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U.S. Courts' Review of Article V(1)(b) under the New York Convention for the Enforcement of Foreign Arbitral Awards

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In light of increasing international trade in recent years, international arbitration has been more widely used by international parties to resolve their conflicts. Thus, the need for reliable and effective enforcement of foreign arbitral awards has amplified. To facilitate the enforcement of foreign arbitral awards, the New York Convention lists grounds for the refusal of recognition and enforcement in Article V. This paper examines prominent U.S. case law on Article V(1)(b), which is put in place to ensure that arbitration proceedings are conducted properly in accordance with due process requirements: proper notice to parties and an opportunity to a fundamentally fair hearing.

This examination of case law conveys that U.S. courts refuse to enforce foreign arbitral awards pursuant to Article V(1)(b) only when due process rights of the party against whom the award is to be enforced are clearly violated by the arbitral tribunal. This paper also reveals that U.S. courts mainly defer to arbitral tribunals' discretion, especially as to evidentiary matters. Therefore, it is predicted that U.S. courts will likely continue to narrowly construe the grounds in Article V to facilitate reliable and effective enforcement of foreign arbitral awards in the U.S.

Key Words : New York Convention, International Arbitration, Recognition and Enforcement of Foreign Arbitral Awards, Due Process Rights

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I. Introduction

Increasing globalization has resulted in a rapid growth of international trade, and disputes tend to arise between parties from these international business relationships. The need for more efficient and effective ways to resolve international conflicts has been amplified over the years and, as a result, parties' widespread participation in international arbitration raises questions as to the recognition and enforcement of arbitral awards rendered by international arbitral tribunals because these awards would essentially be useless unless they are reliably enforceable whenever needed.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") was adopted in 1958 to better facilitate the recognition and enforcement of foreign arbitral awards, and it now has 150 signatory countries, including the United States[1]. The New York Convention represents a pro-arbitration view and sets forth grounds for the refusal of recognition and enforcement of a foreign arbitral award in Article V. Article V(1)(b), the second ground for refusal of recognition and enforcement, is most significant as its purpose is to ensure that the arbitration itself had been conducted properly in accordance with the requirements of due process — adequate notice to involved parties and a fundamentally fair arbitration hearing[2] — before enforcing arbitral awards. Thus, in this paper, prominent U.S. case law on this second ground for the refusal of recognition and enforcement of a foreign arbitral award, Article V(1)(b) of the New York Convention, will be examined in detail, followed by a predictive conclusion regarding a forthcoming trend in enforcement of foreign arbitral awards by the courts in the United States.

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1) "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" Retrieved July 1, 2014, from http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

2) Blackaby, N., Partasides, C., Redfern, A. and Hunter, M., Redfern and Hunter on International Arbitration 5th ed., Oxford University Press, Inc., 2009.

Ⅱ. Review of Foreign Arbitral Awards Under the New York Convention[3] by American Courts

1. Article V of the New York Convention

The New York Convention applies to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal[4]." Of critical relevance to this paper is Article V, which sets forth an exhaustive list of the grounds by which a challenging party must prove for refusal of the recognition and enforcement of foreign arbitral awards.

The Convention does not, by plain language, state that the listed grounds by which the competent authority may refuse recognition and enforcement are the only permitted grounds for refusal. However, courts construing the Convention's Article V (and Article 36 of the Model Law[5]) have found such a list of grounds to be an exclusive list, and therefore, have construed the grounds narrowly. Furthermore, because the language leaves some discretion to the competent authority as it "may refuse" rather than "shall or must refuse" enforcement if one or more grounds listed in Article V of the Convention are satisfied, parties have argued for residual discretion by enforcing authorities. Such claims, however, have generally been unsuccessful[6], and examination of this issue shall remain for discussion in another paper.

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3) The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

4) New York Convention, Art. I(1).

5) The grounds on which recognition or enforcement may be refused under the UNCITRAL Model Law on International Commercial Arbitration are identical. Such grounds are set forth in Article 36 of the Model Law.

6) "The exclusion of any discretion of the court to refuse recognition and enforcement of an award is either apparent from the legislative materials or clearly underlies the relevant decisions." UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, Art. 36, n. 4.

2. Application of Article V of the New York Convention in the United States

In the United States, federal district court is "the competent authority" where recognition and enforcement of foreign arbitral awards should be sought under Article V of the Convention. The statute that implements the Convention in the United States, 9 U.S.C. §§ 201 et seq., authorizes a party who is awarded a foreign arbitral award to bring an action in a federal district court seeking confirmation of the award[7]. In order to obtain recognition and enforcement of a foreign arbitral award, the party applying for its recognition and enforcement must, in a timely application, provide a duly authenticated original award or a duly certified copy of the award together with the original agreement to arbitrate or a duly certified copy of such an original arbitration agreement[8].

The role of a district court in reviewing an arbitral award is "narrowly limited," and "arbitration panel determinations are generally accorded great deference under the [Federal Arbitration Act[9]]." According to the Second Circuit Court of Appeals, such deference to arbitral tribunals promotes "the twin goals of arbitration, namely settling disputes efficiently and avoiding long and expensive litigation[10]."

Despite this limited reviewing authority, in order for U.S. federal courts to give effect to arbitral awards rendered as a result of foreign arbitration proceedings, it is crucial to examine and ensure that at the very least, due process requirements — that the relevant parties had received proper notice and had been entitled to a fundamentally fair hearing — had been properly observed by the arbitral tribunals[11].

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7) 9 U.S.C. § 207.

8) New York Convention, Art. IV.

9) Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 19 (2d Cir. 1997) (citation omitted); see Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 878 F. Supp. 2d 459 (S.D.N.Y. 2012).

10) Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 729 F.3d 99, 103 (2d Cir. 2013) (quoting Telenor Mobile Commc'ns AS v. Storm LLC, 584 F.3d 396, 405 (2d Cir. 2009)).

11) This also reflects the underlying idea of the Model Law, that even outside of court systems, the involved parties are entitled to due process rights when they resort to

3. Focusing on Article V(1)(b) of the New York Convention

It is evident from examining Article V(1)(b), the ground that ensures that parties' due process rights had been protected during arbitration hearings, that this section can be further divided into two categories of cases: the first category consists of cases with allegations of improper notice — either of appointment of the arbitrator or of the arbitration proceedings — and the second category consists of other cases in which the party against whom the award is invoked allegedly had been otherwise unable to present his or her case. Thus, these cases will be examined separately in this paper.

Despite the fact that parties rely heavily on and invoke Article V(1)(b) most often as a ground for the competent court to refuse to recognize or enforce their foreign arbitral awards[12], the following sections of case law demonstrate that it is highly unlikely for courts in the U.S. to refuse the recognition and enforcement of foreign arbitral awards based on this ground. Rather, only in extremely exceptional cases of denial of fundamental due process rights do courts refuse to enforce foreign arbitral awards. Such a pattern supports the underlying idea of respect and deference to arbitral tribunals' large degree of discretion and thereby minimizes judicial review and intervention following arbitration proceedings.

(1) Case Law with respect to the Adequacy of Notice Prong of Article V(1)(b) under the New York Convention

1) Exemplary Cases of Unsuccessful Allegations of Inadequate Notice Claims as Defenses Against Enforcement of Foreign Arbitral Awards

In a case where evidence before the First Circuit Court of Appeals clearly showed that a reinsurer had received adequate notice of the arbitration proceeding through its designated intermediary and also through other indirect

arbitration rather than litigation before courts.

12) Commentary to the Model Law Article 36 states that the alleged violation of the right to be heard … also referred to as violation of "natural justice" or of "due process" belongs to the most frequently raised ground to resist recognition and enforcement in practice.

resources, the Court held that the reinsurer at issue could not later claim lack of proper notice and meaningful representation at arbitration[13]. In this case, the reinsurer moved to vacate the arbitral award arguing that the award was not enforceable pursuant to Article V(1)(b) of the Convention since it had not been given proper notice of the appointment of the arbitrator or of the arbitration proceedings. The record before the Court showed, however, that in the treaty signed by the parties, there was an intermediary clause providing that all communications between the reinsured and the reinsurer shall be transmitted through their designated intermediary, Hodson. Accordingly, the Court held that when Hodson received a copy of the notice of arbitration letter sent to the reinsurer at issue, the reinsurer had received proper notice[14]. The Court also noted that according to the terms of reference between the parties, notice to counsel was deemed proper notice to the parties themselves. Because the counsel for the reinsured were advised by attorneys who were representing the reinsurer that they had been retained on behalf of the reinsurer, it was deemed by the Court that the reinsurer had received proper notice. Therefore, despite the reinsurer's claims of no notice, the Court held that when the method of correspondence by which the parties agreed to in the terms of their treaty – establishing by contractual terms that all correspondence would be through their designated intermediary – had been carried out, the reinsurer could not claim lack of proper notice after the fact.

As a result, because the Court ruled that proper notice is notice that would satisfy the due process requirements under the forum state's law, it held that the contractual notice provision satisfied the fundamental requirement of proper notice. Therefore, the reinsurer had no meritorious defense under Article V(1)(b) of the New York Convention against enforcement of its foreign arbitral awar d[15][16].

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13) First State Ins. Co. v. Banco De Seguros Del Estado, 254 F.3d 354 (1st Cir. 2001).

14) Furthermore, the underlying pool through which the reinsurer reinsured also acknowledged its receipt of the notice letter and thereafter requested additional time to appoint an arbitrator on behalf of the reinsurer.

15) First State Ins. Co., 254 F.3d at 358.

16) See, e.g., Geotech Lizenz AG v. Evergreen Sys., Inc., 697 F. Supp. 1248, 1253 (E.D.N.Y. 1988) (rejecting Article V(1)(b) defense to recognition and enforcement on the ground that

Moreover, in a recent case where a commercial lender sought enforcement of its foreign arbitral award issued against a borrower by the International Court of Arbitration of the International Chamber of Commerce under the Convention, the district court held that the borrower's alleged lack of notice of a foreign arbitration proceeding did not violate due process standards[17]. In this case, the court noted that in order to establish lack of notice as a defense against enforcement under Article V(1)(b) of the Convention, the party challenging the enforcement of the award must show that the arbitration procedures failed to comport with the forum country's standards of due process. However, the court noted that rather than lack of notice, the borrower here, Samaraneftegaz, deliberately chose not to participate in the arbitration proceedings, despite full knowledge of its existence as it received five separate notices of the proceeding's commencement. The borrower did not dispute having received notices from the ICC regarding the commencement of arbitration proceedings with it as a named respondent, along with further notices[18]. Additionally, the borrower had also received a letter informing it that it would be represented by Yukos EP, outlining the issues that were to be determined, and also including the terms of reference along with a notice that the ICC Court had confirmed other arbitrators as co-arbitrators.

Although the borrower contended that it had been denied its due process rights, in light of the record available to the court, the borrower failed to submit any briefing or request to be heard after having received notice that the arbitration was proceeding in its absence. Therefore, the court declined to conclude that the borrower had been precluded from presenting its case due to denial of an adequate opportunity to be heard at a meaningful time or in a

party "was given ample notice of the arbitration and an adequate opportunity to present its defenses. Evergreen's failure to participate was a decision that was reached only after the Company had full knowledge of the peril at which it acted").

17) Yukos Capital, S.A.R.L. v. OAO Samaraneftegaz, 963 F. Supp. 2d 289 (S.D.N.Y. 2013). The district court granted the lender's motion for summary judgment as a result.

18) The borrower admitted that it had received notices from the ICC on January 20, 2006, February 7, 2006, February 15, 2006, February 28, 2006 and March 13, 2006 regarding commencement of arbitration proceedings and informing it of due date of its answers, soliciting comments on the proposal to use a sole arbitrator or an arbitration panel and informing it that the lender had nominated another co-arbitrator.

meaningful manner. Rather, the court held that evidence supported its conclusion that the borrower had knowingly decided against appearing at arbitration even after having had received numerous notices and letters from the ICC informing it of the arbitral progress with it as a named respondent. Thus, the court held that the borrower's due process rights had not been violated under the Convention's Article V(1)(b)[19].

2) Less Common Cases of Inadequate Notice Claims as Successful Defenses to Recognition and Enforcement of Foreign Arbitral Awards

The court in *Sesostris, S.A.E. v. Transportes Navales, S.A*[20]. held that the mortgagee, the party against whom the arbitral award was to be enforced, was not bound by the Spanish arbitral award concerning the vessel at issue under the New York Convention because the mortgagee had no notice of the arbitration proceeding until after its completion[21]. The court found that correspondence between BCI, the party against whom the arbitral award was to be enforced, and its opponent, Sesostris, had been rather minimal regarding the foreign arbitration: on December 5, 1988, BCI sent a letter to Sesostris requesting notice as to when and where arbitration proceedings were to be held. From December 1988 until March 1989, however, BCI received no response from Sesostris. Then, on March 15, 1989, BCI received a letter from Sesostris stating only that the arbitration proceedings "are presently being pursued in Madrid, Spain[22]." On March 30, 1989, BCI wrote to Sesostris again: "[p]lease provide us

19) Yukos Capital S.A.R.L., 963 F. Supp. 2d at 297.

20) Sesostris, S.A.E. v. Transportes Navales, S.A., 727 F. Supp. 737 (D. Mass. 1989).

21) This case was an admiralty action for breach of two charter parties, and when the disputes arose between them, their matters were to be referred to the three-person panel in Madrid pursuant to their arbitration clauses. Among other issues that were present before the district court, only the relevant facts and issue will be discussed here. Because the district court discussed in detail whether the third party involved in this action was a proper party to the action, to promote better understanding, such discussion will be omitted, and the involved party names will be simplified.

22) Sesostris, S.A.E., 727 F. Supp. at 739.
The letter, which was dated March 11, 1989 and signed by counsel for Sesostris reads as follows: "With regard to your inquiry as to 'when and where arbitration proceedings are pursued by [our] client,' our understanding is that they are presently being pursued in Madrid, Spain."

with details as to when and where the arbitration proceeding is alleged to proceed[23]." Finally, Sesostris responded on April 19 that the arbitration proceedings had already been concluded.

The district court noted that it appeared from the record that the arbitration proceedings had taken place some time between March 13 and March 17 of 1989, as the panel had signed the arbitral award on March 17, 1989. As a result, the district court found that Sesostris's letter on March 11 was so vague and ambiguous, especially in light of its lack of response for the preceding three months since BCI's first request of notice of arbitration proceedings, and that it failed to state the arbitration procedures, or make any reference to the scheduling of the proceedings despite the fact that they were to begin within the week, and that it also failed to reveal that counsel for the parties had been retained in Spain to represent the interests of ownership and possession of the vessel at issue. Then, only after additional information had been requested by BCI again, Sesostris informed BCI in mid- April that the arbitration proceedings had been completed. Therefore, the court held that BCI, as the party against whom the foreign arbitral award was to be enforced, proved grounds for refusal of the foreign arbitral award under Article V(1)(b) as it had been denied any notice of the appointment of the arbitrator and of the arbitration proceedings, and thus had been rendered unable to present its case[24].

Also, more recently, a shipping company petitioned to enforce a foreign arbitral award against a charterer that had failed to respond to the notice of appointment of the shipping company's arbitrator, and so, the arbitration had proceeded before a sole arbitrator who then rendered an award in the petitioner's favor. About three weeks after the arbitral award had been rendered, the arbitrator posted a hard copy of the award to the charterer at an address in Geneva, but the charterer again failed to appeal within the time allowed. The petitioner then proceeded to serve the charterer with a summons and petition by personal delivery to the charterer's registered agent, the entity listed with the New York Secretary of State for the service of process[25]. At the shipping

23) Id.

24) Sesostris, S.A.E., 727 F. Supp. at 742-43.

25) Sea Hope Navigation Inc. v. Novel Commodities SA, 978 F. Supp. 2d 333, 335 (S.D.N.Y. 2013).

company's request, a default judgment was entered against the charterer, and the court ordered the shipping company to send a copy of its papers to the business address listed on the charterer's website. Seventeen days after the papers had been sent, an attorney for the charterer filed a notice of appearance, and the attorney informed the court that his client had never received notice regarding the initiation or pendency of the London arbitration. The counsel for the charterer argued that the shipping company's notice of commencement of arbitration, appointment of arbitrator, and claims submissions should have been sent to RaetsMarine, the charterer's marine insurer, as it was the point of contact in relation to the shipping company's claims and had dealt with the shipping company's insurance representatives in France. The charterer alleged that notices of arbitration had been sent to a generic e-mail address that was not monitored by anyone at the charterer. Therefore, it argued that no one on the charterer's side had been aware of the arbitration due to this defect in the arbitration procedure, and thus, it had been deprived of an opportunity to present its case against the shipping company.

The district court concluded that assuming the charterer's factual statements and allegations were accepted as true, a court might conclude that sending notice of an international arbitration to an e-mail address taken off a website could not constitute proper and adequate notice of the arbitration[26]. Therefore, the district court further found that such lack of notice was sufficient for the charterer's defense against enforcement of the arbitral award pursuant to Article V(1)(b) of the New York Convention[27].

By contrast, the Korean Supreme Court held that the recognition and enforcement of the foreign arbitral award at issue was proper in a case where the Korean company alleged it had been denied proper notice of the arbitration proceedings because it had not received an arbitration notice sent by the arbitral tribunal in London as no employee had been present to receive said notice, and therefore, argued that the arbitral award should not be enforced[28]. In this case,

26) Additionally, it held that the subsequent mailing of the arbitral award had failed to cure the initial lack of notice.

27) The district court vacated the default judgment against the charterer as a result. Sea Hope Navigation Inc., 978 F. Supp. 2d at 341.

the Korean party had failed to appear at the scheduled arbitral hearing or submit any paperwork on its behalf, and the arbitral proceedings were completed in its absence.

The arbitrators sent the notice on September 23, 1980, and the hearings were completed by April 15, 1981, and followed by the arbitral decision on May 1, 1981. The evidence also revealed, however, that although the London office of the Korean company ceased to exist at the listed address in London as of August 26, 1981, which was after the arbitral decision had been rendered, the Korean company's wholly-owned subsidiary, Koben, began to exist at the same address with at least two employees working there. Furthermore, more evidence regarding notices of the forthcoming arbitration were revealed from the conversations between the involved parties back on May 19, 1980, when the representatives of the opposing party visited Seoul in an effort to resolve the disputes and arrive at a settlement agreement. As a result of the failed effort to settle, the opposing party notified the Korean company that it would receive information regarding the arbitration proceedings in a matter of weeks. Therefore, the Korean Supreme Court found that the Korean company had received direct notice of the arbitration. This finding was further supported by the fact that the arbitral decision had been sent to the Seoul office of the Korean company by the opposing party, and yet the Korean company decided against taking any action or raising any meritorious defense against its enforcement.

This case is distinguishable from the above mentioned cases in this section because on the record, the Korean company's London office was in existence at the time the notices were sent out to the listed address. Also, the Korean Supreme Court assumed there had been no errors in the mailing system and therefore assumed proper delivery service of the notices. There was also other circumstantial evidence that pointed to the fact that the Korean company had received notice of arbitral proceedings.

As a result, the Korean Supreme Court held that enforcement of the arbitral award rendered in London was proper pursuant to the New York Convention, as not all claims of a lack of proper notice of arbitration proceedings constitute a

28) Korean Supreme Court Decision 89Daka20252 rendered on 10 April, 1990.

violation of the party's due process rights. More importantly, this holding by the Korean Supreme Court made it very clear that only in limited instances of violation of due process rights, *where such violation had been remarkably intolerable*, the enforcing courts may refuse to recognize and enforce foreign arbitral awards, which may appear to place a higher burden on the party raising an Article V(1)(b) defense against the recognition and enforcement of foreign arbitral awards in Korea. What is also important is that this holding is in line with the U.S. courts' narrow construction of the grounds listed in Article V of the New York Convention to facilitate the effective enforcement of foreign arbitral awards. Nevertheless, a close examination of the Korean court's recognition and enforcement of foreign arbitral awards should be reserved for another paper.

(2) Case Law Based on the Otherwise Unable to Present His Case Prong of Article V(1)(b) under the Convention

The United States Supreme Court has held that under U.S. law, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner[29].'" Therefore, if any party against whom an arbitral award is invoked had been denied the opportunity to be heard in a meaningful time or in a meaningful manner, enforcement of the award should be refused pursuant to Article V(1)(b). In addition, U.S. courts have recognized that the defense provided for in Article V(1)(b) "essentially sanctions the application of the forum state's standards of due process," and that due process rights are "entitled to full force under the Convention as defenses to enforcement[30]." A fundamentally fair hearing "meets the minimal requirements of fairness – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator[31]."

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29) Matthews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965)).

30) Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 975-76 (2d Cir. 1974).

31) Slaney v. The Int'l Amateur Athletic Fed'n, 244 F.3d 580, 592 (7th Cir. 2001). See China Nat. Bldg. Material Inv. Co., Ltd. v. BNK Intern, LLC, No. A-09-CA-488-SS (W.D.Tex. Dec.

Moreover, with respect to cases concerning evidentiary matters, the United States Supreme Court has noted that arbitrators are not bound by the federal rules of evidence[32]. Furthermore, an arbitrator is not bound to hear all of the evidence tendered by the parties. An arbitrator must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments[33]. Therefore, it is appropriate to vacate an arbitral award when the exclusion of relevant evidence actually deprives a party of a fair hearing[34]. The Seventh Circuit Court of Appeals, however, held that "[a] party's choice to accept arbitration entails a trade-off. A party can gain a quicker, less structured way of resolving disputes; and it may also gain the benefit of submitting its quarrels to a specialized arbiter...Parties lose something, too: the right to seek redress from courts for all but the most exceptional errors at arbitration[35]."

1) Landmark Case in which a Court Refused to Enforce a Foreign Arbitral Award Pursuant to the "Otherwise Unable to Present His Case" Prong of Article V(1)(b) of the Convention

In *Iran Aircraft Industries & Iran Helicopter Support and Renewal Co. v. Avco Corp*[36],. Iran Aircraft Industries and Iran Helicopter Support and Renewal Company (collectively the "Iranian parties") appealed the district court's order granting Avco's motion for summary judgment, which resulted in it refusing to enforce the foreign arbitral award. In this case, disputes arose from the contractual relationship between Avco and the Iranian parties and, as agreed to by the parties, the disputes were submitted to an arbitral tribunal[37].

Most of what Avco argued to support its claim of violation of due process

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4, 2009).

32) Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203-04, 76 S. Ct. 273, 276-77, 100 L. Ed. 199 (1956).

33) Hoteles Condado Beach v. Union De Tronquistas, 763 F.2d 34, 40 (1st Cir. 1985).

34) Hoteles Condado Beach, 763 F.2d at 40.

35) Dean v. Sullivan, 118 F.3d 1170, 1173 (7th Cir. 1997).

36) 980 F.2d 141 (2d Cir. 1992).

37) The tribunal was vested with exclusive jurisdiction over claims by nationals of the U.S. against Iran, claims by nationals of Iran against the U.S. and counterclaims arising from the same transactions, and it was created by the Algiers Accords, an agreement between the U.S. and Iran; see also, Claims Settlement Declaration, Art. II(1).

rights in the arbitration proceeding arose out of the pre-hearing conference that considered "whether voluminous and complicated data should be presented through summaries, tabulations, charts, graphs or extracts in order to save time and costs[38]." At the conference, Avco sought guidance from the tribunal as to the method for proving its claims that were based on voluminous invoices. Avco asked whether the tribunal would prefer to see the invoices as "raw data" in evidence or would prefer for the counsel to use an outside auditing agency to certify the amounts and summarize the underlying invoices. Judge Nils Mangard of Sweden[39] responded that he did not think the panel "will be very, very much enthusiastic getting kilos and kilos of invoices[40]." Neither counsel for the Iranian parties, however, was present at the pre-hearing conference. Following the conference, Avco's counsel submitted to the tribunal a "Supplemental Memorial" stating that in light of the tribunal's suggestion, it had retained an internationally recognized public accounting firm to verify that the records submitted to the tribunal accurately reflected the actual invoices in Avco's possession.

By the date of hearing on the merits, however, Judge Mangard had resigned and had been replaced by another judge from France. At the hearing, Judge Ansari of Iran, who had also been absent at the pre-hearing conference, inquired about Avco's evidence and its lack of substantiation of its claims. In response, Avco's counsel argued that rather than producing "thousands of pages of invoices," it chose to substantiate its claims through an audit performed by a third party accounting firm, which was specifically prepared for the proceedings before the tribunal. The tribunal then issued its award, refusing to allow Avco's claims, which were documented by its audited records, stating that the tribunal could not grant Avco's claims based on an affidavit and a list of invoices, even if the existence of the invoices was certified by an independent audit[41].

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38) See Avco Corp. v. Iran Aircraft Indus., Case No. 261, 19 Iran-U.S.Cl.Trib.Rep. 200, 235 (1988) (Browser, J., concurring and dissenting).

39) Judge Mangard was the Chairman of Chamber Three at the time of pre-hearing conference.

40) Iran Aircraft Industries, 980 F.2d at 143.

41) Iran Aircraft Industries, 980 F.2d at 144. The only judge of the tribunal who had been present at the pre-hearing conference, filed a concurring and dissenting opinion, in which he stated "I believe the tribunal has misled [Avco], however, unwittingly, regarding the

Following the district court's refusal to enforce the award, Avco argued before the Second Circuit Court of Appeals that refusal to enforce was proper because Avco had been unable to present its case to the tribunal under Article V(1)(b). The Court held that Judge Mangard's advice during the pre-hearing conference had misled Avco, although unintentionally, regarding Avco's method of proof as to submitting actual invoices or audited accounts. Therefore, the Court held that Avco had been denied the opportunity to present its claim in a meaningful manner before the tribunal. As it had been unable to present its case within the meaning of Article V(1)(b), the Court of Appeals agreed with Avco and thereby held that the district court had properly denied enforcement of the award[42].

However, there was a dissenting opinion to the majority in this case. The dissenting Circuit Judge opined that the brief exchange of conversation between Judge Mangard and Avco at the pre-hearing conference did not constitute a binding ruling of the tribunal that summaries of invoices would suffice as substitutes for the actual invoices[43]. Therefore, the dissenting Judge opined that because Avco simply chose to substantiate its claims with summaries rather than actual invoices, it took its chances inherent in making such a decision with respect to submission of evidence. Furthermore, because it seemed that Avco had taken a "calculated risk," Avco surely had a full opportunity to present its claims before the arbitral tribunal. As this opinion delves into discussing *Parsons & Wittemore Overseas Co. Inc.,* examination of that case is worthwhile here as well.

In *Parsons & Wittemore Overseas Co., Inc.*, the Second Circuit Court of Appeals refused to use the Article V(1)(b) defense to deny enforcement of a foreign arbitral award on the ground that the arbitral tribunal had refused to accommodate a key witness's schedule, having held that the inability to produce one's witnesses before an arbitral tribunal is a risk inherent in an agreement to submit to arbitration[44]. In this case, Overseas argued that it had been denied an

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evidence it was required to submit, thereby depriving [Avco], to that extent, of the ability to present its case …." Id. The judge noted that Avco did exactly what it was told to do by the tribunal at the pre-hearing conference. Id.

42) Iran Aircraft Industries, 980 F.2d at 146.

43) Id.

44) Parsons & Wittemore Overseas Co., Inc., 508 F.2d at 975.

adequate opportunity to present its case in a meaningful manner pursuant to Article V(1)(b) because its alleged key witness was kept from attending the hearing due to a prior commitment to lecture at a university. The Court of Appeals, however, found such reason for an inability to attend "hardly the type of obstacle" to his presence which would require the arbitral tribunal to postpone the hearing as a matter of fundamental fairness to Overseas[45]. The Court also appeared especially unsympathetic to Overseas because the arbitral tribunal had, in its possession, the alleged key witness's affidavit. The witness stated by his own words that his affidavit contained "a good deal of the information to which I would have testified[46]." Therefore, the Court held that the arbitral tribunal had rightfully acted within its discretion in deciding against rescheduling the hearing due to Overseas' witness's inability to attend, and such decision by the tribunal had not infringed upon Overseas' right to an adequate opportunity to present its case[47].

2) Reconciling the Second Circuit Court of Appeals' *Parsons and Wittemore Overseas Co., Inc.* and *Iran Aircraft Industries* Cases

As discussed in more detail above, when the arbitral tribunal refused to reschedule its proceedings due to a witness's inability to testify at the hearing, the Court of Appeals held that the tribunal had properly exercised its discretion, and thus held that the tribunal had not infringed upon the party's right to an adequate opportunity to present its case[48]. Some years later, on the other hand, the Court held that the arbitral tribunal's misguided suggestion at the pre-hearing conference[49] as to methods of submitting evidence, on which the party relied heavily, had violated the party's right to an adequate opportunity to present its case within the meaning of Article V(1)(b), and therefore affirmed the lower court's refusal to enforce the foreign arbitral award[50].

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45) Id.
46) Parsons & Wittemore Overseas Co., Inc., 508 F.2d at 976.
47) Id.
48) Parsons & Wittemore Overseas Co., Inc., 508 F.2d 969.
49) Such conference had taken place *ex parte* as the opposing counsel had been absent.
50) Iran Aircraft Industries, 980 F.2d 141.

The dissenting Judge in the latter case pointed out, however, that although the party had been on notice that it might encounter a problem with substantiating its claims through the abbreviated, audited records, it nevertheless *chose to* produce only summaries of invoices. Additionally, the record reflected that no member of the tribunal had stated that the tribunal would refuse to accept invoices as evidence. Furthermore, the party failed to argue that it had been precluded from producing such invoices themselves by the tribunal. Therefore, the dissenting Judge opined that the party had had a full and fair opportunity to present its case before the arbitral tribunal. In my opinion, the dissent may be further supported by the fact that no opposing counsel had been present at the pre-hearing conference, which would have made it more reasonable for the appearing party to have taken the tribunal judge's comment as a suggestion, rather than a binding ruling. Thus, it had been completely up to the party to still *choose* to follow such a suggestion and act upon it as though it had a binding effect on all parties.

When examining and reconciling these two cases, however, the party's reliance on its conversation with the Chairman of Chamber Three during the pre-hearing conference, *albeit in the absence of opposing counsel*, may have weighed in its favor when such reliance produced negative results for the party. However, deference to the discretion of arbitral tribunals probably was the underlying reasoning of the Court in its enforcement of the foreign arbitral award under the New York Convention in the former case.

Furthermore, as is evident from Parsons & Wittemore Overseas Co., Inc., by agreeing to submit to arbitration, parties are essentially relinquishing their courtroom rights, including the right to be able to subpoena witnesses. The arbitral tribunal's refusal to delay proceedings to accommodate a witness's convenience appears to be considered more akin to U.S. courts' orders of scheduling, with which parties must comply, except in very limited circumstances, rather than requesting that courts better accommodate their witnesses' schedules.

3) More Prevalent Cases Where Courts Rejected Parties' Defenses Against Enforcement of Foreign Arbitral Awards Under the "Otherwise Unable to Present His Case" Prong of Article V(1)(b)

The following are examples of the more common cases in which U.S. courts have rejected parties' arguments that they had been otherwise unable to present their cases at arbitration within the meaning of Article V(1)(b).

In *Overseas Cosmos, Inc. v. NR Vessel Corp*[51]., the London arbitral award was confirmed despite the respondent's argument that it had been denied an opportunity to be heard at a meaningful time or in a meaningful manner because the court found that respondent's alleged lack of participation could only be interpreted as intentional. The court found that while the respondent argued that it did not appear in the London arbitration and did not appoint an arbitrator or hire counsel in England, the record demonstrated that the respondent had corresponded with the arbitrator appointed on its behalf, asking the arbitrator to consider two key issues, and the respondent had neither objected to the arbitration proceeding based solely on the parties' written submissions nor demanded an oral hearing, despite the fact that it had ample opportunity to do so. Therefore, the court held that rather than having been denied an adequate opportunity to present its case, the respondent simply had refused to participate in the arbitration proceeding. Accordingly, the arbitral award was confirmed by the court.

In *Generica Ltd. v. Pharm. Basics, Inc*[52]., after an arbitrator of the International Court of Arbitration entered an award finding that the American pharmaceutical manufacturer had breached and repudiated its contract with the British licensor for the manufacture of a fertility drug, the licensor petitioned for confirmation of the foreign arbitral award. The parties had agreed in their terms of reference that their arbitrator, at his discretion, should decide what evidence to admit and in what form the evidence was to be tendered, along with what weight to give any particular evidence. However, the manufacturer argued that the arbitration procedure curtailed its cross-examination of a witness called by

51) Overseas Cosmos, Inc. v. NR Vessel Corp., No. 97 Civ. 5898 (S.D.N.Y. Dec. 8, 1997).
52) Generica Ltd. v. Pharm. Basics, Inc., 125 F.3d 1123 (7th Cir. 1997).

the licensor, thereby denying it an adequate opportunity to present its case. The record revealed that the arbitrator had allowed the manufacturer to cross-examine the witness at issue until it raised serious implications for the witness personally and for his company, at which point the arbitrator fully explained to the parties his concerns and allowed the witness an opportunity to obtain legal advice. When the witness planned to leave the hearing in Paris, the manufacturer did not choose to request that the witness remain at the hearing and also failed to seek an order compelling the witness to attend further arbitration hearings. Therefore, the Court of Appeals held that the arbitrator had not abused his discretion in handling the evidence since he had weighed the conflicting evidence, excluding the evidence of the witness at issue, to conclude that the manufacturer had breached the agreement with the licensor. Accordingly, the Court affirmed the district court's confirmation of the foreign arbitral award as it held that the manufacturer had not been denied an adequate opportunity to present its case.

In *Slaney v. The Int'l Amateur Athletic Fed'n*[53], former Olympic runner Slaney brought suit against the International Amateur Athletic Federation ("IAAF") and the United States Olympic Committee ("USOC") shortly after the IAAF arbitration panel determined that Slaney had committed a doping offense. Among several issues that she appealed to the Seventh Circuit Court of Appeals was her claim that the arbitral award should not be enforced by the U.S. federal courts because the arbitration had not satisfied the requirements of the New York Convention. She claimed that she had been denied the opportunity to present her case before the arbitral tribunal because under IAAF rules, the IAAF has the burden of proving, beyond a reasonable doubt, that a doping offense had occurred. Therefore, she argued that the IAAF could not scientifically prove beyond a reasonable doubt that any prohibited substance was in her urine. So, she argued that by concluding that the arbitral tribunal was bound by the IAAF's position, that upon a showing that an athlete had a testosterone to epitestosterone ratio greater than 6:1, the burden of proof shifted to the athlete to show by clear and convincing evidence that such an elevated ratio was due

53) Slaney v. The Int'l Amateur Athletic Fed'n, 244 F.3d 580 (7th Cir. 2001).

to a pathological or physiological condition[54], the arbitral tribunal had denied Slaney an adequate opportunity to present her case. In particular, when the arbitral panel upheld the IAAF's interpretation of how to determine a testosterone doping offense in an interlocutory decision, she withdrew from the arbitration because she thought it was scientifically impossible to prove by clear and convincing evidence that her high ratio was due to pathological or physiological factors. Accordingly, the arbitration panel ruled that she had committed a doping offense.

In reviewing such a record, the Court of Appeals held that because the arbitral tribunal had employed a burden-shifting test in a fair manner, contrary to Slaney's allegations, she had not been denied an opportunity to present her case before the tribunal. As a result, having found no error with the arbitral tribunal's requiring such a standard of proof, coupled with other reasons, the Court of Appeals held that the arbitral award should be enforced pursuant to the New York Convention[55].

Also in *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*[56], the relevant arguments against enforcement of the arbitral award were that the arbitral tribunal had refused to hear evidence pertinent and material to the controversy in violation of Article V(1)(b). The defendants alleged, and Kolel acknowledged, that the arbitration panel had issued its award after only one witness provided testimony for less than a half-hour. The defendants argued that the arbitrator had unilaterally interrupted the witness's testimony and stated that there was an urgency to conclude certain matters. However, Kolel and the arbitrator disagreed with the defendants and recalled that the witness had left the arbitration hearing early at the proceeding. Prior to issuing its award, the arbitration panel had held seven or eight sessions to consider legal arguments from both sides. Accordingly, the district court held that the arbitration panel had not violated the defendants' due process rights by refusing to hear more of their proffered evidence, especially because the issue was one of contractual

54) Such test assumes that an ordinary testosterone to epitestosterone ratio in humans is 1:1, and any ratio above 6:1 is consistent with blood doping.

55) Slaney, 244 F.3d at 594.

56) Kolel Beth Yechiel Mechil of Tartikov, Inc., 878 F. Supp. 2d 459 (S.D.N.Y. 2012).

interpretation.

Likewise in *Abu Dhabi Inv. Auth. v. Citigroup, Inc.*[57], the petitioner argued that certain evidentiary rulings by the arbitral tribunal had rendered it unable to present its case in a meaningful manner, in violation of the Convention's Article V(1)(b). The court held that the denial of a document request must rise to the level of violation of due process or fundamental fairness; also, an arbitral tribunal is not bound by the same strict evidentiary rules as a district court[58]. In light of the petitioner's argument that the tribunal's denial of two of its nearly sixty document requests amounted to the tribunal refusing to hear pertinent and material evidence, the district court examined whether such denial had been fundamentally unfair: the tribunal had allowed a substantial discovery by the parties, including over 550,000 pages of documents that the petitioner requested of Citigroup and the petitioner's cross-examination of several of Citigroup's top level officers. Also, while one of the two denials of document requests concerned the e-mails of a low level employee who worked in Citigroup's consumer lending group, the petitioner had failed to call him as a witness or cross-examine other witnesses about those e-mails at the hearing. The petitioner also had 23 remaining hours allotted to it at the time the hearing had ended, although it alleged that it did not have enough time to explore the issues with respect to the e-mails at issue. Therefore, the district court held that despite the fact that the petitioner had the opportunity to cross-examine other witnesses regarding the e-mails, it had chosen not to, and thus, cannot argue now that it had been denied a fundamentally fair hearing. Moreover, the court further held that the only other request denied by the tribunal had been filed untimely by the petitioner. As a result, the court held that when the tribunal had listened to 24 witnesses over the course of 16 days of testimony and accepted 5,988 exhibits as evidence, it had properly exercised its discretion in admitting or rejecting the evidence it had felt was necessary for the hearing[59]. Thus, the

57) Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12 Civ. 283 (S.D.N.Y. Mar. 4, 2013).

58) Bell Aerospace Co. Div. of Textron v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974).

59) Arbitral tribunals have "great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary proceedings." Supreme Oil Co., Inc. v. Abondolo, 568 F. Supp. 2d 401, 408 (S.D.N.Y. 2008); Arbitral tribunals are also endowed with "discretion to admit or reject evidence and determine what materials may be cumulative or irrelevant." Abu

court ruled that although the tribunal had denied two of the petitioner's nearly sixty requests, it had not rendered the petitioner unable to present its case and so confirmed the arbitral award[60][61].

Ⅲ. Conclusion

Article V of the New York Convention sets forth an exhaustive list of grounds by which the challenging party may defend against the recognition and enforcement of a foreign arbitral award. Article V(1)(b) is in place to ensure that the arbitration itself had been conducted properly in accordance with the requirements of due process — proper notice to the involved parties and an adequate opportunity to present their cases — before competent courts may enforce foreign arbitral awards.

In the United States, however, despite the fact that parties invoke Article V(1)(b) most frequently as their defense against the enforcement of arbitral awards, most claims for denial of enforcement are unsuccessful, as has been examined in detail above. Only in exceptionally limited cases, where the due process rights of the party against whom the award is to be enforced have been clearly violated, do courts refuse to enforce such arbitral awards. This is largely

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Dhabi Inv. Auth. v. Citigroup, Inc. (quoting Fairchild Corp. v. Alcoa, Inc., 510 F. Supp. 2d 280, 285 (S.D.N.Y. 2007)).

60) Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12 Civ. 283 (S.D.N.Y. Mar. 4, 2013).

61) There are more cases in which courts have rejected arguments by parties who have challenged enforcement of foreign arbitral awards based on Article V(1)(b) of the Convention. Another example is the following: In National Dev. Co. v. Khashoggi, Khashoggi objected to the petitioner National Development Company's motion for summary judgment by which it asked the court to confirm the arbitral award issued by a tribunal of the Court of Arbitration of the International Chamber of Commerce against Khashoggi. In his objection, Khashoggi argued that he had not appeared or participated in the arbitration that had taken place in London allegedly due to his inability to attend the proceeding, and thus, the district court should refuse to confirm the award pursuant to Article V(1)(b) of the Convention. The district court, however, found that his decision not to attend the arbitration proceeding in London had been due to his fear of being taken into custody for extradition to face criminal charges in the U.S., and thereby did not constitute an inability to attend and to participate in the arbitration proceeding. Thus, the court held that Khashoggi's argument that he had been unable to present his case before the arbitral tribunal failed, and together with other reasons, it held that the arbitral award should be confirmed.

due to the fact that U.S. courts recognize that these parties have agreed to arbitrate their disputes rather than to litigate in court and therefore respect a large degree of discretion by arbitral tribunals, especially with respect to evidentiary matters, as has been clearly demonstrated by the above case law. Such deference to arbitral tribunals minimizes judicial review and intervention post arbitration and thus promotes widespread use of arbitration by the parties who have agreed to opt for this more time and cost efficient means to resolve their conflicts. Therefore, in line with the pro-arbitration spirit of the New York Convention and the U.S. courts, it is likely that courts will continue to construe the grounds set forth in Article V narrowly and thereby facilitate reliable and effective enforcement of foreign arbitral awards in the U.S. in the near future.

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