-enforcement stance of the New York Convention and the views of national courts already interpreting the exception.<sup>125</sup> Though many states already interpret the public policy exception narrowly, adjusting the language would respond to the criticism of the Hypothetical Draft that the New York Convention did not sufficiently eliminate the possibility that the public policy exception could be used to infuse national court bias.<sup>126</sup>

The Hypothetical Draft, however, did not go so far as to resolve issues over what role national courts should play in reviewing the merits of the arbitral award.<sup>127</sup> The New York Convention, therefore, must clarify the court’s role in reviewing whether to allow the public policy exception.<sup>128</sup> To maintain a pro-enforcement stance and ensure arbitration continues to be the preferred method for settling international business-related disputes, the New York Convention would benefit from adopting the stan-

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123. See Petit & Kajkowska, *supra* note 51, at 132 (stating there is no agreed upon definition of public policy because of its “indeterminate and evolving nature”).

124. See *Admart AG v. Stephen & Mary Birch. Found., Inc.*, 457 F.3d 302, 308 (3rd Cir. 2006) (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)).

125. See Gaillard & Siino, *supra* note 10, at 96 (noting case law on the New York Convention demonstrates that most national courts narrowly interpret the public policy exception and only apply it when the award results in “a deviation from the core values of their legal system”).

126. See Craig, *supra* note 1, at 706 (discussing questions of voluntary enforcement of arbitral awards and stating that “it is not clear that moral norms, which may be sufficient to ensure respect of arbitral awards rendered within the framework of domestic trade associations and professional groups, will be sufficient to ensure the satisfaction of arbitral awards between parties who have no relationship other than the contract by which they are linked”); see also Bird, *supra* note 2, at 1047 (commenting on Professor Jan van den Berg’s Hypothetical Draft). Bird notes that even with the revisions “[a] biased judiciary could circumvent the Draft Convention by imposing its will through the ‘public policy’ exception to enforcement present in both the Convention and the Draft convention.” *Id.* (footnote omitted).

127. For further discussion of the difference between French and American national courts’ jurisprudence regarding the depth of judicial review, see *supra* notes 95–96 and accompanying text.

128. See Petit & Kajkowska, *supra* note 51, at 132 (citing INT’L BAR ASS’N, REPORT ON THE PUBLIC POLICY EXCEPTION IN THE NEW YORK CONVENTION 18 (2015), [https://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Recognitn\\_Enfrcemnt\\_Arbitl\\_Awrdr/publicpolicy15.aspx](https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recognitn_Enfrcemnt_Arbitl_Awrdr/publicpolicy15.aspx) [<https://perma.cc/L6H4-5NBN>]) (discussing the lack of uniformity in the review process by national courts when determining whether to enforce arbitral awards).



dard of review articulated by the Second Circuit.<sup>129</sup> Under that approach, the New York Convention would clarify that the enforcement proceeding should be “summary . . . in nature” and not one where the court considers the facts or merits of the arbitrator’s decision.<sup>130</sup> This standard resolves discrepancies and eliminates a scenario where a country strategically uses the public policy exception as a way to get the court to review the merits of an award because there would no longer be an opportunity for national courts to consider the facts or merits of the arbitrator’s decision.<sup>131</sup>

#### V. NEW YORK I LOVE YOU, BUT YOU’RE BRINGING ME DOWN: THE IMPACT OF THE NEW YORK CONVENTION IF LEFT UNCHANGED

International commercial arbitration is becoming ever more popular; there was almost a ten percent increase in international commercial arbitration filings in 2020.<sup>132</sup> Because the public policy exception is arguably the most commonly invoked defense raised by those against whom an arbitral award is being enforced, national courts must apply it uniformly.<sup>133</sup> As this Comment has shown, the New York Convention, in its current form, does not provide national courts with sufficient guidance for deter-

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129. See Tuck, Bromberek & George, *supra* note 19, at 62 (stating international commercial arbitration is viewed as an advantageous dispute resolution method because it allows parties to avoid potential biases from national courts). However, the authors point out that this is only possible when the courts hearing such disputes and the laws governing them are determined to recognize and support the arbitration decisions. *Id.* See also Rogers, *supra* note 19, at 409 (noting arbitration is preferred because it allows parties to avoid potential bias from local and national courts).

130. See Zeiler v. Deitsch, 500 F.3d 157, 169 (2d Cir. 2007) (describing the summary nature of the award confirmation process and stating that “[a] district court confirming an arbitration award does little more than give the award the force of a court order”).

131. See Petit & Kajkowska, *supra* note 51, at 133 (highlighting that certain countries with parochial approaches to the public policy exception can use court involvement “opportunistically . . . as a gateway to review the merits of the award”).

132. See Mark Chudleigh & Erik Penz, *The Rise of International Arbitration and a Comparison of Arbitration Procedures in the USA, England and Wales, Bermuda and Canada*, KENNEDYS (Nov. 17, 2022), <https://www.kennedyslaw.com/thought-leadership/article/the-rise-of-international-arbitration-and-a-comparison-of-arbitration-procedures-in-the-usa-england-and-wales-bermuda-and-canada/> [https://perma.cc/N6UH-JKAF] (discussing the increase in international commercial arbitration in the midst of the pandemic). The authors note there has been a “reported rise in arbitration filings of more than 3% a year from 2010 to 2019 and a spike of 9.9% in 2020, based on data from international arbitration institutions.” *Id.*

133. See Joseph D Pizzurro, Robert B García & Juan O Perla, *Substantive Grounds for Challenge*, in THE GUIDE TO ENFORCING AND CHALLENGING ARBITRATION AWARDS, *supra* note 3, at 74, 83 (claiming the public policy exception is likely the most commonly invoked defense by those refuting enforcement while also noting that this could be due to the fact that it gives courts the most latitude to rectify any of the award’s substantive defects).

mining the applicability of the public policy exception.<sup>134</sup> This lack of guidance and the threat it poses to the effectiveness of the New York Convention is now of heightened importance for two reasons. First, national governments and the business sector both have a strong interest in sustaining the increase in international trade because it is beneficial to national economic growth.<sup>135</sup> This increase in international business, however, will produce more disputes that will require international commercial arbitration to resolve.<sup>136</sup> For parties to willingly engage in international commercial arbitration, they must feel confident that it is a self-contained process operating outside of national courts.<sup>137</sup> Accordingly, this requires the New York Convention to assure parties there will be a certain level of detachment between the arbitral tribunal and the national court enforcing the awards.<sup>138</sup> The New York Convention does not supply national courts with any guidance on the standard of review, which means that national courts may take it upon themselves to review the merits of the underlying claim, thereby undermining the ability of parties to operate outside of national courts.<sup>139</sup>

The success of the New York Convention is also impacted by the state of international relations between its member countries.<sup>140</sup> Currently, relationships are strained between certain nations.<sup>141</sup> For example, Russia,

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134. See Petit & Kajkowska, *supra* note 51, at 130 (noting the New York Convention's lack of guidance as to when courts should refuse to enforce an arbitration award based on the exceptions listed in Article V).

135. See Hensler & Khatam, *supra* note 5, at 401 (explaining national governments are in favor of international trade because it is seen as "the primary engine of national economic growth and domestic welfare, and arbitration was regarded as essential to international trade").

136. See *id.* at 423–24 (noting that a rise in global business will result in an increase in transnational disputes, which, in turn, will require more disputes to be resolved via international commercial arbitration).

137. See Craig, *supra* note 1, at 700–01 (stating the driving force behind the growth of international commercial arbitration is the parties' desire to avoid national courts out of fear they will be disadvantaged due to factors such as national bias, preferences of national judges, and being unaccustomed to the national court's language and procedures).

138. See Tuck, Bromberek & George, *supra* note 19, at 61 (stating the benefits of international commercial arbitration can only be appreciated when "national courts and national laws stand ready to recognize and support the parties' decisions to resolve disputes through binding international arbitration").

139. See Rogers, *supra* note 19, at 409 (highlighting that parties prefer international commercial arbitration because of its detachment from national courts). For further discussion of why parties may prefer international commercial arbitration to national courts, see *supra* note 131 and accompanying text.

140. For further discussion of this argument, see *supra* notes 75–80 (discussing that a public policy exception was raised, although rejected, when two states that were parties to the Convention had imposed sanctions against each other).

141. See *Ten Challenges for the UN in 2022–2023*, INT'L CRISIS GRP. (Sept. 14, 2022), <https://www.crisisgroup.org/b8-united-states/ten-challenges-un-2022-2023> [<https://perma.cc/3V56-AP8N>] (discussing the issues the United Nations faced leading up to the UN General Assembly's annual high-level session in September of 2022).

the United States, and the European Union are all members of the New York Convention and yet the European Union recently imposed sanctions on Russia.<sup>142</sup> Clarifying the public policy exception is thus important because parties to arbitration may be fearful that the exception could be used as a way for national courts to impose their biases against parties to the arbitration in a time where relationships are strained.<sup>143</sup> Therefore, to keep up with the increase in transnational businesses and the ever-changing relationships between states, the New York Convention must be modernized to ensure its continued usage and success.

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142. See Andrew Chatzky, *Have Sanctions on Russia Changed Putin's Calculus?*, COUNCIL FOREIGN AFFS. (May 2, 2019, 9:00 AM), <https://www.cfr.org/in-brief/have-sanctions-russia-changed-putins-calculus> [<https://perma.cc/9BJJ-MN4L>] (discussing the impact of sanctions placed on Russia by the United States and European Union); see also *Contracting States*, N.Y. ARB. CONVENTION, <https://www.newyorkconvention.org/countries> [<https://perma.cc/W9HS-EQYL>] (last visited July 5, 2023) (listing the states that are parties to the New York Convention).

143. See Rogers, *supra* note 19, at 409 (explaining a perceived benefit of arbitration is that it allows parties to avoid any potential bias from local courts); see also Qian, *supra* note 40, at 61 (contrasting Article V of the Convention with the other sections because the public policy exception “is dependent on judicial interpretation of national courts”).