

New York Convention of 1958: Refusals of Enforcement

By Albert Jan van den Berg*

Introduction

When the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the New York Convention or simply the Convention) celebrated its 40th birthday, I wrote an article for the *ICC International Court of Arbitration Bulletin* entitled: 'Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few'.¹ On the occasion of the Convention's 50th birthday, one may ask whether the reference to 'few' in the title still holds true. The purpose of the present article is to answer that question by examining case law in which enforcement was refused under the Convention up to 2007.

For readers' convenience, the present update includes the cases in which enforcement was refused that I cited in my earlier contribution. It is however limited to enforcement actions brought under the New York Convention. This is for obvious reasons, as the enforcement of awards made outside the country of enforcement is rarely sought on any basis other than the Convention,² and as the Convention has worldwide coverage extending to more than 140 Contracting States. A further limitation is that the article does not pretend to be exhaustive. Although a careful search has been made of court decisions reported in the *Yearbook Commercial Arbitration*,³ some cases may have been overlooked and there may be other cases that have not (yet) have been reported in the Yearbook.⁴

The article is divided into two parts. Consideration will first be given to refusals to enforce Convention awards on the grounds listed in Article V of the Convention. The second part of the article will be devoted to a study of other situations in which the enforcement of a Convention award has been refused.

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1 ICC IC Arb. Bull., 1999 Special Supplement, pp. 75–94. The article was updated for the ICCA Congress in Beijing in May 2004: 'Why Are Some Awards Not Enforceable?', published in *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12, pp. 291–326 (The Hague: Kluwer Law International, 2005). The cases surveyed in the 2004 update are also included in the present article.

2 Although enforcement on a more favourable domestic basis (if any) via Article VII(1) of the Convention should not be ignored.

3 The 1,400 court decisions on the New York Convention reported in the 32 volumes of the *Yearbook Commercial Arbitration*, including those mentioned in the present article, are available online at www.kluwerarbitration.com.

4 See generally the author's Consolidated Commentary and Index of Cases concerning the New York Convention, the last edition of which appeared in the *Y.B. Comm. Arb.* XXVIII (2003) pp. 562–738.

I. Grounds for refusing enforcement listed in Article V

A. Grounds for refusing enforcement under Article V in general

Article V is divided into two parts. The first part lists the grounds upon which enforcement may be refused that have to be proven by the respondent. The second part, which concerns violation of public policy under the law of the forum, lists the grounds on which enforcement may be refused by a court on its own motion.

The overall purpose of Articles IV and VI is to facilitate the enforcement of awards. It thus reflects a ‘pro-enforcement bias’.

The three key features characterizing the grounds for refusing enforcement set out in Article V are:

- the grounds are exhaustive;
- a court may not re-examine the merits of the arbitral award; and
- the burden of proof lies on the respondent.

On the whole, courts have given full endorsement to these features, although there have been some notable exceptions where enforcement has been refused.

The Supreme Court in Queensland, Australia, believed that the grounds for refusal of enforcement listed in Article V left it with discretion to refuse enforcement on other grounds.⁵ The Court based this view on the wording of section 8(2) of the International Commercial Arbitration Act 1974, which implements the New York Convention in Australia. This section states: ‘Subject to this part, a foreign award *may* be enforced in a court of a State or territory as if the award has been made in the State or territory in accordance with the law of that State or territory.’ Further, section 8(5) of the Act omits the word ‘only’ appearing in the opening words of Article V of the Convention (‘Recognition and enforcement of the award may be refused at the request of the party against whom it is invoked *only* if that party furnishes . . .’). In reaching its decision, the Supreme Court failed to take into account the principle that the grounds for refusal of enforcement listed in the Convention are exhaustive. The court’s view seems to have been inspired by the language of the Australian implementing instrument, which is deficient in this respect.⁶

In a 1981 case, the Italian Supreme Court required the *petitioner* to prove the existence of the arbitration clause (ground (a) of Article V(1)), thereby reversing the burden of proof under the Convention. The petitioner failed to do this and enforcement was refused.⁷

⁵ Supreme Court of Queensland, 29 October 1993, *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums (Australasia) Pty Ltd.*, reported in Y.B. Comm. Arb. XX (1995) pp. 628–650 (Australia No. 11, § 44–45, 59–60). See also *infra* note 97.

⁶ Another reason why the Supreme Court of Queensland considered it had residual discretion to refuse enforcement under the Convention was that ‘in the United States of America, it has been held that the “defences” to an application to enforce a foreign award were not limited to specific matters referred to in the Convention’, thereby referring to a New York District Court decision on 1 September

1989, *Dworkin-Cosel Interair Courier Services v. Daniel Avraham*, reported in Y.B. Comm. Arb. XVI (1991) pp. 624–629 (US No. 105). That reference seems to be mistaken, too. The case concerned the setting aside of an arbitral award as well as the question of whether the award, made in New York, was final and binding under federal arbitration law.

⁷ Corte di Cassazione, 26 May 1981, No. 3456, *Viceré Livio v. Prodexport*, reported in Y.B. Comm. Arb. VII (1982) pp. 345–46 (Italy No. 47). See also *infra* note 125.

A court in Athens, Greece, similarly refused enforcement. It decided in an interim decision in 1983 that it could not determine whether the arbitration agreement was valid under the law of the State of New York—the place where the award was made—since the party seeking enforcement had not produced the relevant statutory provisions of New York law together with a Greek translation (ground (a) of Article V(1)).⁸

In similar vein, a court in Brandenburg, Germany, decided in 2002 that the existence and validity of an arbitration agreement in writing is a prerequisite for the enforcement of the award pursuant to Article II(2) of the Convention and that such existence and validity must be proven by the petitioner, which had not been the case.⁹

It is submitted that the above positions taken by Italian, Greek and German courts are erroneous.¹⁰

B. Article V(1)(a): invalidity of the arbitration agreement

On this ground, enforcement may be refused if the respondent asserts and proves that ‘[t]he parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made’.

A substantial number of cases based on a flawed arbitration agreement are decided at the stage of enforcing the agreement under Article II(3) of the New York Convention. However, there are also a large number that fail later at the stage of enforcing the award, as the following survey shows.¹¹

(a) Agreement in writing (Article II(2))

Article V(1)(a) refers to Article II of the Convention, which requires the arbitration agreement to be in writing. Paragraph 2 of Article II defines the expression ‘agreement in writing’ as ‘an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams’. This definition was found not to have been met in a number of cases.

The classic case of non-compliance with the writing requirement of Article II(2) is that in which, after concluding a contract, the seller sends the buyer a confirmation of the sale in which there is an arbitration clause but the buyer does not return or acknowledge receipt of that document in writing. In such a case, there is neither an arbitration clause contained in a contract signed by the parties nor an arbitration clause contained in an exchange. Accordingly, a court in Frankfurt, Germany, refused enforcement of an award made in the Netherlands that was based on a sales confirmation which had not been returned.¹²

⁸ Court of First Instance, Athens, Decision No. 3359 of 1983, *Charterer v. Shipowner*, reported in Y.B. Comm. Arb. XI (1986) pp. 500–501 (Greece No. 6).

⁹ Brandenburgisches Oberlandesgericht [Brandenburg Court of Appeal], 13 June 2002, *Forwarding Agent v. Dealer*, reported in Y.B. Comm. Arb. XXIX (2004) pp. 747–53 (Germany No. 67).

¹⁰ See also below text accompanying notes 131–133.

¹¹ See also, in part II below, G. Problems connected with a party's identity and J(b) Original or certified copy of the arbitration agreement.

¹² Oberlandesgericht [Court of Appeal], Frankfurt am Main, 26 June 2006, *Manufacturer v. Buyer*, reported in Y.B. Comm. Arb. XXXII (2007) pp. 351–57 (Germany No. 103).

Similarly, the Spanish Supreme Court refused enforcement of an award made in Paris under the aegis of the Paris Arbitration Chamber (*Chambre arbitrale de Paris*).¹³ The party against whom enforcement was sought had not signed the sales confirmation containing the arbitration clause. The case is interesting since the Paris Court of Appeal had previously upheld the validity of the arbitration clause in setting aside proceedings. The divergence appears to be due to the fact that the New York Convention's Article II(2) requirements are generally more demanding than those of domestic law (here, French law). The former had to be applied by the Spanish court in proceedings to enforce a foreign award under the Convention, while the latter had to be applied by the French court in proceedings to set aside an award rendered in its jurisdiction.

The same happened in a case decided by a court in Celle, Germany.¹⁴ The court refused enforcement of an award made in London, finding that there was no arbitration agreement in writing in accordance with the Convention as the parties 'neither signed nor mentioned' the general conditions containing the arbitration clause when they concluded the sales contract, 'nor did they agree on their application in an exchange of letters'. Here, too, a difference between Article II(2) of the Convention and domestic law came to light as the High Court in London, when appointing the sole arbitrator, had held that the general conditions had been validly incorporated in the parties' contract.

In another Spanish case, the Spanish Supreme Court held that there was no arbitration agreement between the parties, given that none of the documents supplied with the request had been signed by the respondent.¹⁵

The world of sport is not exempt from the New York Convention's Article II(2) requirement either. Thus, the ice hockey player Alexander Ovechkin did not have to comply in the United States with an award made by the Arbitration Committee of the Russian Ice Hockey Federation, as the US District Court for the District of Columbia held that a written arbitration agreement as required by Article II(2) was lacking.¹⁶ In this case, the court found that there was neither a signed contract nor a written exchange between the parties. In a drug test case with an arbitration agreement that was far from clear, the US District Court in Hawaii held that there was no arbitration agreement in writing within the meaning of the Convention between the International Amateur Athletic Federation (IAAF) and the sprinter Harry Reynolds.¹⁷

In a Norwegian case, the petitioner for the enforcement of an award made in London submitted emails and a charter party that had been regarded in the arbitral award as constituting an agreement between the parties. The Hålogaland Court of Appeal found that the petitioner had not produced 'the original agreement referred to in Article II or a duly certified copy thereof' as required by Article IV(1)(b), and remanded the case to the lower court to assess whether the requirements of Article II of the Convention had been complied with.¹⁸

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Tribunal Supremo [Supreme Court], 16 April 1996, *Activial Internacional SA v. Conservas El Pilar SA*, reported in Y.B. Comm. Arb. XXVII(2002) pp. 528–32 (Spain No. 33).

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Oberlandesgericht [Court of Appeal], Celle, 18 September 2003, *Seller v. Buyer*, reported in Y.B. Comm. Arb. XXX (2005) pp. 536–40 (Germany No. 76).

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Tribunal Supremo [Supreme Court], 26 May 1998, reported in Y.B. Comm. Arb. XXVII (2002) pp. 543–45 (Spain No. 36).

16
US District Court, District of Columbia, 18 January 2006,

Moscow Dynamo v. Alexander M. Ovechkin, reported in Y.B. Comm. Arb. XXXI (2006) pp. 1394–1402 (US No. 568).

17
US District Court, Southern District of Ohio, Eastern Division, 13 July 1993, *Harry L. Reynolds, Jr. v. International Amateur Athletic Federation (IAAF)*, reported in Y.B. Comm. Arb. XXI (1996) pp. 715–19 (US No. 190).

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Hålogaland Court of Appeal, 16 August 1999, *Charterer v. Shipowner*, reported in Y.B. Comm. Arb. XXVII (2002) pp. 519–23 (Norway No. 1). See also *infra* note 131.

In connection with an arbitration clause in, or referred to in, a charter party, the Swiss Federal Supreme Court affirmed a court of appeal's finding that there was no arbitration agreement between the parties, since the charter party was unsigned and there was no mention of the arbitration clause in the respondent's communications. It was considered irrelevant that the respondent had partly performed under the charter party.¹⁹

A court in Bavaria, Germany, declined to enforce an award made at the Foreign Trade Court of Arbitration in Belgrade, Yugoslavia, because the contracts containing the arbitration clause had been drawn up, strangely, by photocopying contractual details and the claimant's signature onto a blank sheet of paper bearing the defendant's letterhead, company stamp and signature that had been faxed by the defendant to the claimant at the claimant's request during the negotiations. Those contracts had subsequently been faxed to the defendant, but the defendant had neither confirmed nor contested them in writing. The court held that the contracts had not been signed and that there had not been an exchange between the parties.²⁰

The involvement of a broker can also cause problems as far as compliance with Article II(2) of the Convention is concerned, as shown by the following two cases in which enforcement was refused by the Spanish Supreme Court.

In the first case, the facts were as follows. Unión de Cooperativas Agrícolas Epis-Centre (Epis-Centre) had sold certain goods to Agucersa, SL (Agucersa) through a broker, Calamand & Co. (Calamand). On 17 and 18 August 1993, the broker sent two confirmations to Epis-Centre, which referred to Standard Contract No. 19 Paris, providing for the arbitration of disputes through the Paris Arbitration Chamber. On 31 August and 1 September 1993, Epis-Centre sent two sales confirmations to Agucersa, in which reference was likewise made to Standard Contract No. 19, and requested that Agucersa sign and return them for acceptance. Agucersa did not do this. Subsequently, Agucersa sent a fax and a telex to Calamand complaining about the quality of the goods received. A dispute ensued and on 23 December 1994 the Paris Arbitration Chamber rendered an award ordering Agucersa to pay FRF 900,025 to Epis-Centre for breach of contract. Epis-Centre sought enforcement of the award in Spain. The Spanish Supreme Court denied enforcement, holding that the documents in the file did not prove Agucersa's intent to agree to the arbitration clause, since Agucersa had signed neither the confirmations sent by Calamand to Epis-Centre nor the sales confirmations it received from Epis-Centre.²¹

In the second case, Barredo Hermanos SA (Barredo), the buyer, and Delta Cereales España SL (Delta), the seller, had entered into a sales contract through Bertran Trading, a broker. On 20 September 1991, Bertran Trading sent Barredo confirmation of an order. Delta subsequently sent Barredo two copies of a sales contract, one of which was to be signed and returned. Barredo kept both copies. Both the confirmation of the order and the contract referred to Standard Contract No. 22 Paris, which provided for arbitration

¹⁹ Bundesgericht [Federal Supreme Court], 31 May 2002, *A Ltd. v. B A.G.*, reported in Y.B. Comm. Arb. XXVIII (2003) pp. 835–41 (Switzerland No. 34). See also below text accompanying note 131.

²⁰ Bayerisches Oberstes Landesgericht [Higher Court of Appeal of Bavaria], 12 December 2002, *Exporterv. Importer*, reported in Y.B. Comm. Arb. XXIX (2004) pp. 761–66 (Germany No. 69).

²¹ Tribunal Supremo [Supreme Court], 7 July 1998, *Unión de Cooperativas Agrícolas Epis-Centre v. Agucersa, SL*, reported in Y.B. Comm. Arb. XXVII (2002) pp. 546–50 (Spain No. 37).

through the Paris Arbitration Chamber. A dispute arose between the parties and Delta commenced arbitration. An arbitral award in favour of Delta was rendered on 13 July 1993. Delta sought enforcement of the award in Spain. The Supreme Court denied enforcement, holding that there was no arbitration agreement in writing between the parties as Barredo had not in any way expressed its intention to be bound by the arbitration clause contained in the Standard Contract.²²

In an old case, the Greek Supreme Court denied enforcement of an award made in New York for lack of compliance with Article II(2), finding that the arbitration agreement concluded by the agent was not valid as he had not received written authorization from his principal to conclude the agreement.²³ The court referred to Greek domestic law, which requires a proxy to be in the same form as the act to which it relates. The court added that the lack of a written power of attorney to conclude the arbitration agreement on the principal's behalf could have been remedied if the principal had appeared before the arbitrators and had participated in the proceedings without making any reservation. It is to be noted that such reliance on domestic law is rare in the reported cases.

The above refusals reflect in many cases a strict judicial interpretation of the writing requirements with respect to arbitration agreements set out in Article II(2) of the New York Convention. The adverse outcome might have been avoided by a more relaxed interpretation, as recommended by UNCITRAL.²⁴

(b) Other cases involving the invalidity of arbitration agreements

The enforcement of awards has been refused due to lack of a valid arbitration agreement under Article V(1)(a) for reasons other than the absence of a written agreement as defined in Article II(2) of the Convention.

A court in Florence, Italy, considered the clause 'eventual arbitration to be performed in London according to English law' as ambiguous.²⁵ According to the court, the clause simply pointed to the possibility of referring a dispute to arbitration on the basis of a further agreement. This is a typical case where more careful drafting of the arbitration clause would have led to a more positive result.

A German claimant in an arbitration in the People's Republic of China applied to the Chinese courts for confirmation of the validity of an arbitration clause in a FIDIC construction contract. The Supreme People's Court for the Jiangsu Province decided otherwise, holding that the arbitration clause was invalid under Chinese law as it did not predetermine the arbitral tribunal. In light of this decision, a German court in Berlin declined to enforce the Chinese award.²⁶

²² Tribunal Supremo [Supreme Court], 6 October 1998, *Delta Cereales España SL v. Barredo Hermanos SA*, reported in Y.B. Comm. Arb. XXVI (2001) pp. 854–57 (Spain No. 31).

²³ Areios Pagos (Supreme Court), 14 January 1977, Decision No. 88, *Agrimex SA v. J.F. Braun & Sons Inc.*, reported in Y.B. Comm. Arb. IV (1979) p. 269 (Greece No. 5).

²⁴ UNCITRAL recommends that Article II(2) 'be applied recognizing that the circumstances described therein are not exhaustive' (Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on

7 July 2006 at its thirty-ninth Session) available at <www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf>.

²⁵ Corte di Appello [Court of Appeal], Florence, 27 January 1988, *Eastern Mediterranean Maritime Ltd. v. SpA Cerealtoscana*, reported in Y.B. Comm. Arb. XV (1990) pp. 496–98 (Italy No. 103).

²⁶ Kammergericht [Court of Appeal], Berlin, 18 May 2006, *Construction company v. Engineering company*, reported in Y.B. Comm. Arb. XXXII (2007) pp. 347–50 (Germany No. 102).

Article V(1)(a) has not been explicitly relied upon by courts in connection with the defence that a State or State agency lacked capacity to agree to arbitration (such a defence is nowadays hardly ever accepted). A rare example of such a defence is found in a decision rendered by an administrative tribunal in Damascus on 31 March 1988.²⁷ Enforcement of two ICC awards made in Geneva was refused on the ground that no preliminary advice on the referral of the dispute to arbitration had been obtained from the competent committee of the Council of State, as required by Syrian law.²⁸ Cases such as this are becoming increasingly rare, due to the tendency for national laws and courts to distinguish between domestic and international transactions.²⁹

C. Article V(1)(b): violation of due process

On this ground, enforcement may be refused if a respondent asserts and proves that he 'was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case'.

When considering ground (b) of Article V(1), a US Court of Appeals for the Second Circuit stated that 'this provision essentially sanctions the application of the forum state's standards of due process',³⁰ which concisely expresses the purpose of the clause: it is concerned with the fundamental principle of a fair hearing and adversarial proceedings, known also as *audi et alteram partem*.

The cases in which enforcement has been refused on the basis of Article V(1)(b) can be divided into various categories.

An initial category covers the failure to inform a party about the arbitration. Informing parties of the identity of arbitrators may be thought to be fundamental. Under certain arbitration rules used in the Copenhagen grain trade, however, the names of arbitrators are not made known to the parties. A court in Cologne, Germany, refused enforcement of an award resulting from such a ghost arbitration.³¹

Another example of this initial category is the case where a bank was a mortgagee in possession of a ship that had been arrested in Boston. The bank agreed to deposit security for the charterer's claims against the owner and was kept almost completely ignorant of the subsequent arbitration proceedings in Madrid. When the charterer sought enforcement of the award against the security deposited by the bank, the District Court in Massachusetts refused enforcement, reasoning that the bank had not received proper notice of the arbitration proceedings.³²

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Administrative Tribunal, Damascus, 31 March 1988, *Fougerolle SA v. Ministry of Defence of the Syrian Arab Republic*, reported in Y.B. Comm. Arb. XV (1990) pp. 515–17 (Syria No. 1).

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Article 44 of Law No. 55 of 1959 of the Council of State reads: 'No Ministry or State organization may conclude, accept or authorize a contract, a compromise or an arbitration or execute an arbitral award of more than Syrian £ 45,000 without the prior advice of the competent Committee.'

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See below G(a) Distinction between domestic and international public policy.

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US Court of Appeals for the Second Circuit, 23 December 1974, *Parsons & Whittemore Overseas Co. Inc. v. Société*

Générale de l'Industrie du Papier (rakta), reported in Y.B. Comm. Arb. I (1976) p. 205 (US No. 7).

31

Oberlandesgericht [Court of Appeal], Cologne, 10 June 1976, *Danish Buyer v. German Seller*, reported in Y.B. Comm. Arb. IV (1979) pp. 258–60 (Germany No. 14).

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US District Court, District of Massachusetts, 28 December 1989, *Sesostris SAE v. Transportes Navales SA and MV Unamuno*, reported in Y.B. Comm. Arb. XVI (1991) pp. 640–45 (US No. 108).

Informing a party presupposes that the party can be located, so this first category also encompasses the question of locating a respondent. A court in Bavaria, Germany, denied enforcement of an award made in Moscow, holding that the German buyer had not been duly informed of the arbitration.³³ The court found that although Russian arbitration law provides that a communication made to the defendant's last known address suffices if no other address can be found after making a reasonable inquiry, there was no evidence here that any attempt had been made to find the correct address of the German buyer.

A second category covers the failure to inform a party of what the other party has submitted. An example is a case decided by a court in Hamburg, Germany, where an arbitrator had failed to forward to the defendant a copy of a letter submitted by the claimant.³⁴ In an attempt to rescue the award, the court considered that due process would be violated if it could not be excluded that the arbitrator would have reached a more favourable result for the respondent, had the event complained of not occurred. In the event, the court found that a more favourable result could not be excluded and refused enforcement.

Another example of the second category is a case decided by a court in Bremen, Germany, refusing enforcement of an award made in London because the German party against which enforcement was sought had not been informed of the other party's arguments.³⁵ The facts of the case, as reported, indicate that the German party submitted documents to the arbitral tribunal and thereafter received no other communication from the arbitrators until the award.

Similarly, a Dutch court in Amsterdam refused the enforcement of an award made in London under the Arbitration Rules of the Cocoa Association because the French claimant had submitted to the arbitral tribunal a statement of claim without copying it to the Dutch defendant, which had not received a copy from the arbitral tribunal either.³⁶ The Amsterdam court held that these circumstances constituted a violation of a fundamental procedural right and considered it irrelevant that, prior to commencement of the arbitration, the French claimant had briefly informed the Dutch defendant of its allegations by telex.

A third category covers what can be described as 'insensitive arbitrators'. Thus, a court in Naples, Italy, refused enforcement of an award made by the Arbitration Board of the Commodity Exchange in Vienna, finding that one month's notice given to the Italian respondent to attend the hearing in Vienna was insufficient as during that very period the area where the respondent was located was hit by a major earthquake.³⁷

33 Bayern Oberlandesgericht [Court of Appeal of Bavaria], 16 March 2000, *Russian Seller v. German Buyer*, reported in Y.B. Comm. Arb. XXVII (2002) pp. 445–50 (Germany No. 53).

34 Oberlandesgericht [Court of Appeal], Hamburg, 3 April 1975, *US Firm P v. German Firm F*, reported in Y.B. Comm. Arb. II (1977) p. 241 (Germany No. 11). The Court declared the Convention to be inapplicable due to lack of retroactivity (see below II.B Retroactive application of the Convention), but the result would undoubtedly have been the same if the Convention had been applied.

35 Landgericht [Court of First Instance], Bremen, 20 January 1983, *Portuguese Company A v. Trustee in bankruptcy of German company X*, reported in Y.B. Comm. Arb. XII (1987) pp. 486–87 (Germany No. 28).

36 Gerechtshof [Court of Appeal], Amsterdam, 16 July 1992, *G.W.L. Kersten & Co. BV v. Société Commerciale Raoul-Duval et Cie.*, reported in Y.B. Comm. Arb. XIX (1994) pp. 708–709 (Netherlands No. 16).

37 Corte di Appello [Court of Appeal], Naples (Salerno Section), 18 May 1982, *Bauer & Grobmann OHG v. Fratelli Cerrone Alfredo e Raffaele*, reported in Y.B. Comm. Arb. X (1985) pp. 461–62 (Italy No. 70).

In the same vein, the Court of Appeal in London confirmed a decision of the High Court refusing to enforce an award made under the auspices of the Indian Council of Arbitration in Mumbai. The High Court held that the serious illness of one of the parties meant that it was not realistically possible for that party to participate meaningfully in the arbitration and present a defence.³⁸

A fourth category is composed of cases where an arbitral tribunal puts a party on the wrong track. The seminal example in this category is a case that came before the US Court of Appeals for the Second Circuit concerning an eventful arbitration conducted before the Iran-US Claims Tribunal in The Hague (*Iran Aircraft Industries v. Avco*).³⁹ At the pre-hearing conference, the chairman of the arbitral tribunal advised Avco specifically not to overburden the tribunal by submitting ‘kilos and kilos of invoices’ and approved the method of proof proposed by Avco instead, which was to submit its audited accounts receivable ledgers. Neither the counsel for the Iranian party nor the Iranian arbitrator attended the pre-hearing conference. Thereupon, Avco submitted an affidavit verifying that the accounts receivable ledgers submitted by Avco tallied with Avco’s original invoices. A hearing on the merits took place, at which the Iranian arbitrator was present but with a different chairman, the original chairman of the arbitral tribunal having by this time resigned and been replaced by another chairman. At that hearing, the Iranian arbitrator asked what the position of Avco’s counsel was with respect to the invoices. Counsel for Avco referred to the pre-hearing conference. In its award, the arbitral tribunal disallowed those claims submitted by Avco that were documented by its audited accounts receivable ledgers, stating that ‘the tribunal cannot grant Avco’s claims solely on the basis of an affidavit and a list of invoices, even if the existence of the invoices was certified by an independent audit’ (US arbitrator dissenting). The US Court of Appeals observed: ‘Thus, Avco was not made aware that the Tribunal now required the actual invoices to substantiate Avco’s claim. Having thus led Avco to believe it had used a proper method to substantiate its claim, the Tribunal then rejected Avco’s claim for lack of proof. We believe that by so misleading Avco, however unwittingly, the Tribunal denied Avco the opportunity to present its claim in a meaningful manner.’ One of the judges of the Court of Appeals dissented, observing that in the face of questioning by the Iranian arbitrator, Avco was placed on notice of the possible risk that the panel would choose not to rely on invoice summaries.

Another example of the fourth category comes from the Supreme Court of Hong Kong (High Court). The Hong Kong court found that the China International Economic and Trade Arbitration Commission (CIETAC) had not given the respondent an opportunity to comment on the reports from the expert appointed by the tribunal.⁴⁰ As stated in the legal opinion supporting the respondent’s position in the enforcement proceedings, the expert’s reports ‘were delivered too late, and the award was issued too soon’.

It is clear that most of the refusals in the above cases could have been avoided if the arbitral tribunal or the administering arbitral institution had paid closer attention to the procedural conduct of the cases.

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Court of Appeal (Civil Division), 21 February 2006 and 8 March 2006, *Ajay Kanoria, eSols Worldwide Limited, and Indekka Software Pvt Limited v. Tony Francis Guinness*, reported in Y.B. Comm. Arb. XXXI (2006) pp. 943–54 (UK No. 73).

39

US Court of Appeals, Second Circuit, 24 November 1992, *Iran Aircraft Industries and Iran Helicopter Support and Renewal*

Company v. Avco Corporation, reported in Y.B. Comm. Arb. XVIII (1993) pp. 596–605 (US No. 143).

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Supreme Court of Hong Kong, High Court, 15 January 1993, *Paklito Investment Ltd. v. Klockner East Asia Ltd.*, reported in Y.B. Comm. Arb. XIX (1994) pp. 664–74 (Hong Kong No. 6).

D. Article V(1)(c): excess of jurisdiction

On this ground, enforcement may be refused if the respondent asserts and proves that ‘[t]he 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’. Ground (c) adds the proviso that if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

Notwithstanding the somewhat unclear language of Article V(1)(c), the enforcement of an arbitral award has been refused for excess of jurisdiction on the part of the arbitral tribunal in only two of the reported cases.

The first case was decided by the courts in Hong Kong.⁴¹ The arbitration clause provided for arbitration in Malaysia and read in its relevant part: ‘All disputes as to quality or condition of rubber or other disputes arising under these contract regulations shall be settled by arbitration.’ The arbitrators awarded a claim for non-payment caused by failure to open a letter of credit as required by the contract. The party resisting enforcement asserted that the arbitration clause applied only to claims based on quality, size and weight and did not cover letters of credit. The Hong Kong High Court granted leave to enforce. The Court of Appeal took the view that the arbitration clause was not broad enough to cover the matters in dispute. It reasoned that ‘contract regulations’ covered specific provisions but did not include the letters of credit. The Court of Appeal observed that ‘the court is not entitled to ignore any of these words [i.e. ‘or other disputes arising under these contract regulations’]. No more is it entitled to write a fresh arbitration clause for the parties on the footing that so to do would render it more efficacious from a business point of view and enable all disputes arising under one or more of the agreements to be dealt with by the same tribunal.’

The second case involved partial enforcement under the proviso that qualifies ground (c). Upon a request for the enforcement of an award rendered in Syria on the basis of an agreement providing for arbitration in Syria for ‘non-technical’ disputes and arbitration under the ICC Rules of Arbitration for ‘technical’ matters, a court in Trento, Italy, applied the following yardstick: given that the Syrian arbitrators had decided ‘technical’ as well as ‘non-technical’ matters and that only their decisions in respect of ‘non-technical’ matters were to be enforced, the court held that before a certain date the disputes were of a ‘non-technical’ nature (i.e. delay in delivery) and that thereafter they were ‘technical’.⁴²

Both cases show that appropriate drafting of the arbitration clause helps to avoid enforcement being refused.

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High Court, 28 November 1990, and Court of Appeal, 18 January 1991, *Tiong Huat Rubber Factory (SDN) BHD v. Wah-Chang International Company Limited and Wah-Chang International Corporation Limited*, reported in Y.B. Comm. Arb. XVII (1992) pp. 516–24 (Hong Kong No. 1).

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Corte di Appello [Court of Appeal], Trento, 14 January 1981, *General Organization of Commerce and Industrialisation of Cereals of the Arab Republic of Syria v. SpA Simer (Società delle Industrie Meccaniche di Rovereto)*, reported in Y.B. Comm. Arb. VIII (1983) pp. 386–88 (Italy No. 53).

E. Article V(1)(d): irregularity in the composition of the arbitral tribunal or in the arbitral procedure

On this ground, enforcement may be refused if the respondent asserts and proves that ‘[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place’. Thus, according to the wording of the text, the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure ranks first, and only where there is no agreement on these matters is the arbitration law of the country where the arbitration took place taken into account.

Under the predecessor to the New York Convention—the Geneva Convention of 1927—enforcement of the award could be refused if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with *both* the agreement of the parties *and* the law of the country where the arbitration took place. The International Chamber of Commerce (ICC), upon whose initiative the new convention was drawn up, considered the Geneva Convention’s main defect to be that it provided for the enforcement of only those awards that were strictly in accordance with the procedural law of the country where the arbitration took place. Hence, in 1953, ICC proposed a draft convention for the enforcement of truly international awards—i.e. arbitral awards not governed by a national arbitration law—containing the present text of ground (d). The concept of truly international arbitration was subsequently rejected by the drafters of the New York Convention, who replaced the expression ‘international awards’ by ‘foreign awards’ and thereby included references in Article V(1) to an applicable national arbitration law. The drafters nonetheless recognized that enforcement could be frustrated if it were to be refused in cases where the composition of the arbitral tribunal and the arbitral procedure agreed upon by the parties did not follow in all details the requirements of a national arbitration law. Various solutions to this problem were proposed, but in the end, after long discussions, the ICC text was retained.

Six cases have been found in which the enforcement of an award was refused on the basis of ground (d).

In the first case, the composition of the arbitral tribunal was found to be at variance with the agreement of the parties but in accordance with the law of the country where the arbitration took place. The case, which was decided by a court in Florence, concerned a charter party (Exxonvoy 1969) between a Finnish charterer and an Italian shipowner.⁴³ Clause 24 of the charter party provided: ‘Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London, whichever place is specified in Part I of this Charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any of two of the three on any point or points shall be final.’ The arbitration clause further defined how the three arbitrators were to be appointed, including in situations where the second arbitrator was not appointed by the respondent or the two arbitrators failed to agree on the third arbitrator. In the latter circumstance the third arbitrator was to be appointed by the

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Corte di Appello [Court of Appeal], Florence, 13 April 1978, *Rederi Aktiebolaget Sally v. srl Termarea*, reported in Y.B. Comm. Arb. IV (1979) pp. 294–96 (Italy No. 32).

‘Judge of any court of maritime jurisdiction in the city above-mentioned’. The place specified in Part 1 of the charter party was London. Following a dispute, each party appointed an arbitrator. The two arbitrators, however, did not appoint a third arbitrator. In the award, which was in favour of the Finnish charterer, the arbitrators gave the following explanation: ‘Clause 24 of the said charter party required arbitration before a board of three persons, the third arbitrator to be appointed by the two chosen by the parties. The Arbitration Act 1950, section 9(1), states that any such provision shall take effect as if it provided for the appointment of an Umpire. As the two arbitrators were minded to agree, an Umpire was not required and if so appointed would not have entered into the Reference.’ This was mandatory English arbitration law at the time and has since been abolished by the 1996 Arbitration Act. The Florentine court, in which the Finnish charterer sought enforcement of the award against the Italian shipowner, refused to grant enforcement on account of Article V(1)(d) of the New York Convention. It considered that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. The court overruled the applicability of section 9(1) of the English Arbitration Act of 1950, taking the view that under Article V(1)(d) of the Convention the agreement of the parties prevails over the law of the country where the arbitration took place.

The second case provides a further reminder of the importance of a carefully drafted arbitration clause. The arbitration clause in question provided for arbitration by two party-appointed arbitrators who ‘in the event of disagreement’ would select a third arbitrator. The clause provided also that the third arbitrator would be appointed by the Commercial Court in Luxembourg if the two arbitrators were unable to agree on the third arbitrator. When a dispute arose, each party appointed an arbitrator (a French accountant and a New York lawyer). After discussions between the two arbitrators relating to procedure but not the merits, the French accountant requested the Luxembourg court to appoint a third arbitrator, which it did. The New York lawyer objected that this appointment was premature and refused to participate in the arbitration. The enforcement of the award made by two arbitrators (i.e. a party-appointed arbitrator and the third arbitrator) was refused in the United States on the ground of violation of the parties’ agreement on the composition of the arbitral tribunal.⁴⁴

The third case was decided by Swiss courts in Basle. The contract, which was between a Swiss seller and a German buyer and concerned the sale of nuts, provided for arbitration under the Conditions of the Commodity Association of the Hamburg Exchange. When a dispute arose between the parties over the quality of the nuts delivered by the Swiss seller, the German buyer sought to have the dispute settled in two stages, first by ascertaining the quality of the nuts and then by assessing damages. The Swiss seller found this division unacceptable and sought to have their differences settled in a single-stage arbitration. When the German buyer proceeded with the arbitration in two stages, the Swiss seller declined to participate. The enforcement of the damages award, made in favour of the German buyer, was refused by the Court of First Instance in Basle, whose decision was subsequently affirmed by the Basle Court of Appeal.⁴⁵ Referring expressly to Article V(1)(d) of the New York Convention, the Court of Appeal reasoned that the arbitral procedure did not conform to the agreement of the

⁴⁴ US Court of Appeals, Second Circuit, 31 March 2005, *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, reported in Y.B. Comm. Arb. XXX (2005) pp. 1136–43 (US No. 520).

⁴⁵ Appellationsgericht Kanton Basel-Stadt, 6 September 1968, *Swiss Corporation X AG, buyer v. German Firm Y, seller*, reported in Y.B. Comm. Arb. I (1976) p. 200 (Switzerland No. 4).

parties as the applicable rules of the Hamburg Commodity Association (section 20 of the *Platzusancen*) did not provide for arbitration in two stages, even though at the time it may have latterly become customary to do so in Hamburg. The court added that even if the Swiss seller knew of this development, it could still assume in good faith that the arbitration rules as printed were still in force. As an aside, it is submitted that proceedings split into two stages (i.e. bifurcation) are nowadays widely accepted in international arbitration.

The fourth case involved an arbitral award made in Switzerland between a Finnish party and a party owned by the Turkish State. The arbitration clause included the following sentence: ‘The Board of Arbitration shall take as base the provisions of this Contract and Turkish laws in force.’ In the arbitration, the Turkish party argued that this sentence meant that Turkish law applied to both substance and procedure. In the award, the majority of the arbitral tribunal held that “‘Turkish laws in force’ [should] not be understood as choice of procedural rules’. Having prevailed in the arbitration, the Finnish party sought enforcement in Turkey. The Court of First Instance and the Court of Appeal refused enforcement, holding that the award violated Article V(1)(d) of the Convention.⁴⁶ Again, this result might have been avoided if the arbitration clause had been drafted more carefully, although it is surprising that a court should construe the words ‘Turkish laws in force’ as referring not only to the substantive applicable law but also to the procedural applicable law, for it is generally understood that the choice of a place of arbitration (here, Zurich) implies the choice of the arbitration law of that place (i.e. Swiss international arbitration law).

The fifth case concerned a ‘home-on-home’ clause in a contract for a marble and granite processing plant: arbitration was to take place in Stockholm if commenced by Tema (Italy) and in Beijing if commenced by Hubei (PR China). Tema commenced arbitration in Stockholm on 1 August 1992 and Hubei participated in the proceedings. On 25 August 1992, Hubei commenced arbitration in Beijing in respect of the same dispute, but Tema did not participate in those proceedings. The Stockholm award was in favour of Tema and the Beijing award was in favour of Hubei. The Italian courts enforced the Stockholm award but refused enforcement of the Beijing award. The Italian Supreme Court considered that the proceedings in the Beijing arbitration did not conform with the parties’ agreement, which contemplated one arbitration only, either in Stockholm or in Beijing, depending on which party commenced first. The court added that the existence of contradictory decisions on the same dispute goes against the nature and function of arbitration.⁴⁷

The sixth case—assuming the alleged facts to be true—is probably the most glaring example of a refusal of enforcement. It involved an award made in Moscow in an arbitration between Media Most and Goldtron under the International Commercial Arbitration Court (ICAC) of the Chamber of Commerce and Industry of the Russian Federation. Enforcement of the award was sought in the District Court in Amsterdam.⁴⁸ Media Most alleged that on 12 August 1999 Mr Orlov, who chaired the arbitral tribunal,

⁴⁶ Court of Appeals, 15th Legal Division, 1 February 1996, No. 1996/627, *Metex Andelslag V.S. v. Türkiye Elektrik Kumuru Genel Müdürlüğü General Directorate, Ankara*, reported in Y.B. Comm. Arb XXIII (1998) pp. 807–14 (Turkey No. 1).

⁴⁷ Corte di Cassazione [Supreme Court], 7 February 2001, *Tema Frugoli SpA, in liquidation v. Hubei Space Quarry Industry Co. Ltd.*, reported in Y.B. Comm. Arb. XXXII (2007) pp. 390–96 (Italy No. 170).

⁴⁸ Rechtbank [Court of First Instance], Amsterdam, 27 August 2002, *Goldtron Limited v. Media Most B.V.*, reported in Y.B. Comm. Arb. XXVIII (2003) pp. 814–20 (Netherlands No. 27).

made a telephone call to the Media Most office in Moscow and, apparently believing himself to be talking to Goldtron's representative, urged Media Most's representative, Mr V.A. Esakov, to file a counterclaim in the arbitration. On 13 September 1999, Goldtron did in fact file a counterclaim, although the time limit to do so under the ICAC Rules had expired. At a hearing held on the following day, 14 September 1999, the arbitral tribunal decided to allow the late filing of Goldtron's counterclaim. On 28 September 1999, Media Most challenged Mr Orlov. The Presidium of ICAC dismissed the challenge on 23 June 2000 on 'formal grounds', holding that the challenge had not been filed within fifteen days of the event giving rise to reasonable doubts over the arbitrator's impartiality (i.e. 12 August 1999), as provided for in the ICAC Rules. The arbitrators rendered an award on 19 November 2001, in which they found in favour of Goldtron and directed Media Most to pay Goldtron US\$ 8,500,000 for the shares and US\$ 899,274.52 in punitive damages, as well as US\$ 38,338.74 and US\$ 100,000 to cover respectively Goldtron's expenses and counsel fees. The District Court in Amsterdam denied enforcement, finding that the ICAC Presidium had erred in holding that Media Most's request for challenge had not been filed within the time limit provided for in the ICAC Rules. The court held that the time limit did not start to run until 14 September 1999, when Media Most became convinced that Mr Orlov had contacted Goldtron and persuaded it to file a counterclaim. The court concluded that, therefore, the arbitral procedure was not in accordance with the arbitration rules agreed upon by the parties. Also, the court found that the Presidium should have given reasons for its decision not to allow a late filing of the challenge, since the ICAC Rules provide that challenges filed after the time limit of fifteen days has expired shall be considered 'if the arbitral tribunal finds the delay justified'. The court further noted that by refusing to examine the merits of the challenge, the ICAC Presidium deprived Media Most of its right to present its case against an arbitrator whom it believed to be partial, thereby violating due process. The latter consideration points to Article V(1)(b). It may be added that enforcement could also have been refused in this case on the basis of Article V(2)(b) (violation of due process as an infringement of public policy).

F. Article V(1)(e): award not binding, set aside or suspended

On this ground, enforcement can be refused if the respondent asserts and proves that '[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'. Reference is made here to three separate grounds, each of which will be considered in turn.

(a) 'Binding'

Ground (e) of Article V(1) provides first that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has not become 'binding'. The 1927 Geneva Convention required the award to have become 'final' in the country of origin. The word 'final' was interpreted by many courts at the time as requiring leave for enforcement (*exequatur* or the like) to have been granted by a court in the country of origin. Since the country where enforcement was sought also required leave for enforcement, this interpretation led in practice to what was called a 'double *exequatur*'. The drafters of the New York Convention considered this system to be too cumbersome and abolished it by using the word 'binding' instead of 'final'. Accordingly, no leave for enforcement in the country of origin is required under the New York Convention. Courts are virtually unanimous in their acceptance of this principle.

Courts differ, however, over the question of whether the binding force is to be determined under the law applicable to the award or independently of the applicable law. While some courts look at the applicable law to find out whether the award has become binding under that law, other courts interpret the word ‘binding’ without regard to an applicable law, as meaning that the award can no longer be appealed on the merits in further proceedings before another arbitral tribunal or in a court.

Whatever the merits of this debate, only one court decision has so far been reported in which enforcement was refused because the court considered that the award had not become binding within the meaning of Article V(1)(e) of the New York Convention. The case concerned an award made in the United States under the auspices of the American Arbitration Association (AAA). The US Court of Appeals for the District of Columbia refused to confirm the award for lack of subject-matter jurisdiction. This prompted the claimant, MINE, to resort to ICSID arbitration. In the meantime it sought enforcement of the AAA award in Switzerland. The Geneva court inferred from MINE’s conduct that the dispute between the parties could not be considered as definitely settled.⁴⁹ The court then considered that the question of whether an award is binding is first of all a question of the law governing the arbitral proceedings, which the parties may freely designate as is provided in Article V(1)(d). Thereupon, the Court held that the parties had agreed to ICSID arbitration and to the Washington Convention governing the proceedings, as acknowledged in MINE’s application for ICSID arbitration. According to the Court, ‘MINE has thus acknowledged that the award had no binding effect’. It is submitted that the refusal to enforce the award was justified here by the rather unusual circumstances of the case.

(b) ‘Set aside’

Ground (e) further provides that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has been ‘set aside’ (annulled, vacated) by a court in the country where, or under the law of which, the award was made. According to Article VI of the Convention, a court may adjourn its decision on enforcement if the respondent has applied for the award to be set aside in the country of origin.

In a number of reported cases, the setting aside of an award in the country where it was made has caused enforcement abroad to be refused under the Convention. Thus, the Court of Appeals for the Second Circuit refused the enforcement of two awards set aside by a court in Nigeria (*Baker Marine*);⁵⁰ the Court of Appeals for the District of Columbia refused the enforcement of an award set aside by a court in Colombia (*TermoRio*);⁵¹ the District Court for the Southern District in New York refused enforcement of an award set aside by a court in Italy (*Spier*);⁵² and the Court of Appeal in Rostock refused the enforcement of an award set aside by a Russian court.⁵³

⁴⁹ Tribunal de Première Instance [Court of First Instance], Geneva, 13 March 1986, *Maritime International Nominees Establishment (mine) v. Republic of Guinea*, reported in Y.B. Comm. Arb. XII (1987) pp. 514–22 (Switzerland No. 15).

⁵⁰ US Court of Appeals, Second Circuit, 12 August 1999, *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. et al.*, reported in Y.B. Comm. Arb. XXIV (1999) pp. 909–13 (US No. 288).

⁵¹ US Court of Appeals for the District of Columbia, *TermoRio S.A. E.S.P. et al. v. Electranta S.P., et al.*, 25 May 2007, No. 06-7-58, to be reported in Y.B. Comm. Arb. XXXIII (2008).

The decision of the US District Court of 17 March 2006 in this case is reported in Y.B. Comm. Arb. XXXI (2006) pp. 1457–73 (US No. 575).

⁵² US District Court, Southern District of New York, 22 October and 29 November 1999, *Martin I. Spier v. Calzaturificio Tecnica S.p.A.*, reported in Y.B. Comm. Arb. XXV (2000) pp. 1042–56 (US No. 325).

⁵³ Oberlandesgericht [Court of Appeal], Rostock, 28 October 1999, reported in Y.B. Comm. Arb. XXV (2000) pp. 717–20 (Germany No. 51).

A somewhat singular example is the Dutch episode in the famous case of *SEEE v. Yugoslavia* saga. In the arbitration, in which Yugoslavia did not participate, the award was made by two arbitrators in the Canton of Vaud, Switzerland, in 1956.⁵⁴ SEEE deposited the award with a court in Vaud, whereupon Yugoslavia brought an action in that court to set aside the award. The court did not set aside the award, but ordered that it be returned to SEEE, on the ground that it was not an arbitral award within the meaning of Article 516 of the Code of Civil Procedure of the Canton of Vaud, which required an odd number of arbitrators at the time.⁵⁵ After several unsuccessful attempts to have the award enforced in a number of countries, enforcement was sought in the Netherlands. Several rounds of proceedings followed and the Dutch Supreme Court, hearing the case for the second time, decided that enforcement should be refused, as the order of the Vaud court was equatable to setting aside the award as mentioned in Article V(1)(e) of the Convention.⁵⁶

In a rather old case, the Italian Supreme Court refused the enforcement of an English award that did not contain reasons.⁵⁷ The court took the view that, as both parties came from countries (Italy and Germany) that had adhered to the 1961 European Convention, the agreement referred to in Article V(1)(d) of the New York Convention should be regarded as incorporating the provisions of the European Convention. Article VIII of the European Convention provides that reasons must be given for an award if a party so requests before the end of the arbitral hearing.

Some courts have gone in the opposite direction. In particular, courts in France have declared an award enforceable notwithstanding the fact that it had been set aside in the country of origin.⁵⁸ In the author's view, this is in principle an undesirable development.⁵⁹

In an old French case, which has probably been surpassed by current case law, the Paris Court of Appeal refused to enforce an ICC award made in Geneva on the ground that the award had been set aside by the Court of Appeal in the Canton of Geneva.⁶⁰ The Geneva court had considered the award to be 'arbitrary', which is a ground for setting

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The award was published in French and English in *Journal du droit international* (1959) p. 1074.

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Tribunal [Court of First Instance], Canton Vaud, 12 February 1957, affirmed by the Tribunal fédéral [Supreme Court], 18 September 1957, published in *Revue critique de droit international privé* (1958) p. 358.

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Hoge Raad [Supreme Court], 7 November 1975, *Société Européenne d'Etudes et d'Entreprises—SEEE v. Federal Republic of Yugoslavia*, reported in Y.B. Comm. Arb. I (1976) pp. 195–98 (Netherlands No. 2 D). It is interesting to note that Professor Henri Battifol, commenting on the first decision of the Dutch Supreme Court in the *SEEE v. Yugoslavia* case, had already suggested that the Vaud court's order for the award to be returned could be equated to a setting aside within the meaning of Article V(1)(e) of the New York Convention (Rev. arb. 1974.326, p. 330). The opposite conclusion was reached by the Rouen Court of Appeal on 13 November 1984 in *Société Européenne d'Etudes et d'Entreprises (SEEE) by its liquidator Mme Y. Cleja v. Socialist Federal Republic of Yugoslavia; International Bank for Reconstruction and Development (the World Bank) and the French State*, reported in Y.B. Comm. Arb. XI (1986) pp. 491–99 (France No. 8), where it was held that the Swiss decision to return the award did not amount to a setting aside of the award within the meaning of Article V(1)(e) of the New York Convention, but rather that the award was not an award under Vaud arbitration law. The Rouen court found that, under

the procedure applicable to the arbitration, the arbitrators' decision was consequently binding on the parties within the meaning of the New York Convention.

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Corte di Cassazione [Supreme Court], 8 February 1982, No. 722, *Fratelli Damiano snc v. August Tropfer & Co*, reported in Y.B. Comm. Arb. IX (1984) pp. 418–21 (Italy No. 57).

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Cour de Cassation [Supreme Court], 10 June 1997, *Omnium de Traitement et de Valorisation v. Hilmarton*, reported in Y.B. Comm. Arb. XXII (1997) pp. 696–701 (France No. 45), approving enforcement of an award that had been set aside in Switzerland. See also US District Court, District of Columbia, 31 July 1996, *Chromalloy Aeroservices Inc. v. The Arab Republic of Egypt*, reported in Y.B. Comm. Arb. XXII (1997) pp. 1001–1012 (US No. 230), where an award that had been set aside in Egypt was declared enforceable in the United States. That decision was not followed by other courts in the United States (see *supra* notes 50–52).

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See J. Paulsson, 'Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment (LSA)' (1998) 9:1 ICC IC Arb. Bull. 14 and my response, 'Enforcement of Annulled Awards?' (1998) 9:2 ICC IC Arb. Bull. 15.

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Cour d'appel [Court of Appeal], Paris, 20 June 1980, *Claude Clair v. Louis Berardi*, reported in Y.B. Comm. Arb. VII (1982) p. 319 (France No. 4 § 2).

aside under the Swiss Arbitration Concordat of 1969. Since international arbitration in Switzerland is now governed by a modern arbitration statute (the 1987 Private International Law Act), which does not provide for the setting aside of awards that are ‘arbitrary’, it is unlikely that this situation would recur.

There have also been situations in which the reverse occurs, that is to say the setting aside of an award is refused in the country of origin and subsequently enforcement is refused abroad under the New York Convention.⁶¹ This situation can happen in particular with respect to the validity of the arbitration agreement, which is determined in accordance with domestic law in proceedings to set aside in the country of origin, but in accordance with the more stringent Article II(2) of the New York Convention in enforcement proceedings abroad.

(c) ‘Suspended’

Ground (e) also provides that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has been ‘suspended’ by a court in the country where, or under the law of which, the award was made. According to Article VI of the Convention, a court may adjourn its decision on enforcement if the respondent has applied for suspension of the award in the country of origin. Although it is not entirely clear what the drafters of the Convention meant by the suspension of an award, it may be assumed to refer to suspension of the enforceability or enforcement of the award by a court in the country of origin.

The foregoing raises problems with awards made in Paris against which an action for setting aside is brought in the French courts. Under French (international) arbitration law (namely Article 1502 of the French Code of Civil Procedure), such action suspends the enforcement of the award by operation of law. Two foreign courts have nonetheless held that such suspension is sufficient to meet the requirement of ground (e) of Article V(1)(e) of the Convention.

In one case, the Court of First Instance in Geneva refused enforcement of an award made in France because the respondent had filed an application to set aside the award in a French court.⁶²

The case of *Creighton v. The Government of Qatar* has attracted more attention. Creighton sought enforcement in the United States of an ICC award made in its favour in Paris, while the Government of Qatar applied to the Paris Court of Appeal for the award to be set aside. Under French law, as already mentioned, an application to set aside an award automatically suspends the enforcement of the award in France. Relying on Article V(1)(e) of the New York Convention, the US District Court in the District of Columbia refused to enforce the award.⁶³ The court reasoned as follows: ‘To determine whether an award has been set aside or suspended, the Court must look to the laws of the competent authority of the country under which the award was made . . . In this case, according to [the] French Code of Civil Procedure, the arbitral award has been

⁶¹ See *supra* notes 13 and 14.

⁶² Tribunal de Première Instance [Court of First Instance], Geneva, 25 April 1985, and Cour de Justice [Court of Appeal], Geneva, 10 October 1985, *Continaf BV v. Polycoton SA*, reported in Y.B. Comm. Arb. XII (1987) pp. 505–509 (Switzerland No. 12).

⁶³ US District Court, District of Columbia, 22 March 1995, *Creighton Ltd. v. The Government of Qatar*, reported in Y.B. Comm. Arb. XXI (1996) pp. 751–58 (US No. 197).

suspended. Because this Court must look to the procedural law of the place in which the award was rendered, this Court concludes that the award has been suspended for Article V(1)(e) purposes . . . In this case, there is no question that the award has been suspended; an action to set aside an arbitral award in France is all that is required to suspend that award according to [the] French Code of Civil Procedure.’

Like the Geneva court in the previous case, the District Court in the District of Columbia in this case failed to grasp the distinction between suspension of enforcement in the country of origin by operation of law and suspension of enforcement ordered by a court in that country. The suspension to which reference is made in Article V(1)(e) of the New York Convention is that ordered by ‘a competent authority’. The latter is almost always a court. Thus, to determine whether an award has been suspended (or set aside), an enforcement court must look to what the courts of the country in which the award was made have done (i.e. suspended or set aside) and not to the laws of that country (as the District Court erroneously did). In short, both decisions must be considered the result of a judicial error.

G. Article V(2): public policy

The second section of Article V provides that a court may refuse enforcement on its own motion if it finds that the subject matter of the difference is not capable of settlement by arbitration under the law of the country where enforcement is sought (ground (a)) or enforcement would be contrary to the public policy of that country (ground (b)). The cases in which these provisions have been relied upon for refusing enforcement are summarized below.

(a) Distinction between domestic and international public policy

The public policy defence rarely causes enforcement to be refused. One reason for this is the distinction drawn between domestic and international public policy, for what is considered public policy in domestic relations does not necessarily constitute public policy in international relations. Hence, the number of matters considered as falling under public policy in international cases is smaller than in domestic ones. This distinction is justified by the differing purposes of domestic and international relations, and it is gaining increasing acceptance by the courts in cases falling within the scope of the New York Convention. Courts apply the distinction to both the question of arbitrability (ground (a) of Article V(2)) and other cases of public policy (ground (b) of Article V(2)).

An exception is a 1983 decision handed down by the Austrian Supreme Court, which refused enforcement of a Dutch award because it violated Austrian public policy prohibiting purchases on a margin basis (*Differenzgeschäfte*).⁶⁴ The court held that no distinction between domestic and international public policy was envisaged in Article V(2)(b) of the New York Convention as ‘Article V(2)(b) of the above-mentioned Convention refers clearly to cases where an award is contrary to the public policy of the country where it shall be enforced’.

⁶⁴ Oberster Gerichtshof [Supreme Court], 11 May 1983, *Dutch Appellant v. Austrian Appellee*, reported in Y.B. Comm. Arb. X (1985) pp. 421–23 (Austria No. 7).

A case that came before the Delhi High Court in India provides another example of a non-restrictive interpretation of Article V(2). Unimpressed by the argument that a distinction should be made between domestic and international public policy, the Delhi court refused, on grounds of public policy, the enforcement of an award made in London, in which the arbitrators had rejected the Indian party's defence of *force majeure* based on an Indian export prohibition.⁶⁵

(b) Arbitrability

Although the concept of arbitrability is the subject of considerable academic debate, in practice it rarely results in a refusal to enforce an award. To date, only three cases of refusal can be reported.

The arbitrability of the termination of an exclusive distributorship agreement came before the Belgian Supreme Court, which refused enforcement pursuant to the New York Convention on the ground that the subject of the award was not capable of settlement by arbitration.⁶⁶ The case concerned the Belgian law of 27 July 1961 concerning unilateral termination of sole distributorship agreements of unlimited duration. That law entitles exclusive distributors on Belgian territory to compensation upon termination in certain cases. If the parties cannot agree, a Belgian court can be requested to determine the amount of compensation.

A Brussels first instance court subsequently reaffirmed this principle, ruling that under the 1961 law disputes arising out of the termination of an exclusive distributorship agreement cannot be referred to arbitration.⁶⁷

The Appellate Division of the Supreme Court of New York County has held that in the State of New York a difference with the liquidator of an insolvent insurer is not capable of settlement by arbitration.⁶⁸

(c) Lack of impartiality

A court in Hamburg, Germany, held that an arbitral tribunal acting under the auspices of an association does not satisfy the requirement of independence and impartiality if, when composed predominantly or solely of association members, it has to decide a dispute between a member and a non-member.⁶⁹ This decision was rendered in 1985, i.e. prior to the 1986 decision of the German Supreme Court concerning the appointment of a sole arbitrator by one party only under section 7(b) of the English Arbitration Act 1950 (no longer in force).⁷⁰ Given that the Supreme Court held that 'the finding that a party had predominant weight in constituting the tribunal is . . . not sufficient' for 'a violation of the duty of impartial administration of justice', the decision of the Hamburg court is probably no longer good law.

⁶⁵ High Court, Delhi, 12 July 1985, *COSID Inc. v. Steel Authority of India Ltd.*, reported in Y.B. Comm. Arb. XI (1986) pp. 502–507 (India No. 11).

⁶⁶ Cour de Cassation, 28 June 1979, *Audi-NSU Union AG v. SA Adelin Petit & Cie*, reported in Y.B. Comm. Arb. V (1980) pp. 257–59 (Belgium No. 2), affirming Cour d'appel, Liège, 12 May 1977, reported in Y.B. Comm. Arb. IV (1979) pp. 254–57 (Belgium No. 1).

⁶⁷ Tribunal de Commerce [Commercial Court of First Instance], Brussels, 13 September 1979, *SA Agima v. Smith Industries*, reported in Y.B. Comm. Arb. VIII (1983) pp. 360–61 (Belgium No. 4).

⁶⁸ Supreme Court (Appellate Division), New York County, 10 April 1990, *Corcoran et al. v. Ardra Insurance Co. Ltd. et al.*, reported in Y.B. Comm. Arb. XVI (1991) pp. 663–68 (US No. 111).

⁶⁹ Landgericht [Court of First Instance], Hamburg (1st case) 10 December 1985 and (2nd case) 30 December 1985, *Singaporean Seller (1st case) and Dutch Seller (2nd case) v. German Buyer*, reported in Y.B. Comm. Arb. XII (1987) pp. 487–89 (Germany No. 29).

⁷⁰ Bundesgerichtshof [Supreme Court], 15 May 1986, *German Charterer v. Romanian Shipowner*, reported in Y.B. Comm. Arb. XII (1987) pp. 489–91 (Germany No. 30).

The nomination of an arbitrator by the same party in parallel arbitrations can also give rise to questions of impartiality and independence. An example is an arbitrator who was a member of an arbitral tribunal in France and of another arbitral tribunal in Rome. The arbitrator allegedly conveyed erroneous information to the Rome panel, which influenced the tribunal's decision on jurisdiction. The Paris Court of Appeal refused enforcement of the arbitral award rendered in Rome on grounds of public policy owing to the arbitrator's lack of impartiality. Its decision was upheld by the Supreme Court.⁷¹ It is likely that this outcome could have been avoided if the arbitrator had behaved properly.

It is unlikely that anyone would disagree with the decision of the Swiss courts denying enforcement under the following circumstances. Under a contract dated 15 June 1990, the defendant agreed to find exhibitors for an arms trade fair organized by the claimant in Turkey. The contract was drawn up by Dr E, who was the claimant's lawyer and later also acted as the defendant's lawyer. The contract contained a clause referring all disputes to Dr E as sole arbitrator. The clause further provided that the sole arbitrator could not be removed under any circumstances and that a contractual penalty of SFR 1 million was to be paid to the arbitrator if this provision were violated. A dispute arose over rental for stands that had been collected from the exhibitors. Thereupon, the claimant commenced arbitration as provided for in the contract. Deciding in Ankara on 11 June 1991, the sole arbitrator Dr E directed the defendant to pay the claimant SFR 1,463,131. The defendant applied to have the award set aside in Turkey but its application was denied by the Turkish Supreme Court on 14 July 1992. The claimant sought enforcement of the Turkish arbitral award and the decision of the Turkish Supreme Court in Switzerland. The court of first instance found that the arbitration clause violated Swiss public policy and denied enforcement; the court of appeal in Zurich affirmed.⁷²

(d) Public policy—other cases

A wide variety of cases come under this heading.

A case decided by the Hong Kong Court of Appeal provides a classical example of an arbitrator failing to observe due process.⁷³ The court refused to enforce an award rendered under the auspices of CIETAC in Beijing because the 'chief arbitrator' (but not the other two arbitrators) and the tribunal-appointed experts had attended an inspection of the factory in the presence of the plaintiff's staff but without the defendant, who had not been notified.

A court in Bavaria, Germany refused enforcement of an award made in Russia on the ground of public policy because the award had been made after the parties had reached a settlement, which had been concealed from the arbitrators.⁷⁴

⁷¹ Cour de Cassation [Supreme Court], 24 March 1998, *Excelsior Film TV, srl v. UGC-PH*, reported in Y.B. Comm. Arb. XXIVa (1999) pp. 643–44 (France No. 30).

⁷² Bezirksgericht [Court of First Instance], Affoltern am Albis, 26 May 1994, affirmed by the Court of Appeal in Zurich on 26 July 1995, reported in Y.B. Comm. Arb. XXIII (1998) pp. 754–63 (Switzerland No. 30).

⁷³ High Court of the Hong Kong Special Administrative Region, Court of Appeal, 16 January 1998, Civil Appeal No. 116 of

1997, *Polytek Engineering Company Ltd. v. Hebei Import & Export Corp.*, reported in Y.B. Comm. Arb. XXIII (1998) pp. 666–84 (Hong Kong No. 12).

⁷⁴ Bayerisches Oberstes Landesgericht [Higher Court of Appeal of Bavaria], 20 November 2003, *Seller v. Buyer*, reported in Y.B. Comm. Arb. XXXII (2004) pp. 771–75 (Germany No. 71).

A court in The Hague, Netherlands, denied enforcement of three AAA awards for violation of European Community law.⁷⁵ The court found that an exclusive licence agreement for the manufacture and sale of aluminium quick-change billboard frames in the Benelux was at odds with Article 81(1) of the EC Treaty because it established a ‘territorial limitation in addition to the existence of parallel networks’, i.e. similar licence agreements with other licensees in other countries.

There are times when it is not clear whether the decision to refuse enforcement was justified.

For example, a court of first instance in Munich, Germany, held that the arbitrators’ failure to make a preliminary inquiry into their power to decide whether the time limits for initiating arbitration as provided in the arbitration rules in question had been met constituted a ‘serious procedural violation’ for which enforcement was to be refused on the basis of the public policy provision of Article V(2)(b).⁷⁶ In the author’s view, it is doubtful whether the arbitrators’ conduct constituted a serious procedural violation.

Another example is a decision rendered by a court in Manila in the Philippines, which found that an award made in Singapore violated Philippine public policy because it failed to apply Philippine law as required by the contract, caused unjust enrichment, applied the ‘costs follow the event’ rule, and awarded attorney fees.⁷⁷ Court decisions in which domestic public policy is transplanted on a Convention award in this manner are few and far between.

A further example is the enforcement of an award made in the Netherlands that was refused by the French courts. Under the terms of a contract dated 27 May 1985, Dubois & Vanderwalle (Dubois) became the exclusive distributor in France of products manufactured by Boots Frites B.V. (Boots). The contract contained an arbitration clause requiring the award to be rendered within three months of the constitution of the arbitral tribunal. A dispute arose, leading Boots to commence arbitration proceedings. The arbitral tribunal was constituted on 25 August 1992. The award ordering Dubois to pay Boots NLG 301,069.26 was signed by the three arbitrators separately. The arbitrator appointed by Boots and the chairman of the arbitral tribunal signed the award in the Netherlands on 23 December 1992 and 5 January 1993 respectively. The arbitrator appointed by Dubois signed the award in Versailles on 7 January 1993. The court of first instance in Bobigny granted an enforcement order, but its decision was reversed by the court of appeal, which found that the failure to comply with the three-month time limit constituted a violation of international public policy. It is submitted that this case could also have been brought under Article V(1)(d) and, more importantly, that it is a display of excessive formalism by the enforcement court.

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Gerechtshof [Court of Appeal], The Hague, 24 March 2005, *Marketing Displays International Inc. v. VR Van Raalte Reclame B.V.*, reported in Y.B. Comm. Arb. XXXI (2006) pp. 808–20 (Netherlands No. 29).

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Landgericht, Munich, 20 June 1978, *German Seller v. German Buyer*, reported in Y.B. Comm. Arb. V (1980) pp. 260–62 (Germany No. 19).

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Court of Appeals, Manila, Special Former Fourth Division, 29 November 2006, *Luzon Hydro Corporation v. Transfield Philippines, Inc., et al.*, reported in Y.B. Comm. Arb. XXXII (2007) pp. 456–73 (Philippines No. 2).

II. Other reasons for refusing enforcement

A. Jurisdiction over applications for enforcement—*forum non conveniens*

The question arises as to whether a Contracting State can impose jurisdictional requirements upon a request for the enforcement of a Convention award. This has led to two refusals of enforcement in the United States.

In a first case concerning an award made in London, the US Court of Appeals for the Ninth Circuit held that although the New York Convention gives the federal courts subject-matter jurisdiction, it does not eliminate the requirement that a federal court have personal jurisdiction.⁷⁸

The second, involving an award made in Moscow, was decided by the US Court of Appeals for the Second Circuit in *Monde Re v. Naftogaz and State of Ukraine*.⁷⁹ Monde Re had obtained an arbitral award in its favour in an arbitration before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC). Monde Re applied to the US District Court for the Southern District of New York for enforcement of the award against Naftogaz as well as against the State of Ukraine (Ukraine), which was not a party to the arbitration, contending that Naftogaz was an agent, instrumentality or *alter ego* of Ukraine. The District Court dismissed Monde Re's application under the doctrine of *forum non conveniens*, which allows courts to decline jurisdiction over complex lawsuits involving only foreign parties.⁸⁰ The US Court of Appeals for the Second Circuit affirmed the lower court's decision, rejecting Monde Re's argument that the doctrine of *forum non conveniens* may not be applied in cases of enforcement under the New York Convention because *forum non conveniens* is not one of the defences exhaustively listed in Article V. The appeal court held that under Article III proceedings for the enforcement of foreign arbitral awards are subject to the rules of procedure of the forum State, the only limitation being that there may not be imposed 'substantially more onerous conditions . . . than are imposed on the recognition or enforcement of domestic arbitral awards'. The court reasoned that the Supreme Court of the United States has classified the doctrine of *forum non conveniens* as procedural rather than substantive, and this doctrine is applied in the enforcement of domestic arbitral awards in the United States. Accordingly, the Second Circuit rejected Monde Re's argument that Article V sets forth the only grounds for refusing to enforce a foreign arbitral award and held that the courts of the signatory States to the Convention are free 'to apply differing procedural rules consistent with the requirement that the rules in Convention cases not be more burdensome than those in domestic cases. If that requirement is met, whatever rules of procedure for enforcement are applied by the enforcing state must be considered acceptable, without reference to any other provision of the Convention. The doctrine of *forum non*

⁷⁸ US Court of Appeals, Ninth Circuit, 26 March 2002, *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Company*, reported in Y.B. Comm. Arb. XXVII (2002) pp. 922–35 (US No. 399).

⁷⁹ US Court of Appeals, Second Circuit, 15 November 2002, *Monegasque de Reassurances s.a.m. (Monde Re) v. NAK Naftogaz of Ukraine and State of Ukraine*, reported in Y.B. Comm. Arb. XXVIII (2003) pp. 1096–1111 (US No. 422).

⁸⁰ Reported in XXVII Y.B. Comm. Arb. (2002) pp. 710–11 (US No. 376).

conveniens, a procedural rule, may be applied in domestic arbitration cases brought under the provisions of the Federal Arbitration Act, and it therefore may be applied under the provisions of the Convention.’⁸¹

This is an area that calls for further reflection. Article III of the New York Convention states: ‘Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.’ The question is whether this text allows the courts in a Contracting State to impose jurisdictional requirements, that is to say whether, in practice, it is sufficient for a petitioner to show that the award comes within the scope of the Convention or whether the petitioner must additionally satisfy jurisdictional requirements laid down by the forum where enforcement is sought. That question arises in particular in courts in the United States, which invariably examine jurisdiction under their own laws. In a number of other countries, no such additional requirements are imposed and it is sufficient for a petitioner to demonstrate that the award is made in another (Contracting) State as provided in Article I of the Convention. A petitioner may indeed have an interest in obtaining leave for enforcement, despite not satisfying local rules on jurisdiction at the time of filing the request, if it is expected that assets belonging to the respondent will move to the country concerned in the near future. The petitioner may then wish to act swiftly on the basis of leave for enforcement already granted.

B. Retroactive application of the Convention

The New York Convention does not contain a provision on the question of whether it applies retrospectively. This has led to divergent court decisions, although a tendency can be discerned in favour of retroactivity, making the Convention applicable to the enforcement of arbitration agreements and arbitral awards no matter when they were made. However, there have been cases in which enforcement has been refused by courts that took the opposite view.

The Court of Appeal in Geneva and the High Court of Ghana each refused to apply the Convention to an award made before it entered into force in Switzerland and Ghana, respectively.⁸²

The Court of First Instance in Brussels refused to apply the Convention to an award made in Algeria before Algeria became a party to the Convention.⁸³

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The US District Court, District of Columbia, 17 March 2006, *TermoRio S.A. E.S.P. et al. v. Electranta S.P. et al.*, reported in Y.B. Comm. Arb. XXXI (2006) pp. 1457–73 (US No. 575), refused enforcement of an award set aside by the courts in Colombia on the alternative basis of *forum non conveniens*. The US Court of Appeals for the District of Columbia, 25 May 2007, No. 06-7-58, to be reported in Y.B. Comm. Arb. XXXIII (2008), affirmed the dismissal by the District Court on the basis of Article V(1)(e) of the Convention and therefore found it unnecessary to determine whether the case might have been dismissed on the ground of *forum non conveniens*. See also *supra* note 51.

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Cour de Justice, Canton Geneva, 12 May 1967, *Commoditex SA v. Alexandria Commercial Co.*, reported in Y.B. Comm. Arb. I (1976) p. 199 (Switzerland No. 2); High Court of Ghana,

29 September 1965, *Strojexport v. Edward Nasser and Company Ltd.*, reported in Y.B. Comm. Arb. III (1978) p. 276 (Ghana No. 1).

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Tribunal de Première Instance [Court of First Instance], Brussels, 6 December 1988, *Société Nationale pour la Recherche, le Transport et la Commercialisation des Hydrocarbures (Sonatrach) v. Ford, Bacon and Davis Incorporated*, reported in Y.B. Comm. Arb. XV (1990) pp. 370–77 (Belgium No. 7).

The Court of Appeal in Hamburg declined to apply the Convention in a case concerning a contract containing an arbitration clause that was concluded between US and German parties before the United States acceded to the Convention.⁸⁴ This was sufficient reason for the court to deny application of the Convention, notwithstanding the fact that the award was made in New York after the date of the USA's accession to the Convention.

The Italian Supreme Court considered that the commencement of proceedings to enforce an award before the Convention had entered into force in the State where enforcement was sought was justification for refusing to apply the Convention.⁸⁵ The court argued that Article II of the Convention is a rule of substantive law rather than a rule of procedure, owing to its content.⁸⁶

The Supreme Court of Nigeria held that the Convention was inapplicable to an award for which enforcement proceedings had been initiated one month prior to Nigeria's accession to the Convention.⁸⁷

It is regrettable that the drafters of the Convention refrained from including a provision regarding retroactivity, for this would have avoided a number of frustrating decisions, of which the above are examples.

C. Lack of implementing legislation

Some countries have a constitutional system that requires implementing legislation to be enacted before an international convention can take effect. This has given rise to difficulties in respect of the New York Convention in certain countries that failed to adopt implementing legislation upon becoming a party to the Convention.

One example is Nigeria, although it is reported to have recently introduced legislation in pursuance of the Convention. In the case described above concerning the enforcement of an award made in Moscow,⁸⁸ the Nigerian Supreme Court used the Convention's perceived lack of retroactivity, for good measure, as an additional reason for refusing enforcement.

Another example is Indonesia, where the Supreme Court refused enforcement of an award made in London for the same reason.⁸⁹ Indonesia has since enacted an implementing regulation.⁹⁰

The legislation implementing the New York Convention in Colombia—Law No. 37 of 1979—was declared unconstitutional by the Colombian Supreme Court in 1988 because

⁸⁴ Oberlandesgericht, Hamburg, 3 April 1975, *US firm P v. German firm F*, reported in Y.B. Comm. Arb. II (1977) p. 241 (Germany No. 11); see also *supra* note 34. It should be noted that the German Federal Supreme Court has decided that the Convention is applicable to arbitration agreements and awards irrespective of their date, Bundesgerichtshof, 8 October 1981, *Comitas, Mutuamar, Levante v. Schwarzmeer und Ostsee Versicherungs AG (Sovag)*, reported in Y.B. Comm. Arb. VIII (1983) pp. 366–70 (Germany No. 25).

⁸⁵ Corte di Cassazione, 30 April 1969, No. 1403, *Officine Fratelli Musso v. sarl Sevplant*, reported in Y.B. Comm. Arb. I (1976) p. 189 (Italy No. 1). The Convention entered into force in Italy on 29 April 1969; the action was initiated on 27 April 1962.

⁸⁶ In subsequent decisions, the Italian Supreme Court has abandoned this view and held that the Convention is

essentially of a procedural nature. See e.g. Corte di Cassazione (Sezioni unite), 8 April 1975, No. 1269, *Agenzia Marittima Constantino Tommaso Ltd. v. Sorveglianza Sipa*, reported in Y.B. Comm. Arb. II (1977) pp. 247–48 (Italy No. 13).

⁸⁷ Supreme Court, 11 December 1974, *Murmansk State Steamship Line v. Kano Oil Millers Ltd.*, reported in Y.B. Comm. Arb. VII (1982) pp. 349–50 (Nigeria No. 1).

⁸⁸ See *supra* note 87.

⁸⁹ Mahkamah Agung [Supreme Court], 20 August 1984, *Navigaton Maritime Bulgare v. P.T. Nizwar*, reported in Y.B. Comm. Arb. XI (1986) pp. 508–509 (Indonesia No. 1 § 2).

⁹⁰ Reproduced in Y.B. Comm. Arb. XVI (1991) pp. 398–401.

it was signed by the minister in charge of presidential affairs rather than the President himself, who was travelling abroad.⁹¹ It is not clear from the case report whether the enforcement of an award has actually been refused for this reason. In any event, the Convention was subsequently implemented again in Colombia by Law No. 39 of 1990.⁹²

Bangladesh appears to be another country where implementing legislation is lacking.⁹³

It may also happen that the implementing legislation is in place but is ignored by the enforcement court. The Witwatersrand Local Division of the Supreme Court in South Africa held in 1982 that the Convention was not applicable as ‘the necessary legislation requisite to make it operative and binding on me has apparently not been passed’.⁹⁴ On 25 March 1977, however, South Africa had enacted the Recognition of Foreign Arbitral Awards Act 1977 (Act no. 40 of 1977), which took effect on 13 April 1977.

The lack of implementing legislation has therefore caused enforcement to be refused in two reported cases. A third case of refusal was due to a mistaken belief that no implementing legislation had been enacted. Clearly, such refusals of enforcement do not reflect an inherent shortcoming in the Convention itself.

D. Types of awards

The drafters of the New York Convention did not provide a definition of what constitutes an ‘arbitral award’. It therefore appears to depend on the arbitration law governing the award whether a decision can be characterized as an arbitral award and accordingly qualify for enforcement under the Convention.

In international arbitration, a wide variety of adjectives are used to qualify arbitral awards: ‘final’ (also called ‘definitive’ awards), ‘partial’, ‘interim’, ‘interlocutory’ and ‘preliminary’. There are also special categories of awards: ‘award on agreed terms’ (also called ‘consent awards’), ‘default awards’, ‘additional awards’, ‘interpretation awards’, and ‘correction awards’.

The problem with several of these categories of awards is that arbitration laws differ over the question of which category can or cannot be used. Also, the same terms appear to be used with different meanings. For example, what is referred to as a partial award in some civil law countries is called an interim award in certain common law countries. The 1985 UNCITRAL Model Law on International Commercial Arbitration refers only to a ‘final award’ (Article 32(1)), but it appears from the legislative history that an arbitral tribunal may also issue an interim award, an interlocutory award or a partial award.

To add to the confusion, arbitration rules of international arbitral institutions sometimes admit yet other categories and employ divergent terminology. The 1976 UNCITRAL

⁹¹ Corte Suprema de Justicia [Supreme Court], 6 October 1988, *Carmen Marina Melo Torres*, reported in Y.B. Comm. Arb. XV (1990) pp. 443–49 (Colombia No. 1).

⁹² See Corte Suprema de Justicia [Supreme Court], 20 November 1992, *Sunward Overseas SA v. Servicios Marítimos Limitada Semar Ltd.*, reported in Y.B. Comm. Arb. XX (1995) pp. 651–55 (Colombia No. 2).

⁹³ Appellate Division, 8 May 1997, *Bangladesh Air Service (Pvt) Ltd. v. British Airways PLC*, reported in Y.B. Comm. Arb. XXIII (1998) pp. 624–40 (Bangladesh No. 1).

⁹⁴ Supreme Court, Witwatersrand Local Division, 24 February 1982, *Transvaal Alloys Ltd. v. Polysius Ltd. and Benoni Engineering Works and Steel Ltd.*, reported in Y.B. Comm. Arb. VIII (1983) pp. 404–405 (South Africa No. 2). It may be noted that the Transvaal Provincial Division of the Supreme Court had already applied the Convention in a decision rendered in 1977, Supreme Court, Transvaal Provincial Division, 16 June 1977, *Benidai Trading Co. Ltd. v. Gouwe & Gouwe Pty. Ltd.*, reported in Y.B. Comm. Arb. VII (1982) pp. 351–55 (South Africa No. 1).

Arbitration Rules state that ‘[i]n addition to making a final award, the tribunal shall be entitled to make interim, interlocutory, or partial awards’ (Article 32(1)). The 1988 ICC Rules of Arbitration referred to ‘an award, whether partial or definitive’ (Article 21), while their successor, the 1998 ICC Rules of Arbitration, now refer to ‘any Award’ (Article 27). The 1994 WIPO Rules provide that ‘[t]he Tribunal may make preliminary, interim, interlocutory, partial or final awards’ (Article 62(a)).

There appears to be no difficulty bringing final awards within the scope of the Convention. The same applies to partial awards, although problems have been encountered in Italy.⁹⁵ The Bulgarian Supreme Court of Appeal has held that a partial award cannot be enforced under the Convention.⁹⁶ No case law exists for other categories of awards.

The question of whether an order issued by an arbitral tribunal can be enforced under the Convention has been answered negatively by one court so far. It was in the context of an arbitration in Indianapolis, Indiana, USA conducted under the AAA rules. The arbitral tribunal had issued an ‘Interim Arbitration Order and Award’ enjoining the respondents from carrying out activities related to the disputed agreement during the course of the arbitration. The Supreme Court of Queensland in Australia refused to grant enforcement, holding that it was not an ‘arbitral award’ within the meaning of the Convention.⁹⁷ On the other hand, the Court of Appeals for the Seventh Circuit in the USA enforced an order made by an arbitral tribunal instructing a party to provide the other party with certain information.⁹⁸

Concerning awards for interim relief, the question arises as to whether the subject matter of such an award concerns a ‘difference’ between the parties to which reference is made in Articles I(1), I(3), II(1), and V(1)(c) of the New York Convention. Another problem is the temporary nature such awards, as they may be subject to rescission, suspension or modification by the arbitral tribunal. The question therefore is whether an award ordering interim relief is ‘binding’ on the parties within the meaning of Article V(1)(e) of the Convention.⁹⁹

It may be noted that the Supreme Court of Colombia refused enforcement of an ICC award on jurisdiction, holding that an award of this kind is not covered by the New York Convention.¹⁰⁰

E. Reciprocity reservation

According to the first paragraph of Article I, the New York Convention applies to awards made in *any* State other than that where enforcement is sought. However, upon

⁹⁵ Corte di Cassazione [Supreme Court], 7 June 1995, *WTB v. Costruire Coop srl*, Y.B. Comm. Arb. XXII (1997) pp. 727–33, reversing the Court of Appeal’s refusal to enforce the final award in the absence of the partial final award.

⁹⁶ Supreme Court of Appeal, Civil Collegium, Fifth Civil Department, 23 February 1999, *ECONERG Ltd. v. National Electricity Company AD*, reported in Y.B. Comm. Arb. XXV (2000) pp. 678–82 (Bulgaria No. 1).

⁹⁷ Supreme Court of Queensland, 29 October 1993, *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums (Australasia) Pty Ltd.*, reported in Y.B. Comm. Arb. XX (1995) pp. 628–50 (Australia No. 11). See also *supra* note 5.

⁹⁸ US Court of Appeals, Seventh Circuit, 14 March 2000, *Publicis Communication, et al. v. True North Communications Inc.*, reported in Y.B. Comm. Arb. XXV (2000) pp. 1152–57 (US No. 338).

⁹⁹ In 2006, UNCITRAL amended its 1985 Model Law on International Commercial Arbitration in particular with respect to interim measures issued by an arbitral tribunal. In the amended text, Article 17H provides for the enforcement of interim measures and Article 17 I lists the grounds on which enforcement may be refused, <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

¹⁰⁰ Corte Suprema de Justicia [Supreme Court], 26 January 1999, reported in Y.B. Comm. Arb. XXVI pp. 755–66 (Colombia No. 3).

becoming a party to the Convention, a State can limit the application of this provision by using the first reservation of Article I(3). A State making that reservation will apply the Convention to the recognition and enforcement of awards made in the territory of another *Contracting* State only (the so-called ‘reciprocity reservation’).

The reciprocity reservation has caused enforcement to be refused in only one case. A claimant sought enforcement in the United States of an award made in the United Kingdom before the UK had ratified the Convention. Ruling in 1974, the US District Court for the Southern District of New York held that the Convention was not applicable and therefore did not grant enforcement.¹⁰¹ Such a decision would not be possible today with respect to awards made in the UK, as it has since adhered to the Convention. Indeed, it is in general unlikely that the reciprocity reservation would today lead to a refusal of enforcement, because more than 140 countries are now parties to the Convention, and in those cases where the award has been rendered in a State not party to the Convention, enforcement under the Convention will not be sought in a country that has used the reciprocity reservation.

F. Commercial reservation

The second reservation of Article I(3) permits a State to reserve the applicability of the Convention ‘only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration’. At the New York conference leading up to the adopting of the Convention in 1958, fear was expressed that if this clause were not included, certain civil law countries in which a distinction is made between commercial and non-commercial transactions would find it impossible to adhere to the Convention.

In practice, the commercial reservation has generally not caused problems, as courts tend to understand the term ‘commercial’ broadly. Insofar as enforcement of awards is concerned, there is one notable exception. The Supreme Court of Tunisia held in a 1993 decision that a contract in which architects undertook to design an urbanization plan for a resort in Tunisia did ‘not fall under the definition of Articles 1–4 of the [Tunisian] Commercial Code’ and that the contract ‘is not by its nature commercial according to Tunisian law’.¹⁰² Referring specifically to the commercial reservation in Article I(3) of the Convention, the Supreme Court refused to enforce the ICC award made in Paris.

This decision by the Tunisian Supreme Court is cause for concern. In the past, the lower Tunisian courts have displayed a favourable tendency towards international arbitration.¹⁰³ The 1993 decision, however, seems to throw Tunisia back to a bygone age

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US District Court, Southern District of New York, 27 September 1974, *Splosna Plovba of Piran v. Agrelak Steamship Corp.*, reported in Y.B. Comm. Arb. I (1976) p. 204 (US No. 6). After finding that the New York Convention did not apply, enforcement was refused because the award had not been confirmed by the competent court in the United Kingdom. This decision must be considered out of line with previous decisions in which the courts in the United States did not require confirmation of the award by the foreign court. For the leading case on this point, see *Gilbert v. Burnstine*, 255 NY 348 (1931).

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Cour de Cassation [Supreme Court], 10 November 1993, *Taie Haddad and Hans Barrett v. Société d'Investissement Kal*,

reported in Y.B. Comm. Arb. XXIII (1998) pp. 770–73 (Tunisia No. 3).

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See Court of First Instance of Tunis, 22 March 1976, *Société Tunisienne d'Electricité et de Gaz (Steg) v. Société Entrepouse*, reported in Y.B. Comm. Arb. III (1978) p. 283 (Tunisia No. 1), holding that in an international transaction a Tunisian public enterprise is bound by an arbitration clause providing for arbitration in Geneva. The same Court took the same stance in another decision, 17 October 1987, which was affirmed by the Tunis Court of Appeal on 1 February 1988, *Tunisian State v. Bec-Gtaf*, reported in Y.B. Comm. Arb. XV (1990) pp. 518–20 (Tunisia No. 2).

when, in India, two lower courts reached a similar conclusion in two cases in which enforcement of an arbitration agreement was refused because the underlying contract was not considered to be commercial under the laws of India.¹⁰⁴ The Indian Supreme Court has since rectified such a parochial attitude.¹⁰⁵

G. Problems connected with a party's identity

Various questions come under this heading. One is whether an award rendered against a company can be enforced against another company that was not a party to the arbitration agreement but is closely connected with the former company (usually the parent company). Piercing the corporate veil is not covered by the Convention and is therefore to be answered by individual courts on the basis of the law they find to be applicable. Another question is whether a legal successor is bound by an arbitration agreement concluded by its predecessor. A similar question may arise in connection with the assignment of a contract containing an arbitration clause or an arbitral award to a third party.

In an increasing number of cases the respondent summoned in the arbitration asserts that it is not a party to the contract containing the arbitration clause but rather that another party is and therefore the arbitrators lack competence to decide the case as far as the summoned party is concerned. This defence usually occurs in two factual patterns. First, the respondent summoned is a State, which asserts that the party to the contract containing the arbitration clause is an allegedly independent entity (State agency, authority) and not the State itself. Second, the respondent summoned asserts that it is not a party but merely an agent for a(n) (un)disclosed principal. Again, these questions need to be resolved on the basis of the law the court finds to be applicable.

These issues have led to the enforcement of arbitral awards being refused in the following cases coming under the Convention.

The US Court of Appeals for the Second Circuit remanded a case to the District Court over the question of whether a party was the successor in interest to another party in connection with the enforcement of an arbitral award.¹⁰⁶ In another case heard in the District Court in New York, enforcement was sought against three parties. The court determined that two of them were not parties to the arbitration and declared the award enforceable only against the remaining party.¹⁰⁷

The High Court in London set aside enforcement orders, holding that the enforcement of an award falling under the New York Convention may be sought only 'in terms of the

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In a 1977 decision, the High Court in Bombay held that an agreement providing for technical assistance and know-how is not a commercial agreement under the laws in force in India; High Court of Bombay, 4 April 1977, *Indian Organic Chemicals Ltd. v. Chemtex Fibres, Inc.*, reported in Y.B. Comm. Arb. IV (1979) pp. 271–74 (India No. 4 § 3). The High Court in Calcutta echoed the words of the prior Bombay decision when deciding in 1986, in relation to an agreement for technical cooperation, that: 'I am of the view that the agreement in substance provides for the supply of technical know-how and expertise from Meissner to Kanoria in exchange for the payment of a "fee" to Meissner. There is no element of transaction between the merchants and traders as understood in Indian Law.' High Court of Calcutta, *Josef Meissner GmbH & Co. v. Kanoria Chemicals & Industries Ltd.*, reported in Y.B. Comm. Arb. XIII (1988) pp. 497–503 at 507 (India No. 14).

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Supreme Court of India, 10 February 1994, *RM Investment & Trading Co. Pvt. Limited v. Boeing Co. and another*, reported in Y.B. Comm. Arb. XXII (1997) pp. 710–14 (India No. 25), holding that the agreement to render consultancy services by RMI to Boeing was commercial in nature.

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US Court of Appeals, Second Circuit, 18 April 1994, *Productos Mercantiles e Industriales, SA v. Fabergé USA, Inc. et al.*, reported in Y.B. Comm. Arb. XX (1995) pp. 955–61 (US No. 184 § 14-16).

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US District Court, Southern District of New York, 11 April 1994, *Chios Charm Shipping Co. v. Rionda et al.*, reported in Y.B. Comm. Arb. XX (1995) pp. 950–54 (US No. 183).

award' and that, while 'true slips and changes of name can be accommodated', what was sought here was the enforcement of an award that had been made against a single party against two separate and distinct parties. According to the court, this would necessarily require 'the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal' in order to ascertain whether the arbitrators considered the State to be the true respondent or whether the State Fund was acting on behalf of the State.¹⁰⁸

The Court of Appeal in The Hague refused the enforcement of an arbitral award rendered under the auspices of the AAA as far as one of the respondents was concerned. The court inferred from the documents before it that this party did not appear to have bound itself to submit to arbitration in respect of the disputes that had arisen with the petitioner.¹⁰⁹

In an AAA arbitration in California, the arbitrator had joined an individual as an additional party to the arbitration on the grounds that he was the *alter ego* of one of the existing parties to the arbitration. The Supreme Court of British Columbia refused enforcement of the award insofar as the individual was concerned, opining that the aim of the legislation implementing the New York Convention in Canada was to limit enforcement of arbitral awards to the parties to the arbitration agreement.¹¹⁰

The Supreme People's Court in People's Republic of China affirmed the decision of the Hefei Intermediate People's Court refusing to enforce an award made in Hong Kong because the petitioner (Hainan) had used the name of another company (Anhui) without having been authorized by the latter to enter into a contract for the sale of peanuts.¹¹¹

The Moscow District Court refused to enforce an ICC award because the arbitration agreement had not been validly assigned to the claimant in the arbitration (although the claimant belonged to the same group of companies).¹¹² This case turned on the facts; proper assignment is generally not a bar to the transfer of the arbitration clause.

The Moscow District Court denied the application by 'Sokofl Inc.', from Panama, for enforcement of an award made in London in favour of 'Sokofl Ltd.', also from Panama.¹¹³ Both the Russian Trade Counsel in Panama and the Panama State Register had advised that the company Sokofl Ltd. was not listed in the Panama State register of legal and natural persons engaged in commerce.

The Spanish Supreme Court denied enforcement because the contract was concluded with Glencore Grain Rotterdam BV, while the arbitration in London was conducted by

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High Court, Queen's Bench Division (Commercial Court), 18 October 2002, *Norsk Hydro ASA v. The State Property Fund of Ukraine et al.*, reported in Y.B. Comm. Arb. XXVIII (2003) pp. 885–95 (UK No. 69).

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Gerechtshof [Court of Appeal], The Hague, 10 April 1981, and President, Rechtbank [Court of First Instance], Rotterdam, 14 April 1980, *Keck Seng (S) Pte Ltd. and K.S. Edible Oil (Hong Kong) Ltd. v. Hunt-Wesson Foods, Inc.*, reported in Y.B. Comm. Arb. VII (1982) pp. 347–48 (Netherlands No. 6).

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Supreme Court of British Columbia, 6 March 2003, *Eddie Javor and FusionCrete, Inc. v. Luke Francoeur and FusionCrete Products, Inc.*, reported in Y.B. Comm. Arb. XXIX (2004) pp. 596–602 (Canada No. 12).

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Supreme People's Court, 12 November 2003, *Hong Kong Heung Chun Cereal & Oil Food Co. Ltd. v. Anhui Cereal & Oil Food Import & Export Co. Ltd. and Hainan Gaofurui Industrial & Trading Co. Ltd.*, reported in Y.B. Comm. Arb. XXXI (2006) pp. 620–23 (PR China No. 3).

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Moscow District Court (Civil Department), 21 April 1997, *IMP Group (Cyprus) Ltd. v. Aeroimp*, reported in Y.B. Comm. Arb. XXIII (1998) pp. 745–49 (Russian Fed. No. 8).

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Moscow District Court (Civil Department), 11 April 1997, *Sokofl Star Shipping Co. Inc. v. GPVO Technopromexport*, reported in Y.B. Comm. Arb. XXIII (1998) pp. 742–43 (Russian Fed. No. 7).

Glencore Grain Limited, which was also named as a party to the award.¹¹⁴ The court considered that Glencore Grain Limited was not a party to the original contract and, thus, to the arbitration agreement it contained.

In another case brought in the Spanish Supreme Court, it appeared that the Spanish defendant had died before the request for arbitration was notified.¹¹⁵ The proceedings were not conducted against his heirs, nor did the request for enforcement of the arbitral award invoke a right against any heir. The Supreme Court denied enforcement.

H. Procedures akin to arbitration (*arbitrato irrituale*)

In Italy, there are two main types of arbitration: one, known as *arbitrato rituale* (formal arbitration), is governed by the Italian law on arbitration set forth in the Code of Civil Procedure; the other, known as *arbitrato irrituale* (informal arbitration), is entirely based on contract law and is not governed by the law on arbitration. The main difference between the two is that a decision rendered in *arbitrato irrituale* cannot be enforced as an arbitral award but only by means of a contractual action.

The Italian Supreme Court takes the view that a decision [*lodo*] rendered in *arbitrato irrituale* falls under the Convention.¹¹⁶ The German Supreme Court, on the other hand, has held that a decision resulting from *arbitrato irrituale* can be neither recognized nor enforced under the Convention.¹¹⁷ The same view has been expressed by the District Court for the Southern District in New York with respect to price determination by a third party pursuant to Article 1592 of the French Civil Code (which procedure exists alongside arbitration governed by Articles 1442–1507 of the French Code of Civil Procedure).¹¹⁸

The question of whether procedures like *arbitrato irrituale* (including the Dutch *bindend advies* and the German *Scheidsgutachten*) fall under the Convention is open to debate. The Italian courts appear to be alone in their view that decisions resulting from these procedures can be enforced under the Convention. It would therefore seem advisable not to agree to *arbitrato irrituale*, or similar procedures akin to arbitration, in an international context, otherwise enforcement under the Convention may not be ensured.

I. Merger of award into judgment

Leave for enforcement granted by a court in the country where the award was made may constitute a judgment in that country. The award may thereby be absorbed into the judgment. If enforcement is then sought in another Contracting State, the question

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Tribunal Supremo [Supreme Court], 14 January 2003, *Glencore Grain Limited v. Sociedad Ibérica de Molturación, S.A.*, reported in Y.B. Comm. Arb. XXX (2005) pp. 605–609 (Spain No. 38).

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Tribunal Supremo [Supreme Court], 7 October 1986, *T.H. v. Juan Antonio Dominguez*, reported in Y.B. Comm. Arb. XIV (1989) pp. 708–709 (Spain No. 21).

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Corte di Cassazione, 18 September 1978, No. 4167, *Gaetano Butera v. Pietro e Romano Pagnan*, reported in Y.B. Comm. Arb. IV (1979) pp. 296–300 (Italy No. 33); 6 July 1982, No. 4039, *Colella Legnami SpA v. Carey Hirsch Lumber Company*, reported in Y.B. Comm. Arb. IX (1984) pp. 429–31

(Italy No. 62); 15 December 1982, No. 6915, *Rocco Giuseppe e Figli snc v. Federal Commerce and Navigation Ltd.*, reported in Y.B. Comm. Arb. X (1985) pp. 464–66 (Italy No. 72).

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Bundesgerichtshof [Federal Supreme Court], 8 October 1981, *Comitas, Mutuamar, Levante v. Schwarzmeer und Ostsee Versicherungs AG (Sovag)*, reported in Y.B. Comm. Arb. VIII (1983) pp. 366–70 (Germany No. 25).

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US District Court, Southern District of New York, 30 June 1995, *Jean Frydman et al. v. Cosmair, Inc. et al.*, reported in Y.B. Comm. Arb. XXI (1996) pp. 784–92 (US No. 201).

arises as to whether the award can be enforced as a foreign award under the Convention or, on a different basis, as a foreign judgment.

Most courts hold that the merging of an award into a judgment in the country where it was made does not have extraterritorial effect and that the award therefore remains a cause of action for enforcement in other countries on the basis of the Convention. The only dissenting view was expressed by a court of appeal in Florence, Italy, in 1980.¹¹⁹ The court was faced with an English award that had been subject to the Special Case procedure (as it then was). The court refused to grant enforcement, reasoning that the petitioner was entitled to a sum of money not by virtue of the award but by virtue of the (court) decision made in the Special Case proceedings. According to the Court, the arbitral award becomes an integral part of the judgment and it is therefore the judgment, not the award, that must be taken as the basis for enforcement. The position taken by the Florentine court would appear to represent an isolated view in this regard.¹²⁰

J. Conditions for the request for enforcement (Article IV)

Article IV sets out to facilitate enforcement by requiring a minimum number of conditions to be fulfilled by a party seeking enforcement of an award falling within the scope of the New York Convention. That party has only to supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement or a duly certified copy thereof (paragraph 1). If these documents are in a language other than that of the country where enforcement is sought, the party must also submit a translation of each document. In fulfilling these conditions, the party seeking enforcement produces *prima facie* evidence entitling it to obtain enforcement of the award. It is then up to the other party to prove that enforcement should not be granted on the basis of the grounds mentioned in the exhaustive list appearing in Article V(1). The conditions mentioned in Article IV are the only conditions with which the party seeking enforcement of a Convention award has to comply.

(a) Authenticated original or certified copy of the award

In the cases reported so far, only Bulgarian, Spanish and Italian courts have refused enforcement on the ground that the party seeking enforcement failed to submit a duly authenticated original award or a duly certified copy thereof. It is submitted that these decisions reflect undue formalism.

The Bulgarian case involved an award made in an arbitration conducted under the UNCITRAL Arbitration Rules by an *ad hoc* arbitral tribunal in Bern, Switzerland. The

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Corte di Appello [Court of Appeal], Florence, 1 December 1980, *Nidera Handelscompagnie BV v. Moretti Cereali SpA*, reported in Y.B. Comm. Arb. X (1985) pp. 450–52 (Italy No. 65).

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In another case a year later, the Florentine court took the opposite view. Enforcement of the award had initially been refused by the same court on the grounds that the constitution of the arbitral tribunal was not in accordance with the agreement of the parties; Corte di Appello [Court of Appeal], Florence, 13 April 1978, *Rederi Aktiebolaget Sally v. srl Termarea*, reported in Y.B. Comm. Arb. IV (1979) pp. 294–96 (Italy No. 32), see *supra* note 43. Thereupon, the petitioner obtained a judgment on the award in England and then once again requested enforcement in Italy, this time on

the basis of the English judgment. On this occasion, the Florentine court did not regard the English decision as an autonomous judgment that could be enforced under international conventions and domestic law on civil procedure relating to foreign judgments, but instead took the opposite view that the judgement was to be assimilated to the arbitral award. Enforcement was thus refused. Corte di Appello [Court of Appeal], Florence, 19 January 1981, *Rederi Aktiebolaget Sally v. srl Termarea*, reported in Y.B. Comm. Arb. X (1985) pp. 453–54 (Italy No. 66).

Bulgarian Supreme Court refused enforcement.¹²¹ Relying on Article 193 of the Swiss Private International Law Act, it reasoned that the authentication of the award must be made by the Swiss court at the seat of the arbitration. Moreover, as Article III of the New York Convention prescribes that enforcement shall be in compliance with the procedural rules applicable in the territory where enforcement is sought, the requirement of Article 305(1) of the Bulgarian Code of Civil Procedure, which provides that a request for leave for enforcement must be accompanied by a copy of the decision authenticated by the court of law that has issued it and by a certificate of the same court to the effect that the decision has entered into force, had not been fulfilled. A second reason for denying enforcement was that neither the UNCITRAL Arbitration Rules nor the New York Convention provide for the enforcement of partial awards.

The Spanish Supreme Court denied enforcement in a case where the claimant had supplied copies of two awards rendered by the sole arbitrator, which were signed by him and by an unidentified witness.¹²² The court held that the authenticity of these documents had not been certified, that the witness had not been identified, and that the signatures had not been authenticated. Nor, according to the Court, had the document been legalized or subsequently given the *apostille* referred to in the Hague Convention of 1961.

The Court of Appeal in Florence was faced with a request for enforcement of two awards made by the arbitral tribunal of the Vienna Commodity Exchange.¹²³ It refused enforcement of one award because ‘only an informal photostatic copy of the document containing the award has been submitted in these proceedings, although together with the request, as it appears from a summary examination (the seal on the back of the last pages is a translator’s seal)’. The court reached a different conclusion with respect to the second award as the petitioner had submitted the original award together with a translation in Italian by a sworn translator.

The Italian courts are also rather formalistic when it comes to the authentication and certification of awards. The Italian Supreme Court refused enforcement of an award made in England on the ground that only two of the three signatures of the arbitrators were authenticated.¹²⁴ The court held that the existence of the required conditions for authenticity must be ascertained according to the procedural law of the State in which the action for enforcement is brought, here Italian law, since Article III of the Convention provides that each State shall recognize an arbitral award and enforce it ‘in accordance with the rules of procedure of the territory where the award is relied upon’. For the Italian Supreme Court, the English practice of accepting the authentication of the signatures of two arbitrators for an award to be authentic was irrelevant.

(b) Original or certified copy of the arbitration agreement

The formalistic approach of the Italian courts can also be seen in their reliance on the words ‘shall, at the time of application, supply’ in Article IV(1). These words led the Italian Supreme Court to refuse enforcement of the award in a case where a petitioner

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Supreme Court of Appeal, Civil Collegium, Fifth Civil Department, 23 February 1999, *ECONERG Ltd. v. National Electricity Company AD*, reported in Y.B. Comm. Arb. XXV (2000) pp. 678–82 (Bulgaria No. 1).

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Tribunal Supremo [Supreme Court], Civil Chamber, Plenary Session, 1 April 2003, *Satico Shipping Company Limited v. Maderas Iglesias*, reported in Y.B. Comm. Arb. XXXII (2007) pp. 582–90 (Spain No. 57).

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Corte di Appello, Florence, 29 November 1991, *H. & H. Hackenberg GmbH v. NCS di Sbrilli Franco & C. snc*, reported in Y.B. Comm. Arb. XXI (1996) pp. 587–89 (Italy No. 136).

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Corte di Cassazione [Supreme Court], 14 March 1995, No. 2919, *Sodime – Società Distillerie Meridionali v. Schuurmans & Van Ginneken B.V.*, reported in Y.B. Comm. Arb. XXI (1996) pp. 607–609 (Italy No. 140).

had not supplied the arbitration agreement when applying for enforcement.¹²⁵ The court specifically mentioned that this perceived defect must be raised *ex officio* by the enforcement court.¹²⁶

In another Italian case, the Court of Appeal in Bari, held that the requirement of Article IV of the New York Convention not been fulfilled ‘as the confirmations sent by the broker . . . certainly cannot be deemed to be an agreement under the Convention’.¹²⁷

As described earlier, the Spanish Supreme Court refused to order enforcement in a case where the contract had been made by Glencore Grain Rotterdam BV while the party to the arbitration in London and to the award was Glencore Grain Limited.¹²⁸ In support of its decision, the Court reasoned that Glencore Grain Limited had failed to supply a valid arbitration agreement in support of its request for enforcement and, thus, had not complied with the condition for enforcement in Article IV(1)(b) of the New York Convention.

Reference was made earlier to another case in which the Spanish Supreme Court refused enforcement as the claimant had not submitted two arbitral awards in accordance with Article IV(1)(a).¹²⁹ In the same case, the court also held that the claimant had failed to supply the original agreement or a duly certified copy as required by Article IV(1)(b). The court found no evidence of an arbitration agreement between the parties either in a document signed by the parties—since the charter party in question was unsigned—or in an exchange of letters—since the claimant had supplied only uncertified copies of the faxes exchanged between the brokers and, further, had failed to attach the relevant transmission reports.

In *Czarina*, the US Court of Appeals for the Eleventh Circuit affirmed the lower court’s decision refusing enforcement of an award made in London. The court dismissed Czarina’s contention that a party requesting enforcement of an award under the New York Convention need not supply an arbitration agreement in writing as provided for in Article II of the Convention. The court held that the language of the Convention requires that the requesting party submit such an agreement and concluded that, when ‘confirming an award, courts first assure themselves of their jurisdiction by deciding whether the agreement-in-writing requirement has been met’.¹³⁰

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Corte di Cassazione, 26 May 1981, No. 3456, *Viceré Livio v. Prodexport*, reported in Y.B. Comm. Arb. VII (1982) pp. 345–46 (Italy No. 47), see also *supra* note 7; Corte di Cassazione, 12 February 1987, No. 1526, and 26 May 1987, No. 4706, *Jassica SA v. Ditta Gioacchino Polojaz*, reported in Y.B. Comm. Arb. XVII (1992) pp. 525–28 (Italy No. 109). Enforcement was also refused for this reason in the Corte di Appello [Court of Appeal], Bari, 19 March 1991, *Lenzina Shipping Co. SA v. Casillo Grani snc*, reported in Y.B. Comm. Arb. XXI (1996) pp. 585–86, and Corte di Appello [Court of Appeal], Bologna, 4 February 1993, *wtbv. Società cooperativa a responsabilità limitata – crei*, reported in Y.B. Comm. Arb. XXI (1996) pp. 590–93 (Italy No. 137).

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That enforcement proceedings are not always easy in Italy is also illustrated by the judgment of the Corte di Cassazione [Supreme Court], 28 June 2002, *Sherwood Producers and Exporters Lt. v. Conceria Tre Emme di De Maio Vincenzo S.p.A.*, reported in Y.B. Comm. Arb. XXVIII (2003) pp. 810–13 (Italy No. 162) concerning enforcement refused by the Court of Appeal in Naples, which held that the petitioner had failed to supply the original arbitration agreement or a duly certified copy thereof together with its request for enforcement.

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Corte di Appello [Court of Appeal], Bari, 30 November 1989, *Finagrain Compagnie Commerciale Agricole et Financière SA v. Patano snc*, reported in Y.B. Comm. Arb. XXI (1996) pp. 571–75 (Italy No. 132).

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Tribunal Supremo [Supreme Court], 14 January 2003, *Glencore Grain Limited v. Sociedad Ibérica de Molturación, S.A.*, reported in Y.B. Comm. Arb. XXX (2005) pp. 605–609 (Spain No. 38). See above text accompanying note 114.

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Tribunal Supremo [Supreme Court], Civil Chamber, Plenary Session, 1 April 2003, *Satico Shipping Company Limited v. Maderas Iglesias*, reported in Y.B. Comm. Arb. XXXII (2007) pp. 582–90 (Spain No. 57). See also above text accompanying note 122.

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US Court of Appeals, Eleventh Circuit, 4 February 2004, *Czarina, LLC v. W.F. Poe Syndicate*, reported in Y.B. Comm. Arb. XXIX (2004) pp. 1200–1208 (US No. 476).

The foregoing cases raise the question of the interplay between Article IV(1)(b) and Article V(1)(a) of the Convention. If a petitioner submits a document purporting to be an arbitration agreement, does the onus of proof that the agreement is invalid always lie on the respondent as in Article V(1)(a)? In a number of cases, enforcement was refused due to the fact that the petitioner had failed to submit an arbitration agreement in accordance with Article IV(1)(b). These cases may lead to the mistaken belief that a petitioner must not only submit the original arbitration agreement or a certified copy thereof, but also prove that the agreement is valid. In a case judged by the Swiss Federal Supreme Court to which reference was made earlier,¹³¹ the petitioner's contention that the court of appeal should have assumed the existence of an arbitration agreement was dismissed. The Federal Supreme Court noted that, although the burden of proof is reversed in Article V of the Convention, Article IV(1)(b) requires the party requesting recognition to supply an arbitration agreement that satisfies the formal requirements of Article II(2).¹³² This belief could be reinforced by the words 'referred to in article II' that appear in Article IV(1)(b) and which might be taken to mean that a petitioner has to show that the agreement submitted complies with the writing requirement of Article II. The better view, however, seems to be that as long as the document appears to be *prima facie* an arbitration agreement, it constitutes a rebuttable presumption that it is a valid arbitration agreement in terms of Article II(2) and that it is for the respondent to bring proof to the contrary.¹³³

(c) Translation

Article IV(2) of the Convention requires that a translation of the arbitration agreement and award be produced if they are not made in an official language of the country where enforcement is sought. The translation needs to 'be certified by an official or sworn translator or by a diplomatic or consular agent'.

In one case, the latter requirement was considered not to have been met. The case involved an arbitral award made in Moscow in the Russian language. The translation of the award into German was made by an employee of a Moscow notary public, who had marked on a copy of the award that that copy corresponded to the original award. A court in Zug, Switzerland, refused enforcement because the translation had not been certified by a diplomatic or consular agent 'either at the Swiss mission in Moscow or at the Russian mission in Switzerland'.¹³⁴

Concluding remarks

In terms of numbers, refusals of enforcement may seem to be within an acceptable range. Some 1,400 court decisions have been reported on the interpretation and application of the New York Convention in the 32 volumes of the *Yearbook Commercial*

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Bundesgericht [Federal Supreme Court], 31 May 2002, *A Ltd. v. B A.G.*, reported in Y.B. Comm. Arb. XXVIII (2003) pp. 835–41 (Switzerland No. 34). See also above text accompanying note 19.

132
See also *supra* notes 18 and 19 and above the cases referred to and text accompanying notes 7–9.

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On the interplay between the two provisions of the Convention, see Court of Appeal, Civil Division, 18 April

2002, *Yukos Oil Company v. Dardana Limited*, reported in Y.B. Comm. Arb. XXVII (2002) pp. 570–92 (UK No. 60).

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Obergericht [Court of Appeal], Zug, 27 February 1998, reported in Y.B. Comm. Arb. XXIX (2004) pp. 805–808 (Switzerland No. 35).

Arbitration. Approximately half of these decisions concern the enforcement of arbitral awards (the other half deal with enforcement of arbitration agreements under Article II(3) of the Convention). There were thus around 700 enforcement decisions, out of which some 70 refused enforcement of the award. A score of 10% can be considered to be a successful achievement for an international convention.

As this review of those 10% of cases has shown, a fair number of the decisions resulted from a mistake of one kind or another—parties drafting inadequate arbitration clauses, arbitral tribunals or arbitral institutions not paying sufficient attention to the conduct of the proceedings, or courts misunderstanding the meaning of the Convention.

In my previous contributions, I took the view that the text and structure of the Convention do not seem to be at stake. However, I am no longer so certain of this. The question is not so much whether the 10% of refusals can be avoided, but rather that we should not be complacent with a text and a structure now 50 years old. The wear and tear they are undergoing might indeed be good reason to consider revamping or indeed replacing the Convention.