ICCA

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION

SECOND EDITION

with the assistance of the
Permanent Court of Arbitration
Peace Palace, The Hague

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FOREWORD BY PROFESSOR PIETER SANDERS AS HONORARY GENERAL EDITOR

The 1958 New York Convention is the most successful multilateral instrument in the field of international trade law. It is the centrepiece in the mosaic of treaties and arbitration laws that ensure acceptance of arbitral awards and arbitration agreements. Courts around the world have been applying and interpreting the Convention for over fifty years, in an increasingly unified and harmonized fashion.

I participated in 1958 in the drafting of the Convention as a delegate from The Netherlands. We started our work on a draft that was originally produced by the International Chamber of Commerce (ICC) in 1955. The ICC draft provided for the enforcement of "international" awards. It was presented to the United Nations Economic and Social Council (ECOSOC). ECOSOC changed the draft to apply to "foreign" awards. This was the draft the Conference worked on from 20 May to 10 June 1958.

Changes and additions were made to the working draft, leading to what became known as the "Dutch proposal". One change was the elimination of the requirement of a double *exequatur*, so that it would be possible to present awards for enforcement without first obtaining a declaration of enforceability from the courts of the country where they were rendered. Another change was to restrict the grounds for refusal of the award to the seven grounds listed in Article V and to shift the burden of proving those grounds to the party opposing enforcement. The seven grounds listed in the Convention became the exclusive grounds for refusal. The burden of proof on the party resisting enforcement and the exhaustive grounds for refusal are now recognized as key features of the Convention.

Article II of the Convention was added in the final drafting stage, also as a result of the Dutch proposal. It provides that courts *shall* refer the parties to arbitration when a party relies on a valid agreement. The working draft only provided for the enforcement of foreign arbitral

awards. Including a provision on the enforcement of arbitration agreements was more efficient than the earlier regulation in two instruments: the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.

In order for the application of the New York Convention to be unified and harmonized, an effective worldwide system of reporting cases applying the Convention was needed. That is why the publication of the ICCA *Yearbook Commercial Arbitration* was begun in 1976. I was its General Editor. Since then, thirty-five volumes have been published. The *Yearbook* is also available online at <www.KluwerArbitration.com>. The *Yearbook* has reported 1,666 New York Convention court decisions from 65 of the 145 countries that have acceded to the Convention.

The Convention was forward-looking. Professor Matteucci, the Italian delegate to the Conference, called it "a very bold innovation". The Convention has stood the test of time. More than fifty years later, we can still look forward to beneficial adaptations of the interpretation of its text, responding to modern technology and practice.

The Model Law on International Commercial Arbitration issued by UNCITRAL (the United Nations Commission on International Trade Law) in 1985, and as amended in 2006, has been adopted in over seventy countries and federal states. Some countries have adopted the Model Law with no changes. Others have enacted modern arbitration laws inspired by the Model Law. As countries adopt modern arbitration laws, courts can rely on their more favourable provisions as provided by Article VII of the Convention.

Such modern arbitration laws may also contain provisions on the procedure for the enforcement of an award. The Convention only prescribes the documents to be submitted to the court (Article IV) and that no more onerous conditions or higher fees may be imposed than for the enforcement of a domestic award (Article III). The UNCITRAL Secretariat, together with the International Bar Association, has surveyed these conditions and determined in its Report of 2008 that "there are diverging solutions to the many different procedural requirements that govern the recognition and enforcement of awards

under the Convention" (Report of the United Nations Commission on International Trade Law A/63/17 para. 353, p. 71) and has recommended that the Secretariat work towards developing a guide to enactment of the Convention to promote uniform interpretation and application. Such a guide could introduce uniform rules for the enforcement process.

ICCA's initiative to create *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* is a welcome addition and companion to the ICCA *Yearbook*. It sets out the questions to be answered and the steps to be followed by courts when applying the New York Convention in a concise, clear and straightforward style that highlights the pro-enforcement bias of the Convention. I expect that this Guide will serve as an effective tool in advancing the motto I have repeated on many occasions: *Vivat, Floreat et Crescat New York Convention 1958*.

Pieter Sanders
Schiedam, April 2011

INTRODUCTION TO THE SECOND EDITION

Prof. Andrés Jana

ICCA's Guide to the Interpretation of the 1958 New York Convention was conceived as a handbook to give guidance to judges on the scope, interpretation and application of the Convention. In order to achieve these goals, the Guide was drafted as a concise text, written in plain language, and limited to an examination of the most essential aspects of the Convention. The Guide is not intended to be a comprehensive reference work, rather is designed to answer specific questions that may arise in the application of the Convention. The Guide as drafted reflects the basic idea that the New York Convention is a simple text that must be applied by courts in the vast majority of the cases by following the plain text of its provisions.

Since its publication in 2012, the Guide has proven remarkably effective. It has become an influential and often cited authoritative text on the New York Convention. Having been translated into twenty-eight languages and distributed to 4,000 judges worldwide, it now serves as a tool for judges around the globe, as well as a basic consultation text for academics, students and practitioners.

The wide-spread impact of the Guide can be appreciated in the key role it has played in ICCA's judicial outreach programme, which has been institutionalized since the release of the First Edition through the creation of a Judiciary Committee. The Committee has to date conducted in-person and web-based training programmes for national courts in over forty different countries. The "New York Convention Roadshows", as the judicial dialogue and training events came to be known by, were developed with the aim of engaging with national court judges about the critical role of local courts in the proper functioning of international arbitration and use the Guide as the basis for discussion.

Ten years after publication of the First Edition of the Guide, the success of the New York Convention itself has continued to grow, as

evidenced by its current 172 contracting States and the increased number of court decisions applying it. Case law and some state court practices have also evolved. Noting these developments, as well as the influence of the Guide, ICCA's Judiciary Committee, chaired at the time by Prof. Albert Jan van den Berg, considered it time to update the Guide, and has now prepared a Second Edition.

The approach taken by the Judiciary Committee in preparing the Second Edition was that while updating and complementing the text where necessary, the Second Edition should preserve the overall structure and original style of the Guide. In particular, it is still presented in plain language aiming to serve as a road map to more in depth study, includes reference to key cases only, and focuses on the fundamental aspects of the application of the Convention.

While our goal has been to keep the changes to a minimum, the Second Edition is the result of a thorough review, covering developments in case law on the application of the New York Convention and recent court practices. In addition, certain additional aspects of the Convention not included in the First Edition are now covered.

In concrete, the main changes included in the Second Edition are the following (i) updated references to relevant case law, in particular case law illustrating essential principles; (ii) a more comprehensive treatment of the most favored principle contained in Article VII.1 of the Convention; (iii) a new section on Article VI of the Convention; (iv) clarification of certain points to reflect court practice; and (v) redrafting across the text to improve clarity.

The Guide maintains its overall structure. It begins with a checklist setting out the questions to be answered and the steps to be followed by courts when applying the Convention in the two actions available within its scope: a request for the recognition and enforcement of an arbitration agreement or a request for the recognition and enforcement of an arbitral award.

Chapter 1 refers to the Convention as an instrument of international law, applicable to arbitration agreements and arbitral awards, including

its interpretation and guidance principles such as the pro-enforcement bias. It then addresses the material and territorial scope of application of the Convention, explaining the possible limitations of the reciprocity and commerciality reservations available to contracting States. Chapter 1 then discusses the relationship of the Convention with domestic law and other treaties, analyzing the most favored application principle contained in Article VII. Finally, it explains the international obligation of States party to the Convention to comply with the Convention, and the consequences of not doing so.

Chapter 2 explains the requirements to enforce an arbitration agreement, and the considerations that a court must take into account when entertaining such a request.

In turn, Chapter 3 discusses the requirements for the request made to a court for the recognition and enforcement of an arbitral award.

Finally, in order to facilitate deliberations by judges in matters related to the Convention, the Guide contains four annexes: (I) the New York Convention itself; (II) the UNCITRAL Model Law on International Commercial Arbitration; (III) the UNCITRAL Recommendation of 2006 regarding the interpretation of Article II of the Convention; and (IV) a number of useful online sources for further reference.

As already mentioned, the Second Edition is the result of a thorough and detailed review of the Guide. In June 2023, I was honored to succeed Prof. van den Berg as Chair of ICCA's Judiciary Committee and since then have been responsible for the Second Edition. But this work would not have been possible without the contribution of numerous people. First, Prof. van den Berg, who promoted the idea of this Second Edition within ICCA's Judiciary Committee. Second, the members of that committee, in particular those that conducted the review process, including Carolyn Lamm, Dominique Hascher, Mohammed Abdel Raouf and Albert Jan himself with the valuable assistance of Erica Stein, and myself. Very special recognition goes to Lindsay Gastrell and Emily Hay who at different times led the editorial team, for their work in consolidating updates, taking significant drafting responsibilities and having a primary role in updating case law. The

result of this Second Edition is largely due to their invaluable contribution. I also recognize the work of Young ICCA representatives in carrying out voluminous case research and cite checking that has ensured that this Second Edition is accurate and up to date.* I am grateful to Adam Jankowski from the ICCA Bureau for his assistance in the last stages of the work, and my deep gratitude to Lise Bosman, the Executive Director of ICCA, not only for her help with this Second Edition but also for her continuous support to the work of the Judiciary Committee. Lastly, my sincere appreciation to the authors of the First Edition for their generosity in reviewing this Second Edition.

The New York Convention is rightly the most relevant and influential treaty of international private law. Together with the UNCITRAL Model Law on International Commercial Arbitration, it constitutes the foundation of the normative architecture of international arbitration. Indeed, the enormous success of the Convention largely explains the growth and effectiveness of international commercial arbitration.

For parties involved in cross-border transactions certainty and predictability in the recognition and enforcement of their arbitration agreements and arbitral awards is a necessary condition for a functioning business environment. For that to be achieved, a uniform and harmonized application of international arbitration principles is required – including through fostering a robust international and local culture of international arbitration practice.

In that development, the role of the courts is essential. They play the dual roles of providing assistance to the arbitral process, and acting as gatekeepers of the international arbitration system. Instruments such as this Guide are intended to assist judges in this critical endeavor.

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* Contributing Young ICCA representatives included Toheeb O. Amuda, Matheus Bastos Oliveira, Parnika Chaturvedi, Stefanie Efstathiou, Shehabeldine Ismail, Rita Kaufmann, Francis Levesque, Aracelly López, Byron Perez, Carlos Rios, Patricia Snell and David Isidore Tan.

We hope that this Second Edition of the Guide will continue to contribute to achieving a uniform and consistent application of the New York Convention across the globe.

Echoing the words of Professor Pieter Sanders, author of the Foreword to the First Edition as Honorary General Editor of the Guide, who passed away in 2012 shortly after its publication, we expect that this Second Edition of the Guide will serve as a tool in advancing the mantra he repeated on many occasions: "May the New York Convention Live, Flourish and Grow".

If there is one person that embodies this motto it is Prof. Albert Jan van den Berg. As founder and chair of the Judiciary Committee, a position that he held for ten years, as general editor of ICCA's *Yearbook Commercial Arbitration* for thirty-two years, as creator of the essential database <NewYorkConvention.org>, as well as through his entire career, his contributions to the study and development of the New York Convention are unparalleled. For these reasons and many more that would require long pages to be listed, this Second Edition of the Guide is dedicated to him.

A few words about ICCA

ICCA was formed in 1961 by a small group of experts and friends in the field of international commercial arbitration. It is a worldwide non-governmental organization dedicated to promoting and developing arbitration, conciliation and other forms of international dispute resolution. ICCA is a membership-based organization comprising approx. 1,000 members from around 100 jurisdictions. Its Governing Board Members and General Members include arbitration counsel, arbitrators, scholars, policy advisors, and members of the judiciary. Its branch for young practitioners, Young ICCA, has over 16,000 members and aims to "open the doors of international arbitration".

Every two years ICCA holds a Congress that is one of the major events in the international arbitration calendar. The most recent

Congress was held in September 2022 in Edinburgh, and attracted over 1,000 participants from all over the world. The next ICCA Congress will be held in Hong Kong in 2024.

ICCA is not an arbitral institution; it does not administer arbitrations or act as an appointing authority. ICCA is traditionally best known for its publications. Since 1976, some 3,500 court decisions from more than 100 countries, including 3,000 applying the New York Convention, have been reported in the *Yearbook Commercial Arbitration*. The *International Handbook on Commercial Arbitration* contains continuously updated reports on the arbitration law and practice in over eighty-five countries. The *ICCA Awards Series*, launched in 2023, adds anonymized arbitral awards to the over 600 awards already published in the *ICCA Yearbook*. The *ICCA Congress Series* publishes the final papers presented at ICCA Congresses.

ICCA regularly conducts research and outreach projects on issues of interest or concern to the arbitration community, including developing a Paris Climate Agreement conciliation annex, the use of remote hearings, cybersecurity, data protection, and issue conflict. It also has Working Groups on African Arbitral Practice and Chinese Arbitral Practice and Judicial Outreach programme. ICCA has a strong commitment to diversity and inclusion, reflected in its research into gender diversity, needs-based grant programmes, and the creation of access opportunities to young practitioners and practitioners from emerging jurisdictions.

All ICCA publications are available online at <www.kluwerarbitration.com>. More information on ICCA, ICCA publications and ICCA projects can be found on its website at <www.arbitration-icca.org>.

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CHECKLIST FOR JUDGES WORKING WITH THE NEW YORK CONVENTION

This Checklist sets out the questions to be answered and the steps to be followed by courts when applying the New York Convention. The Checklist is not exhaustive and is meant to be used along with the text of the Guide.

A. APPLICATION OF THE CONVENTION

What is the Convention about?

- The recognition and enforcement of arbitration agreements (Articles I and II)
- The recognition and enforcement of arbitral awards (Articles I, III-VII)

How should the court interpret the Convention?

- Vienna Convention Articles 31 and 32
- Interpretation in favour of recognition and enforcement
- Article VII allows for application of a more favourable treaty or domestic law
- Non-application engages the international responsibility of the State

B. REQUEST FOR THE RECOGNITION AND ENFORCEMENT OF AN ARBITRATION AGREEMENT (ARTICLES I AND II)

Does the Convention apply to this request?

- Is the forum State a party to the New York Convention? (Article I)
  Date of entry into force?
  Reciprocity reservation?
  Commercial reservation?

- Does the forum State have implementing legislation and does it affect the application of the Convention?
- Can the Convention apply to actions ancillary to arbitration?
  Examples:
  - Appointment of arbitrator?
  - Request for conservatory measures?

Does the arbitration agreement fall under the substantive scope of the Convention? (Article II)

- Is there a dispute?
- Does the dispute arise out of a defined legal relationship, whether contractual or not? (Article II(1))
- Did the parties intend to have this particular dispute settled by arbitration?
- Is this dispute arbitrable?
- Is the arbitration agreement formally valid (evidenced in writing)? (Article II(2))
  Examples:
  - Is the arbitration agreement incorporated by reference?
  - Has the arbitration agreement been tacitly accepted?
- Does the arbitration agreement exist and is it substantively valid? (Article II(3))
  Null and void?
  Inoperative?
  Incapable of being performed?
- Is the arbitration agreement binding on the parties to the dispute that is before the court?
- Is this dispute arbitrable?

Does the arbitration agreement fall under the territorial scope of the Convention? (Article I)

- Is the arbitral seat in a foreign State?
- Will the future award be considered non-domestic in the forum State?
- Is there an element of internationality?

Are procedural elements satisfied?

Examples:

- Has a party requested the referral to arbitration (no *ex officio* referral)?
- Does the process at issue qualify as arbitration?
- Has the requesting party satisfied preliminary steps?

  Examples:

  - Cooling off period?
  - Mediation/conciliation?
  - Has the requesting party waived its right to arbitration?
  - Is there a decision of another court on the same matter that is *res judicata*?

What is the applicable law?

Examples:

- Formation and substantive validity of the arbitration agreement?
- Capacity of a party?
- Non-signatories to the arbitration agreement?
- Arbitrability?

Are there matters that should be decided by the arbitral tribunal rather than the court?

Can the court rely on Article VII allowing for reliance on a more favourable right in a national law or treaty?

If all requirements are fulfilled, the court *shall* refer the parties to arbitration.

C. REQUEST FOR THE RECOGNITION AND ENFORCEMENT OF AN AWARD (ARTICLES III TO V)

Does the Convention apply to this request?

- Is the forum State a party to the New York Convention? (Article I)

  Date of entry into force?

Reciprocity reservation?
Commercial reservation?

- Does the forum State have implementing legislation and does it affect the application of the Convention?

Has the petitioner submitted the required documents at the time of the request:

- Duly authenticated original award or a duly certified copy thereof (Article IV(1)(*a*))?
- Original agreement referred to in Article II or a duly certified copy thereof (Article IV(1)(*b*))?
- Translations of these documents into the language of the forum State, where relevant (Article IV(2))?

Does the request meet the applicable local procedural and jurisdictional requirements?

- Must not be substantially more onerous than those imposed on the recognition or enforcement of domestic arbitral awards (Article III)

Has the respondent raised and established any of the five grounds for refusal set out in Article V(1), narrowly interpreted?

- Is the agreement to arbitrate invalid (Article V(1)(*a*))?
  Null and void?
  Inoperative?
  Incapacity of a party?
- Was the respondent deprived of its right to have its case heard and determined by the arbitral tribunal (Article V(1)(*b*))?
  Lack of notice (only where the respondent has not actively participated in the arbitration)?
  Due process violations that prevented the respondent from presenting its case?
- Does the award deal with a dispute not contemplated by, or beyond the scope of, the parties' arbitration agreement (Article V(1)(*c*))?
- Were there serious irregularities in the composition of the arbitral tribunal or the arbitral procedure (Article V(1)(*d*))?

Not in accordance with the agreement of the parties?
In the absence of such agreement, not in accordance with the law of the country where the arbitration took place?

- Is the award not yet binding, or has it been finally set aside or suspended by a competent authority in the country in which, or under the laws of which, the award was made (Article V(1)(*e*))?

Are either of the grounds for refusal set out in Article V(2), narrowly interpreted, present?

- Is the subject matter of the dispute not arbitrable under the law of the forum State?
  Examples non-arbitrability:
  - criminal cases
  - domestic relations, such as divorce and custody of children
  - bankruptcy
  - wills
- Would recognition and enforcement be contrary to the public policy of the forum State?
  Examples public policy:
  - fundamental principles of a State pertaining to justice or morality
  - rules designed to serve the essential political, social or economic interests of the State

Can the court rely on Article VII allowing for reliance on a more favourable right in a national law or treaty?

If the court finds that one or more of the exhaustive grounds for refusal is met, the court *may* refuse recognition and enforcement. Otherwise, recognition and enforcement is mandatory.

OVERVIEW

Judges who are asked to apply the 1958 New York Convention face two types of challenges. First, there are the complexities that usually arise with respect to international treaties from the perspective of national judges. Second, this is a Convention which tests the objectivity of the national judge in a particular way, because it is often invoked by a foreigner against a local party. (This is particularly so with respect to the enforcement of foreign awards, which are typically brought to the home jurisdiction of the losing party, because that is where that party's assets are located.)

This observation is one of great importance. The Convention is the cornerstone of international commercial arbitration, which is crucial to the reliability of international business transactions. The Convention envisages a mechanism which depends on the cooperation of national courts. Its essence is reciprocal confidence. If some courts show bias in favour of their own nationals, this reciprocity is damaged as other courts may be tempted to follow the bad example.

The goal of this Guide is to provide simple explanations of the Convention's objectives, and how to interpret its text in accordance with best international practice over the sixty-five years of its existence.

We start with the most obvious question:

WHAT IS THE NEW YORK CONVENTION ABOUT?

The New York Convention has two objects:

- The recognition and enforcement of arbitration agreements (see below at A; see also Chapter 2);
- The recognition and enforcement of foreign arbitral awards (see below at B; see also Chapter 3).

A. RECOGNITION AND ENFORCEMENT OF ARBITRATION AGREEMENTS

Arbitration is a consensual process. It can only take place if the parties have agreed to submit their dispute to arbitration. The agreement to refer disputes to arbitration is called the "arbitration agreement".

An arbitration agreement has a positive and a negative legal effect:

- It obliges the parties to submit disputes to arbitration and confers jurisdiction on an arbitral tribunal over disputes covered by the arbitration agreement (*positive effect*). If a dispute arises that falls within the scope of the arbitration agreement, either party may submit it to an arbitral tribunal.
- It prevents the parties from seeking the resolution of their disputes in court (*negative effect*). By concluding an arbitration agreement, the parties waive their rights to judicial remedies. A party having entered into an arbitration agreement cannot disregard it and instead go to court.

The New York Convention obliges Contracting States to recognize and enforce these effects. The conditions under which a court must do so are discussed in Chapter 2 of this Guide.

B. RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

Arbitration ends with a final award by the arbitral tribunal or the sole arbitrator. In addition, in the course of the arbitration, the arbitrator(s) may issue interim awards, for example an award on jurisdiction or on liability. All are covered by the New York Convention (see Chapter 1).

Most legal systems confer effects on arbitral awards that are identical or similar to those of court judgments, notably that of *res judicata*. As with court judgments, the final and binding force of an

award is in principle limited to the territory of the State where the award was made. The New York Convention provides for their recognition and enforcement *outside* that territory.

The *recognition* of arbitral awards is the process that makes arbitral awards part of a national legal system. Recognition is most often sought in the context of another proceeding. For example, a party will request the recognition of an arbitral award in order to raise a defence of *res judicata* and thus bar the re-litigation in court of issues that have already been resolved in a foreign arbitration, or a party will seek set-off in court proceedings on the basis of a foreign arbitral award. Because recognition often acts as a defensive mechanism, it is frequently described as a shield.

By contrast, *enforcement* is a sword. Successful parties in arbitration will seek to obtain what the arbitrators have awarded them. It is true that most awards are complied with voluntarily. However, when the losing party does not comply, the prevailing party may request court assistance to force compliance. The New York Convention allows parties to request such assistance.

In other words, recognition and enforcement may give effect to the award in a State other than the one where the award was made (see Chapter 1). When a court has declared an award enforceable within the *forum* State, the prevailing party may resort to the execution methods available under local laws.

CHAPTER 1
THE NEW YORK CONVENTION AS AN INSTRUMENT OF INTERNATIONAL LAW

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2. Breach of Investment Treaty
3. Award Is Unaffected

A. INTERPRETATION

The New York Convention (hereinafter, the "Convention") is an international treaty. As such, it is part of public international law. Consequently, the courts called upon to apply the Convention must interpret it in accordance with the rules of interpretation of international law, which are codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[1]

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1. Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations *Treaty Series,* vol. 1155, p. 331. Article 31 reads:

"*General rule of interpretation*
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(*c*) any relevant rules of international law applicable in the relations between the parties.

Articles 31 and 32 have to be followed in sequence: if the clarity of the meaning is not achieved by reference to the general rule embodied in Article 31, one looks to the supplementary rules embodied in Article 32. National rules of interpretation do not apply. In accordance with international law, courts should interpret the Convention in an autonomous manner (see this Chapter below at A.1) and in favour of recognition and enforcement (see this Chapter below at A.2).

1. Treaty Interpretation: Vienna Convention

In principle, the terms used in the Convention have an autonomous meaning (Article 31 Vienna Convention). The terms must be understood in accordance with their ordinary meaning, taking into account their context and the purpose of the Convention. To confirm that meaning, or where that meaning is either ambiguous or manifestly unreasonable, recourse may be had to the *travaux préparatoires* of the Convention (Article 32 Vienna Convention). Therefore, courts should not interpret the terms of the Convention by reference to domestic law. The terms of the Convention should have the same meaning wherever in the world they are applied. This helps to ensure the uniform application of the Convention in all the Contracting States.

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4. A special meaning shall be given to a term if it is established that the parties so intended."

Article 32 reads:

"*Supplementary means of interpretation*
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(*a*) leaves the meaning ambiguous or obscure; or
(*b*) leads to a result which is manifestly absurd or unreasonable."

In jurisdictions that have implemented the Convention into their legal system by means of an implementing act, it is important to have regard to its terms. In some cases, they alter the terms of the Convention.[2] Current case law unfortunately sometimes diverges in the application of the Convention and therefore does not always provide a useful guideline. In that case, courts should always interpret the Convention on a pro-enforcement bias. Courts can also rely on scholarly writings such as the commentary on the Convention by Professor Albert Jan van den Berg.[3]

2. Interpretation in Favour of Recognition and Enforcement: Pro-Enforcement Bias

As stated above, treaties should be interpreted in light of their object and purpose. The purpose of the Convention is to promote international commerce and the settlement of international disputes through arbitration. It aims at facilitating the recognition and enforcement of foreign arbitral awards and the enforcement of arbitration agreements. Consequently, courts should adopt a pro-enforcement approach when interpreting the Convention.

If there are several possible interpretations, courts should choose the meaning that favours recognition and enforcement (the so-called *pro-*

2. See Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958). Note by the UNCITRAL Secretariat. A/CN.9/656 and A/CN.9/656/Add.1, 5 June 2008.
3. Albert Jan van den Berg, *The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation* (Kluwer, 1981); see also Professor van den Berg's Consolidated Commentary on the 1958 New York Convention in Volume XXVIII (2003) of the ICCA *Yearbook Commercial Arbitration* (henceforth *Yearbook*), covering Volume XXII (1997) to Volume XXVII (2002), and the Consolidated Commentary on the 1958 New York Convention in Volume XXI (1996) of the *Yearbook*, covering Volume XX (1995) and Volume XXI (1996).

enforcement bias). This implies in particular that the grounds for refusing enforcement specified in Article V should be construed narrowly (see Chapter 3 at C.4).[4]

In line with the pro-enforcement bias, which is key to the interpretation of the Convention, the *principle of maximum efficiency* applies: if more treaties could be applicable, the courts should apply the treaty under which the award is enforceable. This is reflected in Article VII (see this Chapter below at E.2).

In a case before the Spanish Supreme Court,[5] two treaties were potentially applicable to determine the enforceability of the award: a bilateral treaty between France and Spain and the Convention. The Court held that, of the two principles relevant to determining whether the bilateral treaty or the Convention applied, one was:

> "... the principle of maximum efficiency or greater favourability to the recognition of foreign decisions. [Taken together with the other relevant principles this leads to the Court concluding that the Convention was the applicable provision as it] establishes a presumption of the validity and efficacy of both the arbitration agreement and the related arbitral award or decision [and] … consequently shifts the burden of proof onto the party against whom the arbitral award is invoked…"

4. A court seised with an application to enforce an award under the Convention has no authority to review the decision of the arbitral tribunal on the merits and replace it by its own decision, even if it believes that the arbitrators erred in fact or law. Enforcement is not an appeal of the arbitral decision (see Chapter 3 at C.1).
5. *Spain*: Tribunal Supremo, Civil Chamber, First Section, 20 July 2004 (*Antilles Cement Corporation v. Transficem*), *Yearbook* XXXI (2006) pp. 846-852 (Spain no. 46).

B. MATERIAL SCOPE OF APPLICATION

To determine whether a particular award or agreement falls within the subject matter of the Convention, a court should ascertain whether it qualifies as an arbitral award or an arbitration agreement.

1. Arbitral Award

There is no definition of the term "arbitral award" in the Convention. Therefore, it is for the courts to determine what the term means for the purposes of the Convention. They must do so in two steps:

1. First, they must review whether the dispute had been submitted and resolved by *arbitration.* Not all out-of-court dispute-settlement methods qualify as arbitration. There are a variety of dispute-settlement mechanisms involving private individuals that do not have the same characteristics as arbitration. Mediation, conciliation and expert determination are a few examples. The New York Convention covers only arbitration.
2. Second, they must review whether the decision is an *award*. Arbitral tribunals may issue a variety of decisions. Some of them are awards, others are not.

Courts have adopted two different methods to determine the meaning of the terms "arbitration" and "award". They either (1) opt for autonomous interpretation or (2) refer to national law using a conflict-of-laws method.

a. Autonomous Interpretation

The first step is to inquire whether the process at issue qualifies as *arbitration*. Arbitration is a method of dispute settlement in which the parties agree to submit their dispute to a third person who will render a final and binding decision in place of the courts.

This definition stresses three main characteristics of arbitration. First, arbitration is consensual: it is based on the parties' agreement. Second, arbitration leads to a final and binding resolution of the dispute. Third, arbitration is regarded as a substitute for court litigation.

The second step is to review whether the decision at issue is an *award*. An award is a decision putting an end to the arbitration in whole or in part or ruling on a preliminary issue the resolution of which is necessary to reach a final decision. An award *finally* settles the issues that it seeks to resolve.[6] Even if the tribunal wished to adopt a different conclusion later, the issue cannot be reopened or revised.

Consequently, the following arbitral decisions qualify as awards:

- Final awards, i.e., awards that put an end to the arbitration. An award dealing with all the claims on the merits is a final award. So is an award denying the tribunal's jurisdiction over the dispute submitted to it;
- Partial awards, i.e., awards that give a final decision on part of the claims and leave the remaining claims for a subsequent phase of the arbitration proceedings. An award dealing with the claim for extra costs in a construction arbitration and leaving claims for damages for defects and delay for a later phase of the proceedings is a partial award (this term is sometimes also used for the following category, but for a better understanding, it is preferable to distinguish them);
- Preliminary awards, sometimes also called interlocutory or interim awards, i.e., awards that decide a preliminary issue necessary to dispose of the parties' claims, such as a decision on whether a claim is time-barred, on what law governs the merits, or on whether there is liability;

6. See, e.g., *United States*: Court of Appeals, Seventh Circuit, 14 March 2000 (*Publicis Communication, et al. v. True North Communications Inc.*), *Yearbook* XXV (2000) pp. 1152-1157 (US no. 338); *Germany*: Bundesgerichtshof, 18 January 2007 (*Parties not indicated*), *Yearbook* XXXIII (2008) pp. 506-509 (Germany no. 109).

– Awards on costs, i.e., awards determining the amount and allocation of the arbitration costs;
– Consent awards, i.e., awards recording the parties' amicable settlement of the dispute; and
– Awards issued by default, i.e., without the participation of one of the parties (the extent they fall within one of the categories listed above).

By contrast, the following decisions are generally not deemed awards:

– Procedural orders, i.e., decisions that merely organize the proceedings;
– Decisions on provisional or interim measures. Because they are only issued for the duration of the arbitration and can be reopened during that time, provisional measures are not awards. Courts have held the contrary on the theory that such decisions terminate the dispute of the parties over provisional measures, but this is unpersuasive: the parties did not agree to arbitration in order to resolve issues of arbitral procedure.

Finally, the name given by the arbitrators to their decision is not determinative. Courts must consider the subject matter of the decision and whether it finally settles an issue in order to decide whether it is an award.

b. Conflict-of-Laws Approach

If, rather than using the preferred autonomous method for all the above questions, a court were to refer to a national law, it would start by deciding which national law will govern the definition of arbitral award. In other words, it would adopt a conflict-of-laws method. It could apply either its own national law (*lex fori*) or the law governing the arbitration (*lex arbitri*). The latter will generally be the law of the seat of the arbitration, much less frequently the law chosen by the parties to govern

the arbitration (not the contract or the merits of the dispute, which is a different matter).

2. Arbitration Agreement

Article II(1) of the New York Convention makes clear that it applies to agreements "in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not".

The use of the words "have arisen or may arise" shows that the Convention covers both arbitration clauses contained in contracts and dealing with future disputes, on the one hand, and submission agreements providing for resolution of existing disputes by arbitration, on the other hand.

Under Article II(1), the arbitration agreement must relate to a specific legal relationship. This requirement is certainly met for an arbitration clause in a contract which concerns disputes arising out of that very contract. By contrast, this requirement would not be met if the parties were to submit to arbitration any and all existing and future disputes over any possible matter.

The disputes covered by the arbitration agreement may concern contract and other claims such as tort claims and other statutory claims.

Finally, the Convention requires that the arbitration agreement be "in writing", a requirement defined in Article II(2) and discussed in Chapter 2.

C. TERRITORIAL SCOPE OF APPLICATION

Article I(1) defines the territorial scope of application of the Convention to arbitral awards in the following terms:

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

Accordingly, the Convention deals only with the recognition and enforcement of *foreign and non-domestic arbitral awards* (see this Chapter below at C.1). It does not apply to the recognition and enforcement of domestic awards in the country where such an award is made.

The Convention contains no similar provision with regard to arbitration agreements. However, it is established that the Convention only applies to "foreign" or international arbitration agreements (see this Chapter below at C.2).

1. Awards

a. Awards Made in the Territory of a State Other Than the State Where Recognition and Enforcement Are Sought

Any award made in a State other than the State of the recognition or enforcement court falls within the scope of the Convention, i.e., is a foreign award. Hence, the nationality, domicile or residence of the parties is without relevance to determine whether an award is foreign. However, these factors may be important when determining if an arbitration agreement falls within the scope of the Convention (see Chapters 2 and 3). Moreover, it is not required that the State where the award was made be a party to the Convention (unless the State where recognition or enforcement is sought has made the reciprocity reservation; see this Chapter below at D.1).

Where is an award made? The Convention does not answer this question. The vast majority of Contracting States consider that an award is made at the seat of the arbitration (also referred to as the place of arbitration). For instance, numerous jurisdictions have incorporated in their arbitration acts Article 31(3) of the UNCITRAL Model Law according to which the award shall be deemed to have been made at the place of arbitration. The seat or place of the arbitration is a legal, not a physical, geographical concept. Whether chosen by the parties or alternatively, by the arbitral institution or the arbitral tribunal, the seat or place of arbitration determines (in most cases) the legal regime applicable to the arbitration, referred to as *lex arbitri*. Hearings, deliberations and signature of the award and other parts of the arbitral process may take place elsewhere, without affecting where the award is deemed to be made.

b. Non-domestic Awards

The second category of awards covered by the Convention are those which are considered as non-domestic in the State where recognition or enforcement is sought. This category broadens the scope of application of the Convention.

The Convention does not define non-domestic awards. Very rarely, it is the parties that indicate whether the award to be rendered between them is non-domestic. Each Contracting State is thus free to decide which awards it does not regard as domestic and may have done so in the legislation implementing the Convention.[7]

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7. For example, the United States Federal Arbitration Act (Title 9, Chapter 2) has made the following provision with respect to a "non-domestic award":

   "Sect. 202. Agreement or award falling under the Convention
   An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under

In the exercise of this freedom, States generally consider all or some of the following awards as non-domestic:

- Awards made under the arbitration law of another State;
- Awards involving a foreign element;
- A-national awards;
- Awards in respect of which the parties have waived the right to seek annulment.

The first type of awards will only arise in connection with an arbitration having its seat in the State of the court seised of the recognition or enforcement but which was governed by a foreign arbitration law. This will be a rare occurrence because it implies that the national law of the recognition or enforcement court allows the parties to submit the arbitration to a *lex arbitri* other than that of the seat.

The second category refers to awards made within the State of the recognition or enforcement court in a dispute involving a foreign dimension, such as the nationality or domicile of the parties or the place of performance of the contract giving rise to the dispute. The criteria for an award to be considered non-domestic under this category are usually established by the States in their implementing legislation (see at fn. 7 for the example of the United States). Very rarely, the parties indicate that their award is non-domestic.

The third type refers to awards issued in arbitrations that are detached from any national arbitration law, for example, because the parties have explicitly excluded the application of any national arbitration law or provided for the application of transnational rules.

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the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States."

Although there has been some discussion as to whether a-national awards fall within the scope of the New York Convention, the prevailing view is that the Convention does apply to such awards. These cases are extremely rare.

The final category concerns awards in respect of which the parties have waived the right to seek annulment. Some jurisdictions allow parties to agree to waive the right to seek annulment of an award, provided that the parties concerned do not hold certain links with the jurisdiction in question (e.g., that they do not have their residence or domicile in that State). In the presence of such waiver agreements, some domestic arbitration acts provide that awards are deemed to be non-domestic under the Convention.[8]

2. Arbitration Agreements

The Convention does not define its scope of application to arbitration agreements. However, it is well established that the New York Convention does not govern the recognition of domestic arbitration agreements. It is equally accepted that the Convention is applicable if the future arbitral award will be deemed foreign or non-domestic pursuant to Article I(1). Some courts reason that the Convention applies if the arbitration agreement is international in nature. The internationality of the agreement results either from the nationality or domicile of the parties or from the underlying transaction.

When determining whether an arbitration agreement falls within the scope of the Convention, courts should distinguish among three situations:

– If the arbitration agreement provides for a seat in a foreign State, the court must apply the New York Convention;

8. See, e.g., Chapter 12 of Switzerland's Federal Act on Private International Law of 18 December 1987, as in force from 1 January 2021, Article 192; Peru's Legislative Decree No. 1071 Regulating Arbitration, in effect 1 September 2008, Articles 63(8) and 74.

– If the arbitration agreement provides for a seat in the forum State, the court
  - must apply the Convention if the future award will qualify as non-domestic pursuant to Article I(1), second sentence;
  - may apply the Convention if the arbitration agreement is international due to the nationality or domicile of the parties or to foreign elements present in the transaction;
– If the arbitration agreement does not provide for the seat of the arbitration, the court must apply the Convention if it is likely that the future award will be held to be foreign or non-domestic in accordance with Article I(1). In addition, it may apply the Convention if the court deems the agreement to be international.

D. RESERVATIONS

In principle, the Convention applies to all foreign or international arbitration agreements and to all foreign or non-domestic awards. However, Contracting States can make two reservations to the application of the Convention.

1. Reciprocity (Article I(3) First Sentence)

Contracting States may declare that they will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State. Approximately two-thirds of the Contracting States have made this reservation.[9] A court in a State which has made the reservation of reciprocity will apply the Convention only if the award has been made in the territory of another Contracting State, or if

9. A full list of the Contracting States and their respective reservations may be found in List of Contracting States (as of 1 November 2022) for the New York Convention, in Schill (ed.), ICCA *Yearbook Commercial Arbitration* XLVII (2022).

the award is non-domestic and shows links to another Contracting State. In practice, this reservation has a limited impact considering the large number of States that have adopted the Convention (as of the date of this publication, the Convention had 172 Contracting States).

There are different positions as to *when* the State in which the award was made is required to be a party to the Convention.[10] The prevailing view is that the relevant time is when recognition and enforcement are sought. However, some courts have held that the relevant time is the date on which the award was rendered.[11]

2. Commercial Nature (Article I(3) Second Sentence)

Contracting States may also declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are deemed commercial under the national law of the State making such declaration. Approximately one-third of the Contracting States have made this reservation.[12]

Although the language of the Convention refers to the national law of the forum State (as an exception to the principle of autonomous interpretation), in practice courts also give consideration to the special circumstances of the case and to international practice. In any event, considering the purpose of the Convention, courts should interpret the notion of commerciality broadly.

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10. *United Kingdom*: High Court, Queen's Bench Division (Commercial Court), 19 February 1981 (*The Government of Kuwait v. Sir Frederick S. Snow and partners, et al.*), *Yearbook* VII (1982) pp. 367-372 (UK no. 9); *Austria*: Oberster Gerichtshof, 17 November 1965 (*Party from F.R. Germany v. Party from Austria*), *Yearbook* I (1976) p. 182 (Austria no. 1).
11. *Belgium*: Tribunal de Première Instance, Brussels, 6 December 1988 (*Société Nationale pour la Recherche, le Transport et la Commercialisation des Hydrocarbures (SONATRACH) v. Ford, Bacon and Davis Incorporated*), *Yearbook* XV (1990) pp. 370-377 (Belgium no. 7).
12. See fn. 9 above.

In jurisdictions that have incorporated in their domestic law Article 1(1) of the UNCITRAL Model Law, the following considerations guide the interpretation of the term "commercial":

> "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."[13]

Although the Convention speaks of reservations only in the context of recognition and enforcement of awards, it is generally understood that the reservations also apply to the recognition of arbitration agreements.

E. RELATIONSHIP WITH DOMESTIC LAW AND OTHER TREATIES (ARTICLE VII)

Article VII(1) of the Convention addresses the relationship between the Convention and national laws of the forum and other international treaties binding upon the State where enforcement is sought in the following terms:

> "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he

13. Article 1(1), fn. 2, UNCITRAL Model Law, see **Annex II** to this Guide.

> may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

1. More Favourable Law

Article VII(1) is called the more-favourable-right provision, since it allows a party seeking recognition and enforcement to rely on rules that are more favourable than those of the Convention. More favourable rules may be found: (i) in the national law of the forum or (ii) in treaties applicable in the territory where recognition and enforcement are sought.

In practice, treaties or national law will be more favourable than the New York Convention if they permit recognition and enforcement by reference to less demanding criteria, whether in terms of procedure or of grounds for non-enforcement.

By now it is a widely (though not universally) accepted understanding that the provisions of Article VII(1) also apply to the recognition and enforcement of the arbitration agreements addressed in Article II. Article VII(1) is mostly invoked in order to overcome the formal requirements applicable to the arbitration agreement by virtue of Article II(2) (the writing requirement, see Chapter 2 at D.2.a).

A Recommendation adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 7 July 2006 (see **Annex III** to this Guide) states that

> "also article VII, paragraph 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an agreement".

The history of the Convention also supports this view. The provision on the enforcement of arbitration agreements was included on the last day

of the negotiations. The other provisions were not amended to take account of this last-minute addition. Article VII should thus not be construed as excluding arbitration agreements from its scope.

2. The New York Convention and Other International Treaties

The first part of Article VII provides that the Convention does not affect the validity of other international treaties on the recognition and enforcement of arbitral awards which are in force in the enforcement State. The second part of the same provision specifies that the parties are entitled to seek recognition and enforcement of an award pursuant to either the New York Convention or another treaty or national laws, whichever is more favourable.

The more-favourable-right principle derogates from the classical rules of international law on conflicting treaties (*lex posterior* and *lex specialis*). Pursuant to the more-favourable-right principle, it is the more favourable one that prevails (see above at A.2).

3. The New York Convention and National Law

With respect to the relationship between the New York Convention and national law of the State in which enforcement is requested, three situations must be distinguished.

Case (i) The Convention supersedes national law
Where the Convention and national law both have rules on the same issues, the Convention supersedes national law, unless the national law is more favourable. In some cases the court will have to refer to legislation implementing the Convention.

Case (ii) National law supplements the Convention
Where the Convention contains no rule on a given matter, courts will apply their national law to supplement the Convention.

Case (iii) The Convention refers expressly to national law

Where the Convention refers explicitly to national law, the courts must apply national law to the extent permitted by the Convention. This is the case for example with Article I (in connection with the commercial reservation) and Article V (certain grounds of non-enforcement refer to national law). In that case, the applicable national law is not necessarily the law of the forum but may be the law under which the award was made.

As another example, Article III provides that Contracting States shall recognize and enforce arbitral awards in accordance with the rules of procedure of the State where the award is relied upon. Thus, the procedure for recognition and enforcement of foreign awards is governed by national law, except for the issues of burden of proof and the documents to be submitted (see Chapter 3). A State may not impose substantially more onerous procedural conditions on foreign awards than those governing domestic awards.

Without being exhaustive, the following procedural issues are governed by national law:

- The time limit for filing a request for recognition or enforcement;
- The authority competent to recognize or enforce awards;
- The form of the request;
- The manner in which the recognition or enforcement proceedings are conducted;
- The remedies against a decision granting or refusing a request for recognition or enforcement;
- The availability of a set-off defence or counterclaim against an award.

An issue may arise if a State poses stringent jurisdictional requirements to accept that its courts rule on an enforcement request. In conformity with the purpose of the Convention and its strong pro-enforcement bias, the presence of assets in the territory of the enforcement State should suffice to create jurisdiction for enforcement purposes. In spite of this,

United States courts have required that they have personal jurisdiction over the respondent and award debtor.

4. Total or Partial Application of More Favourable Instruments

As noted above, Article VII permits an interested party to avail itself of a more favourable right it may have under another domestic law or international treaty. The Convention does not specify whether the more favourable regime applies only in respect of a specific provision that is considered to be more favourable or if rather it should apply in its entirety. Courts have adopted different positions on this issue. Some courts consider that the more favourable law or treaty must apply in its totality, to the exclusion of the Convention.[14] In other words, a party may not "mix and match" provisions of the Convention with those of national laws or other treaties. Other courts are of the view that Article VII merely requires courts to protect any more favourable rights the interested parties may have under other treaties and local laws; a task that, in their view, allows the joint application of provisions of the Convention and of national laws or other treaties[15] (See Chapter 2 at C.4.a).

F. CONSEQUENCES OF THE NON-APPLICATION OF THE NEW YORK CONVENTION

The non-application or incorrect application of the New York Convention engages in principle the international responsibility of the State. A breach of the State's obligations under the Convention (see this Chapter below at F.1) may in certain circumstances also constitute a

14. *Germany*: Bundesgerichtshof, 21 September 2005, paras. 8-10; *Yearbook* XXXI (2006) pp. 640-728 (Germany no. 89).
15. *United States*: United States District Court, District of Columbia, 31 July 1996 (*Chromalloy Aeroservices Inc. v. The Arab Republic of Egypt*), Civil No. 94-2339 (JLG); *Yearbook* XXII (1997) pp. 881-1059 (United States no. 230).

breach of a bilateral or multilateral investment treaty (see this Chapter below at F.2). In any event, the award will remain unaffected by the breaches (see this Chapter below at F.3).

1. Breach of the New York Convention

Although the Convention does not have a dispute-resolution clause, the Convention is an international treaty creating obligations for the Contracting States under international law.

As explained above, the Contracting States have undertaken to recognize and enforce foreign arbitral awards and arbitration agreements. When a party requests the enforcement and/or recognition of an award or an arbitration agreement falling within the scope of the Convention, a Contracting State must apply the Convention. The Contracting State may not impose stricter procedural rules and substantive conditions upon recognition and enforcement and where the Convention is silent on a procedural matter, and it may not impose substantially more onerous procedural conditions than those governing domestic awards.

Within the Contracting States, the principal organs in charge of the application of the New York Convention are the courts. In international law, the acts of courts are regarded as acts of the State itself. Thus, if a court does not apply the Convention, misapplies it or finds questionable reasons to refuse recognition or enforcement that are not covered by the Convention, the forum State engages its international responsibility.

As soon as the notification of the Convention is effective for a given Contracting State, the responsibility of that State will be engaged on the international level irrespective of whether the Convention has been properly implemented by national legislation or whether it has been published or otherwise promulgated under domestic rules. Hence, the fact that the text of the Convention has for example not been published in the relevant official gazette does not change the State's obligations to comply with the Convention under international law.

2. Breach of Investment Treaty

Depending on the circumstances, a breach of the obligation to recognize and enforce arbitration agreements and awards can give rise to a breach of another treaty. This may be so of the European Convention on Human Rights and especially its first Protocol and of investment treaties. Through the latter, States guarantee foreign investors that, among other protections, they will receive fair and equitable treatment and will not be subject to expropriation (unless specific conditions are met). Decisions in investment treaty arbitrations have held that a State had breached its obligations under a bilateral investment treaty because its courts had failed to recognize a valid arbitration agreement.[16]

3. Award is Unaffected

The refusal of a State to enforce or recognize an award has effect only within the territory of that State. The successful party will thus still be entitled to rely on the award and ask for its enforcement in other States.

16. *Saipem SpA v. Bangladesh*, International Centre for Settlement of Investment Disputes (ICSID) case no. ARB/05/07 and *Salini Costruttori SpA v. Jordan*, ICSID case no. ARB/02/13, both available online at <www.icsid.worldbank.org>.

CHAPTER 2
REQUEST FOR THE ENFORCEMENT OF AN ARBITRATION AGREEMENT

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A. INTRODUCTION

To ensure that the parties' original intention to have their disputes settled by arbitration cannot be frustrated by a unilateral submission of the dispute to courts, Article II of the Convention sets out the conditions under which courts must refer the parties to arbitration, and limits the grounds on which a party to an arbitration agreement could challenge its validity:

> "(1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
> (2) The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
> (3) The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

Prior to the rendering of the award, there are situations in which a court may confront a challenge to the validity of an arbitration agreement. The most frequent circumstance will be when, as stated in Article II(3),

a matter in respect of which the parties have made an arbitration agreement is nonetheless brought to court, and the respondent requests the court to refer the matter to arbitration. Similarly, the court may be seised of a request for an anti-arbitration injunction or asked to take measures in support of arbitration proceedings – such as making default appointment of an arbitrator – that will be opposed by the other party on the ground that the arbitration agreement is invalid.

When faced with these kinds of situations, courts should adhere to the purpose of the Convention and the best practices developed in the Contracting States over more than sixty-five years.

The principles in Article II of the Convention also extend to the recognition and enforcement of awards through the operation of Article V(1)(*a*). Specifically, Article V(1)(*a*) provides that courts may deny recognition and enforcement of an award if the relevant arbitration agreement is not valid under the law applicable to it, or the parties lacked the capacity to agree to arbitrate.

B. GENERAL MATTERS

When entertaining a request to enforce an arbitration agreement, courts must first consider several general matters not addressed by the Convention. In particular, the courts must consider: the applicable standard of review; the latest date at which a request for the enforcement of an arbitration agreement can be introduced; and whether the court's decision can proceed before an arbitration has been filed.

1. Scope of Judicial Review of Challenges to the Arbitral Tribunal's Jurisdiction

Two generally accepted principles of arbitration should be considered in determining the court's standard of review in a pre-award stage of the procedure.

First, the "competence-competence" principle (also sometimes referred to as *Kompetenz-Kompetenz*) permits arbitrators to hear any challenge to their jurisdiction and even reach the conclusion that they do not have jurisdiction. This power is essential if the arbitrators are to carry out their task properly. It would be a major impediment to the arbitral process if the dispute were to be remanded to the courts simply because the existence or validity of an arbitration agreement has been questioned. If arbitrators lacked this power, "a party could stall the arbitration at any time merely by raising jurisdictional objections that could then only be resolved in possibly lengthy court proceedings."[17]

The Convention does not explicitly require the application of the competence-competence principle. However, several provisions tend to support the application of the principle nonetheless. For example, Articles II(3) and V(1) of the Convention do not prohibit that both arbitral tribunals and courts may rule on the question of the arbitrator's jurisdiction to deal with a particular dispute. In addition, the provisions of Articles V(1)(*a*) and V(1)(*c*) – dealing with recognition and enforcement of awards – imply that an arbitral tribunal has rendered an award despite the existence of jurisdictional challenges.

Second, and closely intertwined with the principle of "competence-competence", is the principle of the severability of the arbitration clause from the main contract (also referred to as "separability" or the "autonomy of the arbitration clause"). This principle implies that, first, the validity of the main contract does not in principle affect the validity of the arbitration agreement contained therein; and second, the main contract and the arbitration agreement may be governed by different laws.

These principles, taken together, have been interpreted by courts in several jurisdictions to give priority to the determination of the arbitral tribunal's jurisdiction by the arbitral tribunal itself. As a result, the courts' scrutiny of an arbitration agreement that is purportedly null and

17. Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, at 479 (Kluwer 1989).

void, inoperative or incapable of being performed is limited to self-evident defects (*prima facie* review) at the early stage of a dispute. These courts have found that the arbitration agreement is invalid only in manifest cases and are only empowered to fully review the arbitral tribunal's findings on jurisdiction when seised of a request for enforcement of an arbitral award or at the setting-aside stage (the latter not being regulated in the Convention). While this is desirable in light of the object and purpose of the Convention, it should be noted again that the Convention takes no position on this.

2. Timing of the Referral Request in Court Proceedings

The Convention does not set a deadline for requesting the referral to arbitration. The answer to when a referral request must be lodged lies in national arbitration or procedural law. If a party fails to raise the request in a timely manner, it may be considered that it has waived the right to arbitrate and that the arbitration agreement becomes inoperative.

Most national laws provide that the referral to arbitration must be requested before any defence on the merits, i.e., *in limine litis.*[18]

3. Concurrent Arbitration Proceedings Not Required for Referral to Arbitration (Referral is Mandatory)

The admissibility of a request for referral and the court's jurisdiction over it should be decided regardless of whether arbitration proceedings have already been initiated, unless national arbitration law provides otherwise.

Although this is not provided for in the Convention, most courts hold that the actual commencement of arbitration proceedings is not a requirement for asking the court to refer the dispute to arbitration.

18. See, e.g., UNCITRAL Model Law, Article 8(1).

C. REQUIREMENTS FOR THE ENFORCEMENT OF AN ARBITRATION AGREEMENT

To enforce an arbitration agreement under Article II of the Convention, the court seised must be satisfied that:

1. The arbitration agreement falls under the scope of the Convention;
2. There is a dispute, it arises out of a defined legal relationship, whether contractual or not, and the parties intended to have this particular dispute settled by arbitration;
3. The dispute is arbitrable (i.e., capable of settlement by arbitration);
4. The arbitration agreement is formally valid (evidenced in writing) and substantively valid (not null and void, inoperative, or incapable of being performed); and
5. The arbitration agreement is binding on the parties to the dispute that is before the court.

The parties must be referred to arbitration if there is an affirmative finding in respect of each of the above matters.

1. The Arbitration Agreement Must Fall Under the Scope of the Convention

For an arbitration agreement to benefit from the protection of the Convention, it has to come within its scope (see Chapter 1 at B.2).

2. There Must Be a Dispute, It Must Arise Out of a Defined Legal Relationship, Whether Contractual or Not, and the Parties Must Have Intended to Have This Particular Dispute Settled by Arbitration

For an arbitration to take place, there should be a dispute between the parties ("differences", in the language of Article II(1)). Courts are not

required to refer the parties to arbitration where there is no dispute between them, although this does occur very rarely.

Article II(1) requires that these disputes arise out of a "defined legal relationship, whether contractual or not". It is widely accepted that cases arising under investment treaties fall within the ambit of this provision (See Chapter 1 at D.2 on the commercial reservation). Whether a claim in tort is covered depends on the wording of the arbitration clause, i.e., whether the clause is broadly worded, and whether the claim in tort is sufficiently related to the contractual claim.

However, a party to an arbitration agreement may still argue that the claims asserted against the party relying on the arbitration agreement do not come within the ambit of the arbitration agreement. The requirement that the dispute fall within the scope of the arbitration agreement for the parties to be referred to arbitration is implicit in Article II(3) which states as a condition thereto that the action be "in a matter in respect of which the parties have made an agreement within the meaning of this article".

The question sometimes arises whether under a strict interpretation, the term "arising under" could be understood as having a narrower meaning than "arising out of" a defined legal relationship. Similar questions arise with regard to the scope of "relating to" and "concerning".

However, as suggested in the English Court of Appeal case of *Fiona Trust v. Privalov*,[19] attention should rather be focused on whether it can be reasonably inferred that the parties intended to exclude the dispute at hand from arbitral jurisdiction. As the Court then put it

> "[o]rdinary business men would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating

19. *United Kingdom*: England and Wales Court of Appeal, 24 January 2007 (*Fiona Trust & Holding Corporation & Ors v. Yuri Privalov & Ors*) [2007] EWCA Civ 20, para. 17; ICCA *Yearbook Commercial Arbitration* XXXII (2007) pp. 654-682 at [6] (UK no. 77).

whether a particular case falls within one set of words or another very similar set of words".

The decision was confirmed by the House of Lords who "applauded" the opinion of the Court of Appeal.[20]

In addressing questions of scope, courts may have to grapple with the language of some arbitration agreements that may seem to cover only a certain type of claims or to be limited to a specific purpose. However, the disadvantages of having disputes under the same contract allocated to different jurisdictions are substantial. Therefore, if an arbitration clause is broad, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where the exclusion is vague.[21]

While the question of scope is addressed by the Convention, the question of the contents of the arbitration agreement is not. Sometimes parties, particularly in certain trades, use "short form" arbitration clauses in their contracts, which only indicate minimum parameters for their chosen dispute resolution procedure. The courts will need to analyse whether, even with minimum parameters, it is clear that the parties wish to arbitrate their dispute, and there is enough information to ascertain what the parties have consented to in that respect (e.g., what arbitral institution, if any; what place of arbitration, if meant to be designated).

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20. *United Kingdom*: House of Lords, 17 October 2007 (*Fili Shipping Company Limited (14th Claimant) and others v. Premium Nafta Products Limited (20th Defendant) and others*) [2007] UKHL 40, para. 12; *Yearbook* XXXII (2007) pp. 654-682 at [45] (UK no. 77).
21. *Cf. United States*: United States District Court, Eastern District of Pennsylvania, Civil Action no. 17-5399, 22 August 2018 (*PDC Machines Inc. v. NEL Hydrogen A/S (formerly known as H2 Logic A/S et al.)*), *Yearbook* XLIV (2019) (US no. 979), deciding that a broadly worded arbitration clause in a cooperation agreement did not cover disputes arising under a related prior non-disclosure agreement because the terms of the cooperation agreement did not expressly refer to the earlier non-disclosure agreement, while the earlier non-disclosure agreement contained an entire agreement clause.

3. The Subject Matter of the Dispute Must Be Arbitrable ("Capable of Settlement by Arbitration")

Having ascertained that there is a dispute between the parties arising out of a legal relationship that the parties intended to submit to arbitration, the court cannot recognize or enforce the arbitration agreement if the agreement concerns a subject matter that is not arbitrable, i.e., a matter that is not "capable of settlement by arbitration" for the purposes of Article II(1).

The Convention's terms are generally accepted as referring to those matters deemed non-"arbitrable" because they belong exclusively to the domain of the courts. Each State decides which matters may or may not be resolved by arbitration in accordance with its own political, social, and economic policy. Classic examples include domestic relations (divorces, paternity disputes...), criminal offences, labour or employment claims, bankruptcy, tax controversies, etc. However, the domain of non-arbitrable matters has shrunk considerably over time because of the growing acceptance of arbitration. It is now not exceptional for certain aspects of employment claims or claims relating to a bankruptcy to be arbitrable.

Moreover, many leading jurisdictions recognize a distinction between purely domestic arbitrations and those that are of an international nature and allow a broader scope of arbitrability with respect to the latter.

The US courts have used the term "arbitrability" in a starkly different sense. Whereas most national legal systems understand the "non-arbitrability" criterion as relating to the character of the dispute's *general* subject matter, the US courts qualify a dispute as "arbitrable" or "non-arbitrable" based upon issues *specific* to the parties' individual dispute – including, e.g., the existence, validity, and scope of an arbitration agreement.[22] Lawyers and judges should

22. E.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-947 (1995).

keep this terminological distinction carefully in mind to avoid confusion when analysing US court decisions.

a. The Law Applicable to Determine Arbitrability

Article II(1) is silent on the issue of the law under which arbitrability is to be determined, leaving it to the court to decide this issue.

As regards arbitrability at the early stage of a dispute, courts may choose between several options, including the *lex fori* (the court's own national standards of arbitrability); the law of the arbitral seat; the law governing the parties' arbitration agreement; the law governing the party involved, where the agreement is with a State or State entity; or the law of the place where the award will be enforced.

In practice, the most suitable and least problematic solution is the application of the *lex fori*. This option is the most suitable (as long as the court would have jurisdiction in the absence of an arbitration agreement) under the Convention since this approach accords with Article V(2)(*a*), which provides for the application of the standards of arbitrability of the *lex fori* in relation to the enforcement of awards. And it is the least problematic as the application of the alternative solutions is comparatively more difficult: the standards of arbitrability by domestic courts are not always contained in statutes but rather set forth by case law, implying a thorough inquiry of foreign legal orders.

In cases involving a State as party, it is now becoming generally accepted that the State may not invoke its own law on the non-arbitrability of the subject matter.[23]

23. The Swiss Private International Law Act, Article 177(2) provides:

> "A State, or an enterprise held by or an organization controlled by a State, that is party to an arbitration agreement, may not invoke its own law to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement."

b. International Arbitration Agreements Should Be Subject to Consistent Standards of Arbitrability

In any event, arbitrability standards should be interpreted taking into account the presumptive validity of international arbitration agreements enshrined in the Convention. (The presumptive validity is discussed in this Chapter, C.4 below.) Accordingly, not all non-arbitrability exceptions that may succeed regarding purely domestic arbitration agreements may be usefully invoked against international arbitration agreements.

There is no universal criterion to distinguish between domestic and international arbitration agreements. Some laws contain formal definitions (such as diversity of nationalities); others refer more intuitively to "international transactions" without further definition.

4. The Arbitration Agreement Must Be Formally and Substantively Valid

Article II(1) states that the arbitration agreement should be "in writing". This requirement is defined in Article II(2) as including "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". This writing requirement speaks to the formal validity of the arbitration agreement under the Convention.

As any other contracts, arbitration agreements are also subject to rules of formation and substantive validity. This is summarily suggested by Article II(3), which provides that a court should comply with a request for referral to arbitration unless it finds that the putative arbitration agreement is "null and void, inoperative or incapable of being performed".

These questions of formal and substantive validity will be discussed in more detail below. The courts, when examining validity, should keep in mind that arbitration agreements that come within the scope of the Convention are presumed valid. The drafters of the Convention

intended to eliminate the possibility for a party to an arbitration agreement to go back on its commitment to arbitrate and instead submit the dispute to State courts. Accordingly, the Convention sets forth a "pro-enforcement", "pro-arbitration" regime which rests on the presumptive validity – formal and substantive – of arbitration agreements ("Each Contracting State *shall recognize* an agreement in writing ..."). This presumptive validity can only be reversed on a limited number of grounds ("... *unless* it finds that *the said agreement is null and void, inoperative or incapable of being performed*").

The pro-enforcement bias means that the New York Convention supersedes less favourable national legislation. Courts may not apply stricter requirements under their national law for the validity of the arbitration agreement (such as, for example, the requirement that the arbitration clause in a contract be signed separately).

In this respect, practice shows that courts generally follow a guiding principle that an arbitration agreement is valid where it can be reasonably asserted that the offer to arbitrate – in writing – was accepted (that there has been a "meeting of the minds"). This acceptance may be expressed in different ways and is fact specific.

a. Formal Validity: The Arbitration Agreement Must Be "In Writing"

Enforcement of an arbitration agreement cannot proceed under the Convention if the writing requirement set out in Article II is not met. Article II(2) defines an 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".

It is clear that an arbitration agreement signed by both parties or an arbitration clause incorporated into a signed contract satisfies the writing requirement. There is no need for a separate signing of the arbitration clause.

In addition, under Article II(2) an arbitration agreement contained in an exchange of letters, telegrams or similar communications meets the written form. In this case, and as opposed to the first part of Article

II(2) – which refers to an "arbitral clause in a contract or an arbitration agreement, signed by the parties" – there is no requirement that the letters and telegrams be signed.

The Convention sets a uniform international rule. Its drafters sought to reach consensus on a matter on which national legislations had – and still have – different approaches, by establishing a comparatively liberal substantive rule on the writing requirement, which prevails over domestic laws.

Article II(2) thus sets a "maximum" standard that precludes Contracting States from requiring additional or more demanding formal requirements under national law. Examples of more demanding requirements include using a particular typeface or size for the arbitration agreement, memorializing the agreement in a public deed or including a separate signature, etc.

In addition to establishing a maximum standard, Article II(2) used to be construed as also imposing a minimum international requirement, according to which courts were not entitled to require less than provided for the written form under the Convention. However, this is no longer the general understanding.

Following current international trade practices, Article II(2) has been increasingly understood as not precluding the application of less stringent standards of form by Contracting States.

This reading finds support in Article VII(1). As mentioned above in Chapter 1, Article VII(1) is intended to allow the application of any national or international provisions that may be more favourable to any interested party. Although this provision was adopted in relation to the enforcement of arbitral awards, there is a trend toward applying it to arbitration agreements as well. This approach, however, is not universally accepted, in particular as the more-favourable-right provision of Article VII(1) is seen by some courts as a provision allowing them to opt out of the Convention in favour of domestic law, but not to cherry-pick between the Convention and domestic law.

Therefore, many courts have sought to meet the modern demands of international trade not by dispensing with Article II(2) altogether but

rather by interpreting it expansively – readily accepting that there is an agreement in writing – or reading it as merely setting out some examples of what is an agreement "in writing" within the meaning of Article II(1) (on Article VII(1), see Chapter 1 at E.4)

Both of these approaches regarding Article II(2) have been endorsed by UNCITRAL in its Recommendation of 7 July 2006 (see **Annex III** to this Guide). UNCITRAL recommended that

> "article VII, paragraph 1 of the [Convention] should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement"

and that

> "article II, paragraph 2, of the [Convention] be applied as recognizing that the circumstances described therein are not exhaustive".

In all events, it is now understood that an inflexible application of the Convention's writing requirement would contradict the current and widespread business usages and be contrary to the pro-enforcement thrust of the Convention.

Despite the widespread trend to apply the "in writing" requirement under the Convention liberally, there are settings where the formal validity of arbitration agreements may be challenged. Some common situations are discussed below.

1. Arbitration clause included in a document referred to in the main contractual document (incorporation by reference)

It is common in practice that the main contractual document refers to standard terms and conditions or other standard forms, which may contain an arbitration clause.

The Convention is silent on this matter. There is no explicit indication whether arbitration clauses incorporated by reference comply with the formal requirement established in Article II.

The solution to this issue should be case-specific, but certain criteria should be considered, such as: the status of the parties (for example, whether they are experienced businesspersons); trade usages of the specific industry; whether the main contract explicitly refers to the arbitration clause in standard terms and conditions; and whether the document containing the arbitration clause was communicated to the other party prior to or at the time of the conclusion of the contract.

If, after applying these criteria, it is evident that the parties were or should have been aware of the existence of an arbitration agreement incorporated by reference, courts have been generally inclined to uphold the formal validity of the arbitration agreement.

For example, arbitration clauses may be considered as agreed when they are contained in tender documents referred to in standard terms and conditions,[24] or in standard terms and conditions referred to in purchase orders – provided that the former have been attached or form part of the latter.[25]

24. *France*: Cour d'Appel, Paris, 26 March 1991 (*Comité Populaire de la Municipalité d'El Mergeb v. Société Dalico Contractors*) Revue de l'Arbitrage 1991, p. 456.

25. *United States*: United States District Court, Western District of Washington, 19 May 2000 (*Richard Bothell and Justin Bothell/Atlas v. Hitachi, et al.*, 19 May 2000, 97 F.Supp.2d. 939 (W.D. Wash. 2000); *Yearbook* XXVI (2001) pp. 939-948 (US no. 342).

Courts have diverging opinions on whether a reference in a bill of lading to a charter-party containing an arbitration agreement is sufficient. Here too, the recommended criterion is whether the parties were or should have been aware of the arbitration agreement. If the bill of lading specifically mentions the arbitration clause in the charter-party, it is generally considered sufficient.[26] Courts have been less often willing to consider a general reference to the charter-party sufficient.[27]

2. Arbitration clause in contractual document not signed but subsequently accepted

Here, consent to arbitration must be established in the light of the circumstances of the case, depending on how the subsequent acceptance is carried out.

For instance, it may be that a contract containing an arbitration clause is accepted in writing with general reservations or conditions subsequent. In such case, it is reasonably safe to assume that the arbitration agreement can be upheld in so far as it has not been expressly objected to, and there is a writing that evidences the parties' agreement to arbitrate. Indeed, absent specific language to the contrary, neither general reservations nor potential conditions subsequent (e.g.,

26. *Cf. Spain*: Audencia Territorial, Barcelona, 9 April 1987 (*Parties not indicated*) 5 Revista de la Corte Española de Arbitraje (1988-1989); *Yearbook* XXI (1996) pp. 671-672 (Spain no. 25), deciding that a general reference in a bill of lading does not validly incorporate the arbitration clause contained in the charter party.
27. *United States*: United States District Court, Southern District of New York, 18 August 1977 (*Coastal States Trading, Inc. v. Zenith Navigation SA and Sea King Corporation*), *Yearbook* IV (1979) pp. 329-331 (US no. 19) and United States District Court, Northern District of Georgia, Atlanta Division, 3 April 2007 (*Interested Underwriters at Lloyd's and Thai Tokai v. M/T SAN SEBASTIAN and Oilmar Co. Ltd.*) 508 F.Supp.2d (N.D. GA. 2007) p. 1243; *Yearbook* XXXIII (2008) pp. 935-943 (US no. 619).

stipulations such as "this confirmation is subject to details") affect the arbitration clause.[28]

It is increasingly the case that the courts are faced with arbitration agreements concluded in the context of investment arbitrations, where the State provides a standing offer to arbitrate in a treaty, which an investor subsequently accepts in writing when it files its request for arbitration. There is no debate that this satisfies Article II's writing requirement.[29]

3. No tacit acceptance

By contrast, if a contract containing an arbitration clause is sent from one party to another, and the latter does not reply but performs the contract, this raises the issue of tacit consent or implied acceptance to arbitration. Such a situation arises frequently in modern business practices, where economic operations are often carried out on the basis of summary documents, such as purchase orders or booking notes, that do not necessarily require a written reply from the other party.

In principle, tacit acceptance does not meet the writing requirement under the Convention, and some courts have endorsed this view.[30] However, in line with the understanding that the Convention should be interpreted in the context of evolving international trade practices, some courts have held that tacit acceptance of an offer made in writing (e.g.,

28. *United States*: United States Court of Appeals, Second Circuit, 15 February 2001 (*US Titan Inc. v. Guangzhou ZhenHua Shipping Co.*) 241 F.3d (2nd Cir. 2001) p. 135; *Yearbook* XXVI (2001) pp. 1052-1065 (US no. 354).
29. See, e.g., *United States*: United States Court of Appeals, Second Circuit, 17 March 2011 (*Republic of Ecuador v. Chevron Corporation, et al.*), *Yearbook* XXXVI (2011) (US no. 737).
30. See, e.g., *Germany*: Oberlandesgericht, Frankfurt am Main, 26 June 2006 (*Manufacturer v. Buyer*) IHR 2007 pp. 42-44; *Yearbook* XXXII (2007) pp. 351-357 (Germany no. 103).

through performance of contractual obligation[31] or the application of trade usages that allow for the tacit conclusion of an arbitration agreement[32]) should be considered sufficient for purposes of Article II(2). These latter decisions also could have been decided by opting out of the Convention through its Article VII(1) to benefit from more favourable domestic law regarding the writing requirement.

In this respect, in 2006, UNCITRAL amended Article 7 (Definition and form of the arbitration agreement) of its Model Law on International Commercial Arbitration (see **Annex II** to this Guide), providing two Options. Option I introduced a flexible definition of an agreement in writing:

> "Article 7(3). An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, *by conduct*, or by other means."

This definition recognizes a record of the "contents" of the agreement "in any form" as equivalent to traditional writing. The written form is still needed.

Option II eliminated the writing requirement.

In addition, as noted, UNCITRAL has recommended that Article II(2) of the New York Convention be applied "recognizing that the circumstances described therein are not exhaustive" (see this Chapter above at D.2.a and **Annex II** to this Guide).

Although these options and recommendations do not have a direct impact on the Convention, they: (i) are an indication of a trend toward a liberal reading of the Convention's requirement; and (ii) reflect an evolution of the domestic arbitration laws of many countries that have

31. *United States*: United States District Court, Southern District of New York, 6 August 1997 (*Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*), *Yearbook* XXIII (1998) pp. 1029-1037 (US no. 257).
32. *Germany*: Bundesgerichtshof, 3 December 1992 (*Buyer v. Seller*), *Yearbook* XX (1995) pp. 666-670 (Germany no. 42).

adopted the UNCITRAL Model Law, which can be invoked through the more-favourable-right provision of Article VII(1) of the Convention.

4. Arbitration agreement contained in exchange of electronic communications

The wording of Article II(2) was intended to cover the means of communication that existed in 1958. It can be reasonably construed as covering equivalent modern means of communication. The criterion is that there should be record in writing of the arbitration agreement. All means of communication that fulfil this criterion should then be deemed as complying with Article II(2), including electronic communications.

With respect to electronic communications, the UNCITRAL Model Law adopts the following approach:

> "The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference."

b. Substantive Validity: The Arbitration Agreement is Not "Null and Void, Inoperable, or Incapable of Being Performed"

The terms "null and void, inoperative or incapable of being performed" were not addressed by the drafters. The following developments aim at giving a meaning to those terms.

1. Law applicable to the substantive validity of the arbitration agreement

Article V(1)(*a*) refers to the law to which the parties have subjected the arbitration agreement as the law applicable to its validity (see Chapter 3). In practice, however, parties rarely choose beforehand the law to govern the formation and substantive validity of their arbitration agreement. This determination is therefore to be made by the court

seised of a challenge thereto. There are several possibilities but some of the most commonly adopted solutions are either (as mentioned in the Convention) the law of the arbitral seat which may be in a country other than that of the court (Article V(1)(*a*) second rule, by analogy), the *lex fori* or the law governing the contract as a whole. In 2020, the UK Supreme Court determined that where the parties have not specified the law applicable to the arbitration agreement, the law chosen by the parties to govern a contract containing the arbitration clause will generally govern the arbitration agreement as well.[33] Some jurisdictions have also upheld the validity of an arbitration agreement without reference to any national law, referring instead exclusively to the parties' common intention. In general, the driving force behind the choice of the substantive law appears to be the one more favourable to the validity of the arbitration agreement.[34]

2. "Null and void"

The "null and void" exception can be interpreted as referring to cases in which the arbitration agreement is affected by some invalidity from the outset. Typical examples of defences falling within this category include unconscionability, illegality or mistake. Defects in the formation of the arbitration agreement such as incapacity or lack of power should also be included (see also Chapter 3 at D.1, Article V(1)(*a*) incapacity).

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33. *United Kingdom*: Supreme Court (*Enka Insaat ve Sanayi AS v. OOO Insurance Company Chubb*) [2020] UKSC 38.
34. A formulation of this approach is set out in Article 178(2) of the Swiss Private International Law Act which provides:

    "As to substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law."

If the court accepts the severability principle (see this Chapter above at B.1), only the invalidity of the arbitration agreement, rather than the invalidity of the main contract, would prevent the court from referring the parties to arbitration. By way of example, a contract the subject matter of which is the sharing of a market in violation of competition rules is illegal. However, such illegality does not affect the consent to submit related disputes to arbitration as expressed in an arbitration clause contained in the contract. This being said, defences such as fraud or fraudulent inducement, or duress, which speak to whether a party could have consented at all to arbitration, may more readily be decided by the courts directly.

3. "Inoperative"

An inoperative arbitration agreement for the purposes of Article II(3) is an arbitration agreement that was at one time valid but that has ceased to have effect.

The "inoperative" exception typically includes cases of waiver, revocation, repudiation or termination of the arbitration agreement. Similarly, the arbitration agreement should be deemed inoperative if the same dispute between the same parties has already been decided before a court or an arbitral tribunal (*res judicata* or *ne bis in idem*).

For example, the Italian Supreme Court decided that the Italian courts had jurisdiction over a dispute notwithstanding the arbitration clause in the contract because, due to the embargo declared against Iraq, the parties could no longer freely dispose of the underlying contractual rights at the relevant time of filing of the first instance action.[35]

35. *Italy*: Supreme Court of Cassation of Italy, Case no. 23893, 24 November 2015 (*Government and Ministries of the Republic of Iraq v. Armamenti e Aerospazio SpA et al.*), *Yearbook* XLI (2016) p. 503 (Italy no. 189). Although the Supreme Court framed its decision as an analysis as to whether the arbitration clause was "null and void" because the dispute had become non-arbitrable, the facts appear to align with the question of the clause's inoperability.

4. "Incapable of being performed"

This defence includes cases where the arbitration cannot proceed due to physical or legal impediments.

Physical impediments to proceeding with arbitration cover very few situations such as the death of an arbitrator named in the arbitration agreement or the arbitrator's refusal to accept the appointment, when replacement was clearly excluded by the parties. Depending on the particular provisions of the applicable law, these cases could lead to the impossibility of performing the arbitration agreement.

Much more frequently, arbitration clauses may be so badly drafted as to legally impede the commencement of arbitration proceedings. These clauses are usually referred to as "pathological". Strictly speaking, such arbitration agreements are actually null and void and it is often this ground that is raised in court. Such clauses should be interpreted according to the same law as that governing the formation and substantive validity of the arbitration agreement.

The following scenarios are frequent in practice.

(i) Where the referral to arbitration is optional

Some arbitration agreements stipulate that the parties "may" or "can" refer their disputes to arbitration. Such permissive words make it uncertain if the parties intended to refer their disputes to arbitration.

Such arbitration clauses should nonetheless be upheld, in keeping with the general principle of interpretation according to which contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

(ii) Where the contract provides for arbitration as well as jurisdiction of the courts

In such cases, it is sometimes possible to reconcile both stipulations and uphold the arbitration agreement. To achieve this the court must establish the parties' true intention. In particular, the parties should be referred to arbitration only if they indeed wished to have their disputes

settled by that means, whether or not in combination with another dispute-resolution mechanism.

For example, the Singapore High Court held that an agreement that "irrevocably" submitted to the jurisdiction of the courts of Singapore was not, upon a proper construction, necessarily irreconcilable with another clause of the same contract that provided for arbitration. The Court found that the parties did intend to have their disputes decided by arbitration and that the reference to Singaporean jurisdiction operated in parallel by identifying the supervisory court of the arbitration (the *lex arbitri*).[36]

Such interpretation follows the general principle according to which contract terms shall be interpreted to give them effect.

By contrast, the Swiss Federal Tribunal decided that there was no valid arbitration agreement where the clause at issue provided for disputes be referred to AAA arbitration or "to any other US court". The Federal Tribunal considered it irrelevant that the clause was headed "Arbitration" and referred to the rules of the AAA, as no clear intent to arbitrate could be ascertained.[37]

(iii) Where the dispute resolution clause foresees steps prior to arbitration

Parties are increasingly including "escalation" or "tiered" clauses in their contracts, which foresee them taking steps to, for instance, negotiate or mediate (or both) before resorting to arbitration. The courts may be called upon to decide whether the pre-arbitral steps have been complied with and, if not, whether this precludes referring the parties to arbitration. Practice shows that these clauses must be very specific and leave no doubt about whether the pre-arbitral steps are mandatory for courts to enforce them. Even when the language is clear, many courts have considered that these pre-arbitral steps are a jurisdictional

36. *Singapore*: High Court, 12 January 2009 (*P.T. Tri-M.G. Intra Asia Airlines v. Norse Air Charter Limited*), *Yearbook* XXXIV (2009) pp. 758-782 (Singapore no. 7).

37. *Switzerland*: Bundesgerichtshof, 25 October 2010 (*X Holding AG et al. v. Y Investments NV*), *Yearbook* XXXVI (2011) p. 343 (Switzerland no. 43).

question that the arbitrators should decide pursuant to the competence-competence principle or are a question of admissibility instead of jurisdiction that, in all events, is for the arbitrators to decide.

Similarly, in the investment arbitration context, investment treaties often provide for a period during which the State and investor must negotiate before the investor can file for arbitration (known as the "cooling off period") or may include a provision whereby the investor must pursue its claims for a certain period before the State's courts before resorting to arbitration. Some courts have characterized the local litigation requirement as a pre-arbitration "condition precedent" that was procedural in nature, such that any determination regarding compliance with the condition was a matter for the arbitrators, not the courts.

(iv) Where the arbitration rules or arbitral institution are inaccurately designated

In some cases the inaccuracy of a clause makes it impossible for the court to determine the arbitral forum chosen by the parties. The arbitration cannot proceed and the court should then assume jurisdiction over the dispute.

For example, the Supreme Court of the Republic of Belarus decided that there was no valid arbitration agreement in the case before it when the wording of the arbitration clause – which referred to the "Arbitral Centre of the Federal Economic Chamber, Vienna, in accordance with its Rules" – failed to identify the competent arbitration institute and applicable rules, as it appeared from the Internet that there were two distinct institutes, operating under distinct rules, at the same Vienna address: the International Arbitration Centre of the Austrian Federal Economic Chamber and the Vienna International Arbitral Centre.[38]

In some other cases, however, the inaccuracy may be overcome by reasonable interpretation of the clause. Alternatively, courts may rescue

38. *Belarus*: Supreme Court of the Republic of Belarus, Judicial Chamber on Economic Cases, Case no. 189-6/2019/64A/336K, 7 April 2020 (*"D" UAB v. "S" LLC*), *Yearbook* XLVI (2021) p. 232 (Belarus no. 3).

a pathological clause by severing a provision that makes it unenforceable, while still retaining enough of the agreement to put the arbitration into operation.

For example, the United States District Court for the Eastern District of Wisconsin examined an arbitration agreement providing (in the English version) that disputes be arbitrated in Singapore "in accordance with the then prevailing Rules of the International Arbitration" and (in the Chinese version) that arbitration would be conducted "at the Singapore International Arbitration Institution".[39] The Court read this to mean the "well-known arbitration organization known as the Singapore International Arbitration Centre".

(v) Where there is no indication whatsoever as to how the arbitrators are to be appointed ("short form clauses")

It may happen that an arbitration clause uses language such as "General/average arbitration, if any, in London in the usual manner".

In general, such a clause should be upheld only in so far as it contains a detail likely to link the short form clause to a country whose courts are able to provide support for the arbitration to commence.

Such a "linking detail" can be found in the example given above. The parties could apply to the English courts to have the arbitrators appointed. The short form clause could also be upheld if "the usual manner" referred to allows identification of the elements necessary to trigger the commencement of arbitration. The expression "usual manner" may indeed be interpreted as a reference to past practices among members of the same commodity or trade association, thus suggesting the application of the arbitration rules of this association, if any.

In the absence of any "linking detail", short form clauses could not be upheld.

39. *United States*: United States District Court, Eastern District of Wisconsin, 24 September 2008 (*Slinger Mfg. Co., Inc. v. Nemak, S.A., et al.*), *Yearbook* XXXIV (2009) pp. 976-985 (US no. 656).

5. The Arbitration Agreement Must Be Binding on the Parties to the Dispute That Is Before the Court (Non-Signatories)

In practice, courts may find themselves in situations where they are asked to refer to arbitration parties that are not signatories to the arbitration agreement: either because they wish to be referred to arbitration, or because another party is seeking to refer them to arbitration. Accordingly, the courts must determine whether the non-signatory may be deemed a party to the "original" arbitration agreement and, if so, whether the Convention's requirements are met with respect to that party.

a. Formal Validity: Needs Not Be Re-examined With Respect to Non-Signatories

The question arises whether binding a non-signatory to an arbitration agreement could be read as conflicting with the writing requirement set out in the Convention. The answer is "probably not". A number of reasons support this view.

The question of formal validity is independent of the assessment of the parties to the arbitration agreement, which concerns the merits and is not subject to form requirements. Once it is determined that a formally valid arbitration agreement exists, it is a different step to establish the parties which are bound by it. Third parties not explicitly mentioned in an arbitration agreement made in writing may enter into its *ratione personae* scope. Furthermore, the Convention does not prevent consent to arbitrate from being provided by a person on behalf of another, a notion which is at the root of the theories of implied consent. Courts sometimes also look to domestic legal doctrines to determine who should be considered the signatories to the arbitration agreement.[40]

40. *United States*: Supreme Court of the United States, no. 18–1048, 1 June 2020 (*GE Energy Power Conversion France SAS, Corp., F.K.A. Converteam SAS v. Outokumpu Stainless USA, LLC et al.*), *Yearbook* XLV (2020) (US no. 1004).

b. Substantive Validity: The Non-Signatory Must Come Within the Subjective Scope of the Arbitration Agreement

The doctrine of privity of contracts applies to arbitration agreements. It means that an arbitration agreement only confers rights and imposes obligations on the parties to it. The scope of the arbitration agreement with respect to parties will be referred to as the "subjective" scope.

Article II(3) implicitly requires the court to determine the subjective scope of an arbitration agreement when it states that "[t]he court of a Contracting State, when seised of an action in a *matter in respect of which the parties have made an agreement* within the meaning of this Article ..." shall refer the parties to arbitration.

The subjective scope of a contract cannot be defined solely with regard to the signatories of an arbitration agreement. Non-signatories may also assume the rights and obligations arising under a contract. Various legal bases may be applied to bind a non-signatory to an arbitration agreement. A first group includes theories of implied consent, third-party beneficiaries, guarantors, assignment, succession, and other transfer mechanisms of contractual rights. These theories rely on the parties' discernable intentions and, to a large extent, on good faith principles. They apply to private as well as public legal entities. A second group includes the legal doctrines of agent-principal relationships, apparent authority, veil piercing (alter ego), joint venture relations, the group of companies theory, and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

1. The law applicable to determining the subjective scope of the arbitration agreement

To decide whether a non-signatory is bound by an arbitration agreement, the matter should be addressed pursuant to the law governing the arbitration agreement. As discussed above, in the absence of an agreement between the parties on the matter, it is generally understood that the arbitration agreement should be governed by the law of the seat

of the arbitration or the law governing the underlying contract as a whole or in some cases the *lex fori*. However, some court decisions have approached the issue through the application of international principles or *lex mercatoria*, considering it mainly as a matter of fact and evidence (see this Chapter above at C.4.b.1).

2. When a non-signatory can be referred to arbitration

The answer is case-specific. A court facing this question should analyse the issue under the circumstances and decide within that context whether it is arguable or not that a non-signatory may be bound by the arbitration agreement. If it is, the most preferable course of action is to refer the parties to arbitration and let the arbitral tribunal examine and rule on the matter. Courts would be able to review the arbitral panel's decision regarding the incorporation of a non-signatory to the arbitration at the stage of setting aside or enforcement of the award.

Courts have upheld the referral to arbitration of disputes involving non-signatories on the ground that the dispute between a signatory and a non-signatory appeared *sufficiently* connected to the interpretation or execution of a contract of the signatory that contained an arbitration clause. Accordingly, such dispute was held as *arguably* falling under the material scope of the arbitration clause.

In the United States Court of Appeals for the First Circuit's case of *Sourcing Unlimited Inc. v. Asimco International Inc.,*[41] Sourcing Unlimited (Jumpsource) had entered into a written partnership agreement with ATL to split production of mechanical parts and share profits accordingly. Asimco was a subsidiary of ATL and both had the same Chairman. The agreement provided for arbitration in China. The relationship soured and Jumpsource filed suit against Asimco and its Chairman in United States courts notably charging Asimco with

41. *United States*: United States Court of Appeals, First Circuit, 22 May 2008 (*Sourcing Unlimited Inc. v. Asimco International Inc. and John F. Perkowski*), 526 F.3d 38, para. 9; *Yearbook* XXXIII (2008) pp. 1163-1171 (US no. 643).

intentional interference with contractual and fiduciary relationships between itself and ATL. The respondents filed a request to refer the dispute to arbitration. They contended that although they were not signatories to the partnership agreement, Jumpsource's claim against them should be heard by an arbitral tribunal as the issues it sought to litigate clearly arose from the partnership agreement. The Court upheld the request. It held that "[t]he present dispute is *sufficiently intertwined* with the Jumpsource-ATL Agreement for application of estoppel to be appropriate". (Emphasis added)

D. WHEN THE REQUIREMENTS FOR ENFORCING AN ARBITRATION AGREEMENT ARE MET, THE COURT SHALL "REFER THE PARTIES TO ARBITRATION", "AT THE REQUEST OF ONE OF THE PARTIES"

When the court finds that there is a valid arbitration agreement, it shall refer the parties to arbitration, at the request of one of the parties, instead of resolving the dispute itself. This enforcement mechanism is provided for by Article II(3). The Convention was intended to leave no discretion to courts in this respect.

1. How to "Refer" Parties to Arbitration

The "referral to arbitration" is to be understood as meaning either a stay of the court proceedings pending arbitration or the dismissal of the claim for lack of jurisdiction, in accordance with national arbitration or procedural law.

2. No *Ex Officio* Referral

A court shall only refer the parties to arbitration "*at the request of one of the parties*", which excludes this being done on the court's own motion.

3. Options Available to the Court If It Finds That a Party Should Not Be Referred to Arbitration

Particularly in the case of non-signatories, if the court is not satisfied that a party ought to be referred to arbitration, it has to decide whether to refer the other parties to the arbitration agreement to arbitration while assuming jurisdiction over the remaining party – or, conversely, to assume jurisdiction over the entire dispute.

Indeed, the concern that may be raised is that the referral to arbitration of the relevant parties could "split" the resolution of the case between two forums, with the risk of each forum reaching different conclusions on the same matters of fact and law.

In early cases, some Italian courts found that when a dispute involved parties to an arbitration agreement as well as third parties (which the court considered not bound by the arbitration agreement) with connected claims, the jurisdiction of the court "absorbed" the entire dispute and the arbitration agreement became "incapable of being performed". This approach – the so-called *vis atractiva* of the court proceedings – was explicitly ruled out by the 1994 Italian arbitration law reform; it did and does not reflect a universal approach.[42]

Article II(3) compels a court to refer the parties to an arbitration agreement to the arbitral forum chosen, when requested to do so, provided that the conditions of Article II(3) are met. Accordingly, upon a request of one party, a court would have limited room for not referring the parties who have signed the agreement to arbitration while assuming jurisdiction over the dispute with non-signatories.

42. *Austria*: Oberster Gerichtshof, 26 August 2008 (*R GmbH v. O B.V. et al.*), *Yearbook* XXXIV (2009) pp. 404-408 (Austria no. 19).

E. SUMMARY

Based on the concise overview of the Convention's regime on enforcement of arbitration agreements, the following summary principles apply with respect to arbitration agreements falling within the scope of the Convention:

1. The Convention has been established to promote the settlement of international disputes by arbitration. It has laid down a "pro-enforcement", "pro-arbitration" regime.
2. The court should verify the existence of a dispute between the parties.
3. The subject matter of the dispute must be arbitrable. Non-arbitrability is not directly governed by the Convention, but deferred to the national law regimes. However, exceptions of non-arbitrability should be admitted restrictively.
4. An arbitration agreement should be held formally valid when the court is reasonably satisfied that an offer to arbitrate – made in writing – was met with acceptance by the other party. The Convention sets out a maximum uniform standard of form. However, the court may apply less stringent national standards than those laid down in Article II.
5. Regarding substantive validity, courts should allow only a limited number of national law defences of non-existence and invalidity.
6. An arbitration agreement may be binding on non-signatories.

CHAPTER 3
REQUEST FOR THE RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD

TABLE OF CONTENTS

A. INTRODUCTION

Recognition and enforcement of arbitral awards may in principle be granted by courts anywhere. In countries outside the place where the award was made, enforcement is usually based on the New York

Convention. The legal effect of a recognition and enforcement of an award is in practice limited to the territory over which the granting court has jurisdiction.

National courts are required under Article III to recognize and enforce foreign awards in accordance with the rules of procedure of the territory where the application for recognition and enforcement is made (see Chapter 1) and in accordance with the conditions set out in the Convention.

National laws may apply three kinds of provisions to enforce awards:

- a specific text for the implementation of the New York Convention;
- a text dealing with international arbitration in particular;
- the general arbitration law of the country.

Article III obliges Contracting States to recognize Convention awards as binding unless they fall under one of the grounds for refusal defined in Article V. Courts may, however, enforce awards on an even more favourable basis (under Article VII(1), see Chapter 1). Examples of matters not regulated by the Convention and thus regulated by national law are:

- the competent court(s) to be seised with the application;
- production of evidence;
- limitation periods;
- conservatory measures;
- security for the costs of the recognition and enforcement process
- whether the grant or denial of recognition and enforcement is subject to any appeal or recourse;
- criteria for execution against assets;
- the extent to which the process of recognition and enforcement is confidential.

In any event, the imposition of jurisdictional requirements cannot be such as to amount to going back on a State's international obligation to enforce foreign awards (see Chapter 1 at F).

The Convention requires that no substantially more onerous conditions or higher fees or charges be imposed on the recognition or enforcement of arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards. This provision has not led to problems in practice and has been applied in respect of various aspects of enforcement.[43] The Supreme Court of Portugal held, for example, that under Article III a party seeking enforcement of a foreign award is not required to obtain prior recognition of that award, as there is no such requirement for domestic awards.[44]

The *rules of procedure* referred to in the New York Convention are limited to questions such as the form of the request and the competent authority for which the New York Convention defers to national law. The *conditions for the enforcement*, however, are those set out in the New York Convention itself and are exclusively governed by the Convention. These aspects will be examined in detail below. In sum, once a petitioner has submitted the documents as defined in Article IV, it is entitled to the recognition and enforcement of the award unless the respondent proves that one or more grounds for refusal of recognition and enforcement of the award as exhaustively set forth in Article V(1) applies or the court finds one of the grounds in Article V(2) to be applicable.

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43. *Hong Kong*: Court of Appeal, 13 June 2011, 25 July 2011 and 11 August 2011 (*Shandong Hongri Acron Chemical Joint Stock Company Limited v. PetroChina International (Hong Kong) Corporation Limited*), *Yearbook* XXXVI (2011) pp. 287-292 (Hong Kong no. 25); *Netherlands*: Hoge Raad, First Chamber, 25 June 2010 (*OAO Rosneft v. Yukos Capital s.a.r.l.*), *Yearbook* XXXV (2010) pp. 423-426 (Netherlands no. 34).
44. *Portugal*: Supremo Tribunal de Justiça, Civil Section, 19 March 2009 (*S.A. (Belgium) v. B Sociedade Nacional, S.A.*), *Yearbook* XXXVI (2011) pp. 313-314 (Portugal no. 2).

The general rule to be followed by the courts is that the grounds for refusal defined in Article V are to be construed narrowly, which means that their existence is accepted in serious cases only. This is especially true with respect to claims of violation of public policy, which are often raised by disappointed parties but very seldom accepted by the courts. For example, although London is one of the great financial centres of the world, where parties often seek enforcement, only rarely has an English court rejected enforcement of a foreign award on the grounds of public policy (see this Chapter below at E.2).[45]

As of 2024 the ICCA *Yearbook Commercial Arbitration* in its forty-five years of reporting on the Convention has found that only in around ten per cent of the cases recognition and enforcement has been refused on Convention grounds.

Courts approach enforcement under the New York Convention with

– *a strong pro-enforcement bias* and
– *a pragmatic, flexible and non-formalistic approach*

This commendable liberal attitude fully capitalizes on the potential of this most successful treaty, to which 172 States are party, to serve and promote international trade (see the Overview at A.2).

B. PHASE I – REQUIREMENTS TO BE FULFILLED BY PETITIONER (ARTICLE IV)

At this phase of the proceedings, the petitioner has to submit together with the request for recognition and/or enforcement the documents listed in the New York Convention (Article IV). Phase I is controlled by a pro-enforcement bias and practical mindset of the enforcement court.

45. *United Kingdom*: High Court, Chancery Division, 25 October 2022 (*Chechetkin v. Payward Ltd and others*) [2022] EWHC 3057 (Ch).

1. Which Documents?

When reviewing a request for recognition and/or enforcement of the award, courts verify that the petitioner has submitted at the time of the application:

- The duly authenticated original award or a duly certified copy thereof (Article IV(1)(*a*));
- The original agreement referred to in Article II or a duly certified copy thereof (Article IV(1)(*b*)); and
- Translations of these documents into the language of the country in which the award is relied upon, where relevant (Article IV(2)).

2. Authenticated Award or Certified Copy (Article IV(1)(*a*))

a. Authentication

The authentication of an award is the process by which the signatures on it are confirmed as genuine by a competent authority. The purpose of the authentication of the original award or a certified copy of the award is to confirm that the award has been made by the appointed arbitrators. It is unusual that this poses any problem in practice.

The Convention does not specify the law governing the authentication requirement. Nor does it indicate whether the authentication requirements are those of the country where the award was rendered or those of the country where recognition or enforcement is sought. Most courts appear to accept any form of authentication in accordance with the law of either jurisdiction. The Austrian Supreme Court, in an early decision, expressly recognized that the authentication can be made either under the law of the country where the award was

made or under the law of the country where the enforcement of the award is sought.[46] Other enforcement courts apply their own law.[47]

The documents merely aim at proving the authenticity of the award and the fact that the award was made on the basis of an arbitration agreement defined in the Convention. For this reason, German courts hold that authentication is not required when the authenticity of the award is not disputed: see, e.g., two decisions of the Munich Court of Appeal.[48]

There have been only a few cases where a party has failed to satisfy these simple procedural requirements (e.g., in a 2003 case before the Spanish Supreme Court, the petitioner supplied only uncertified and non-authenticated copies of the award).[49] Courts may not require a party to submit any additional documents or use the procedural requirements as an obstacle to an application by interpreting them strictly.

b. Certification

The purpose of a certification is to confirm that the copy of the award is identical to the original. The Convention does not specify the law

46. See, e.g., *Austria*: Oberster Gerichtshof, 11 June 1969 (*Parties not indicated*), ICCA *Yearbook Commercial Arbitration* II (1977) p. 232 (Austria no. 3).
47. See, e.g., *Italy*: Corte di Cassazione, 14 March 1995, no. 2919 (*SODIME – Società Distillerie Meridionali v. Schuurmans & Van Ginneken BV*), *Yearbook* XXI (1996) pp. 607-609 (Italy no. 140); *Austria*: Oberster Gerichtshof, 3 September 2008 (*O Limited, et al. v. C Limited*), *Yearbook* XXXIV (2009) pp. 409-417 (Austria no. 20).
48. *Germany*: Oberlandesgericht, Munich, 17 December 2008 (*Seller v. German Assignee*), *Yearbook* XXXV (2010) pp. 359-361 (Germany no. 125) and Oberlandesgericht, Munich, 27 February 2009 (*Carrier v. German Customer*), *Yearbook* XXXV (2010) pp. 365-366 (Germany no. 127).
49. *Spain*: Tribunal Supremo, Civil Chamber, Plenary Session, 1 April 2003 (*Satico Shipping Company Limited v. Maderas Iglesias*), *Yearbook* XXXII (2007) pp. 582-590 (Spain no. 57).

governing the certification procedure, which is generally deemed to be governed by the *lex fori*.

The categories of persons authorized to certify the copy will usually be the same as the categories of persons who are authorized to authenticate an original award. In addition, certification by the Secretary-General of the arbitral institution that managed the arbitration is considered sufficient in most cases.

3. Original Arbitration Agreement or Certified Copy (Article IV(1)(*b*))

This provision merely requires that the party seeking enforcement supply a document that is *prima facie* a valid arbitration agreement. At this stage the court need not consider whether the agreement is "in writing" as provided by Article II(2) (see Chapter 2 at C.4.a.) or is valid under the applicable law.[50]

The substantive examination of the validity of the arbitration agreement and its compliance with Article II(2) of the Convention takes place during phase II of the recognition or enforcement proceedings (see this Chapter below at D.1, Article V(1)(*a*)).

It happens from time to time that a respondent argues that the petitioner has not shown that it has submitted a valid arbitration agreement. That argument misconceives the structure of the Convention: the burden of proof is not on the petitioner to show that the arbitration agreement is valid; rather, the burden of proof is on the respondent to demonstrate that the arbitration agreement as submitted is invalid (see Article V(1)(*a*)).

50. See, e.g., *Singapore*: Supreme Court of Singapore, High Court, 10 May 2006 (*Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd and Another*), *Yearbook* XXXII (2007) pp. 489-506 (Singapore no. 5).

4. At the Time of the Application

If the documents are not submitted at the time of application, courts generally allow parties to cure this defect in the course of the enforcement proceedings, notwithstanding the mandatory language of "shall, at the time of application" in Article IV(1).[51]

Italian courts, however, consider that the submission of the documents is a prerequisite for commencing the recognition or enforcement proceedings and that if this condition is not met, the request will be declared inadmissible. This defect can be cured by filing a new application for enforcement.[52]

5. Translations (Article IV(2))

The party seeking recognition and/or enforcement of an award must produce a translation of the award and original arbitration agreement referred to in Article IV(1)(*a*) and (*b*) if they are not made in an official language of the country in which recognition and enforcement are being sought (Article IV(2)).

Courts tend to adopt a pragmatic approach. While the Convention does not expressly state that the translations must be produced at the time of making the application for recognition and enforcement, a number of courts have, however, required translation to be submitted at the time of making an application.

51. See, e.g., *Spain*: Tribunal Supremo, 6 April 1989 (*Sea Traders SA v. Participaciones, Proyectos y Estudios SA*), *Yearbook* XXI (1996) pp. 676-677 (Spain no. 27); *Austria*: Oberster Gerichtshof, 17 November 1965 (*Party from F.R. Germany v. Party from Austria*), *Yearbook* I (1976) p. 182 (Austria no. 1).
52. *Italy*: Corte di Cassazione, First Civil Chamber, 23 July 2009, no. 17291 (*Microware s.r.l. in liquidation v. Indicia Diagnostics S.A.*), *Yearbook* XXXV (2010) pp. 418-419 (Italy no. 182).

Examples of cases where a full translation was not required are:

- The President of the District Court of Amsterdam considered no translation of the award and arbitration agreement to be necessary because these documents were "drawn up in the English language which language we master sufficiently to have taken full cognizance thereof".[53]
- The Zurich Court of Appeal held that there is no need to supply a translation of the entire contract containing the arbitration clause; a translation of the part containing the arbitration clause suffices.[54] Note that construction contracts may exceed 1,000 pages in length, with annexes.

Examples of cases where a translation was required are:

- The Argentinian Federal Court of Appeals determined that a translation made by a private – rather than official or sworn – translator who was also not licensed to act in the Province where the enforcement proceeding was held did not satisfy the Convention's requirements.[55]
- The Austrian Supreme Court considered a case where the petitioner supplied a translation of only the dispositive section of the ICC award. It determined that the case should be remitted to

53. *Netherlands*: President, Rechtbank, Amsterdam, 12 July 1984 (*SPP (Middle East) Ltd. v. The Arab Republic of Egypt*), *Yearbook* X (1985) pp. 487-489 (Netherlands no. 10).
54. *Switzerland*: Bezirksgericht, Zurich, 14 February 2003 and Obergericht, Zurich, 17 July 2003 (*Italian Party v. Swiss Company*), *Yearbook* XXIX (2004) pp. 819-833 (Switzerland no. 37).
55. *Argentina*: Cámara Federal de Apelaciones, City of Mar del Plata, 4 December 2009 (*Far Eastern Shipping Company v. Arhenpez S.A.*), *Yearbook* XXXV (2010) pp. 318-320 (Argentina no. 3).

the Court of First Instance to which the application for enforcement had been made so that this defect could be cured.[56]

C. PHASE II – GROUNDS FOR REFUSAL (ARTICLE V) – IN GENERAL

This phase is characterized by the following general principles:

- no review on the merits;
- burden on respondent of proving the exhaustive grounds;
- exhaustive grounds for refusal of recognition and enforcement;
- narrow interpretation of the grounds for refusal;
- limited discretionary power to grant the recognition and enforcement even if one of the grounds applies.

1. No Review on the Merits

The court does not have the authority to substitute its decision on the merits for the decision of the arbitral tribunal even if the arbitrators have made an erroneous decision of fact or law.

The Convention does not allow for a *de facto* appeal on procedural issues; rather it provides grounds for refusal of recognition or enforcement only if the relevant authority finds that there has been a violation of one or more of these grounds for refusal, many of which involve a serious due process violation.

2. Burden on Respondent to Prove the Exhaustive Grounds

The respondent has the burden of proof and can only resist the recognition and enforcement of the award on the basis of the grounds

56. *Austria*: Oberster Gerichtshof, 26 April 2006 (*D SA v. W GmbH*), *Yearbook* XXXII (2007) pp. 259-265 (Austria no. 16).

set forth in Article V(1). These limited grounds are exhaustively listed in the New York Convention. The court can refuse the recognition and the enforcement on its own motion on the two grounds identified in Article V(2).

3. Exhaustive Grounds for Refusal of Recognition and Enforcement

In summary, the party opposing recognition and enforcement can rely on and must prove one of the first five grounds:

(1) There was no valid agreement to arbitrate (Article V(1)(*a*)) by reason of incapacity of the parties or invalidity of the arbitration agreement;
(2) The respondent was not given proper notice, or the respondent was unable to present its case (Article V(1)(*b*)) by reason of due process violations;
(3) The award deals with a dispute not contemplated by, or beyond the scope of the parties' arbitration agreement (Article V(1)(*c*));
(4) The composition of the arbitral tribunal 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 (Article V(1)(*d*));
(5) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in the country in which, or under the laws of which, the award was made (Article V(1)(*e*)).

These are the only grounds on which the respondent can rely.

Further, the court may on its own motion refuse the recognition and enforcement on the grounds mentioned below. However, in practice, the respondent invokes these grounds as well:

(6) The subject matter of the arbitration was not arbitrable under the law of the country where enforcement is sought (Article V(2)(*a*));
(7) Enforcement of the award would be contrary to the public policy of the country where enforcement is sought (Article V(2)(*b*)).

4. Narrow Interpretation of the Grounds for Refusal

Bearing in mind the purpose of the Convention, namely to "unify the standards by which ... arbitral awards are enforced in the signatory countries"[57] (see Chapter 1 at A.2), its drafters intended that the grounds for opposing recognition and enforcement of Convention awards should be interpreted and applied narrowly and that refusal should be granted in serious cases only.

Most courts have adopted this restrictive approach to the interpretation of Article V grounds. For example, the United States Court of Appeals for the Third Circuit stated in 2003 in *China Minmetals Materials Import & Export Co., Ltd. v. Chi Mei Corp.*:

> "Consistent with the policy favoring enforcement of foreign arbitration awards, courts strictly have limited defenses to enforcement to the defenses set forth in Article V of the Convention, and generally have construed those exceptions narrowly."[58]

Similarly, the UK Privy Council said in 2022:

> "It is well established that the grounds for refusing recognition and enforcement set out in article V should be construed narrowly in the

57. *United States*: Supreme Court of the United States, 17 June 1974 (*Fritz Scherk v. Alberto-Culver Co.*), *Yearbook* I (1976) pp. 203-204 (US no. 4).
58. *United States*: United States Court of Appeals, Third Circuit, 26 June 2003 (*China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corporation*), *Yearbook* XXIX (2004) pp. 1003-1025 (US no. 459).

light of the New York Convention's object and purpose of facilitating the recognition and enforcement of foreign arbitral awards."[59]

One issue that is not dealt with in the Convention is what happens if a party to an arbitration is aware of a defect in the arbitration procedure but does not object in the course of the arbitration. The same issue arises in connection with jurisdictional objections that are raised at the enforcement stage for the first time.

The general principle of good faith (also sometimes referred to as waiver or estoppel) that applies to procedural as well as to substantive matters, should prevent parties from keeping arguments up their sleeves.[60]

For example:

– The Federal *Arbitrazh* (Commercial) Court for the Northwestern District in the Russian Federation considered that an objection of lack

59. *United Kingdom*: Privy Council, 19 May 2022, Appeal No 0086 of 2020 (*Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) v. MatlinPatterson Global Opportunities Partners (Cayman) II LP and others*), *Yearbook* XLVII (2022) pp. 480-487 (UK no. 122). See also *Canada*: New Brunswick Court of Queen's Bench, Trial Division, Judicial District of Saint John, 28 July 2004 (*Adamas Management & Services Inc. v. Aurado Energy Inc.*), *Yearbook* XXX (2005) pp. 479-487 (Canada no. 18).

60. Article 4 of the UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006, provides:

"A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, *shall be deemed to have waived his right to object.*" (Emphasis added)

of arbitral jurisdiction that had not been raised in the arbitration could not be raised for the first time in the enforcement proceedings;[61]
- The Spanish Supreme Court said that it could not understand that the respondent "now rejects the arbitration agreement on grounds it could have raised in the arbitration";[62]
- The Hong Kong Court of Final Appeal observed that a failure to make a prompt objection to the arbitral tribunal or the supervisory court may constitute estoppel or want of bona fides.[63]

The principle of estoppel is also applied by some courts if a party fails to raise the ground in setting-aside proceedings, or if the respondent seeks to re-litigate matters already decided by the court at the seat of arbitration:

- The Berlin Court of Appeal found that the German respondent was estopped from relying on grounds for denying enforcement under the New York Convention since it had failed to raise them in annulment proceedings in Ukraine within the time limit of three months set by Ukrainian law. The Court reasoned that although the Convention does not provide for estoppel, the preclusion (*Präklusion*) provision established in respect of domestic awards in German law also applies to the enforcement of foreign awards;[64]

61. *Russian Federation*: Federal *Arbitrazh* (Commercial) Court, Northwestern District, 9 December 2004 (*Dana Feed A/S v. OOO Arctic Salmon*), *Yearbook* XXXIII (2008) pp. 658-665 (Russian Federation no. 16).
62. *Spain*: Tribunal Supremo, Civil Chamber, 11 April 2000 (*Union Générale de Cinéma, SA v. X Y Z Desarrollos, SA*), *Yearbook* XXXII (2007) pp. 525-531 (Spain no. 50).
63. *Hong Kong*: Court of Final Appeal of the Hong Kong Special Administrative Region, 9 February 1999 (*Hebei Import and Export Corporation v. Polytek Engineering Company Limited*), *Yearbook* XXIV (1999) pp. 652-677 (Hong Kong no. 15). See *KB v. S* [2015] HKEC 2042.
64. *Germany*: Kammergericht, Berlin, 17 April 2008 (*Buyer v. Supplier*), *Yearbook* XXXIV (2009) pp. 510-515 (Germany no. 119).

– The Singapore Court of Appeal decided that the doctrine of transnational issue estoppel applies in the context of international arbitration. Thus, the Republic of India could not resist enforcement of a foreign award on the basis that the tribunal lacked jurisdiction, because the Court at the seat of arbitration had already dismissed India's application to set aside the award, upholding jurisdiction and the validity of the award.[65]

5. Limited Discretionary Power to Enforce in the Presence of Grounds for Refusal

Courts generally refuse enforcement when they find that there is a ground for refusal under the New York Convention.

Some courts, however, hold that they have the power to grant enforcement even where the existence of a ground for refusal of enforcement under the Convention has been proved. They generally do so where the ground for refusal concerns a minor violation of the procedural rules applicable to the arbitration – a *de minimis* case – or the respondent neglected to raise that ground for refusal in the arbitration.[66] (See also the cases described in this Chapter above at C.4)

These courts rely on the wording in the English version of Article V(1), which opens with the words "Recognition and enforcement of the

65. *Singapore*: *The Republic of India v. Deutsche Telekom AG* [2023] SGCA(I) 10.

66. *Hong Kong*: Supreme Court of Hong Kong, High Court, 15 January 1993 (*Paklito Investment Ltd. v. Klockner East Asia Ltd.*), *Yearbook* XIX (1994) pp. 664-674 (Hong Kong no. 6) and Supreme Court of Hong Kong, High Court, 16 December 1994 (*Nanjing Cereals, Oils and Foodstuffs Import & Export Corporation v. Luckmate Commodities Trading Ltd*), *Yearbook* XXI (1996) pp. 542-545 (Hong Kong no. 9); *British Virgin Islands*: Court of Appeal, 18 June 2007 (*IPOC International Growth Fund Limited v. LV Finance Group Limited*), *Yearbook* XXXIII (2008) pp. 408-432 (British Virgin Islands no. 1); *United Kingdom*: High Court, Queen's Bench Division (Commercial Court), 20 January 1997 (*China Agribusiness Development Corporation v. Balli Trading*), *Yearbook* XXIV (1999) pp. 732-738 (UK no. 52).

award *may* be refused ...".[67] This wording also appears in three of the five official texts of the Convention, namely the Chinese, Russian and Spanish text. The French text, however, does not contain a similar expression and only provides that recognition and enforcement "*seront refusées*", i.e., shall be refused. French courts have nonetheless recognized and enforced awards based on a narrower range of grounds for refusal under French law, through application of Article VII of the Convention (see this Chapter below at D.5.b).

6. Issues Relating to Sovereign Immunity

The Convention does not address the concept of a State respondent's sovereign immunity from the jurisdiction of the courts of another State. Sovereign immunities applicable to State respondents (as well as the distinct regime of sovereign immunity applicable to States' property) are governed by other international treaties, principles of customary international law, and national legislation of the place where enforcement is sought.

However, it must be noted that States, State-owned entities and other public bodies are not excluded from the scope of the Convention purely by reason of their status. The expression "persons, whether physical or legal" in Article I(1) of the Convention is generally deemed to include public law entities entering into commercial contracts with private parties. In instances where a State or State-owned entity has validly

67. *United Kingdom*: High Court of Justice, Queen's Bench Division, Commercial Court, 17 April 2008 and Court of Appeal (Civil Division), 21 October 2008 (*Nigerian National Petroleum Corporation v. IPCO (Nigeria) Limited*), *Yearbook* XXXIII (2008) pp. 788-802 (UK no. 82); *United States*: District Court, District of Columbia, 31 July 1996 (*Chromalloy Aeroservices Inc. v. The Arab Republic of Egypt*), *Yearbook* XXII (1997) pp. 1001-1012 (US no. 230); *Hong Kong*: Supreme Court of Hong Kong, High Court, 13 July 1994 (*China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd.*), *Yearbook* XX (1995) pp. 671-680 (Hong Kong no. 8).

agreed to arbitrate[68] courts virtually always deny the defence of sovereign immunity raised by a State against enforcement of an arbitration agreement and recognition and enforcement of an arbitral award by relying on the theory of restrictive immunity and waiver of immunity. Courts also frequently invoke the distinction between *acta de jure gestionis* and *acta de jure imperii*, or rely on *pacta sunt servanda* and the creation of an *ordre public réellement international*. This distinction is also made in some cases with respect to execution.

As one example, the Federal Court of Australia dismissed India's attempt to resist enforcement of an UNCITRAL award in favour of Mauritian investors on the basis of sovereign immunity. The Court found that by signing the Convention, India had agreed that Australia (another Contracting State) would recognize and enforce awards under the Convention, including where India is a party to such an award. Thus, although the Convention contains no express words of waiver, sovereign immunity may be waived by implication, and India's status as a Contracting State to the Convention created a "clear and unmistakable submission by agreement" to the Court's jurisdiction in proceedings regarding recognition and enforcement of arbitral awards.[69]

68. By contrast, where a state or another sovereign entity has not entered into the agreement to arbitrate, courts will uphold the respondent's invocation of immunity. See, e.g., *United States*: Court of Appeals, Fifth Circuit (*Al-Qarqani v. Saudi Arabian Oil Co.*) 19 F.4th 794, 802 (5th Cir. 2021) (dismissing petition to enforce arbitral award for lack of jurisdiction due to the lack of agreement to arbitrate between parties, given that "no exception to the general rule of immunity for foreign states [was] applicable").

69. *Australia*: Federal Court of Australia, 24 October 2023, (*CCDM Holdings, LLC v. Republic of India*) (No. 3) [2023] FCA 1266.

D. GROUNDS FOR REFUSAL TO BE PROVEN BY RESPONDENT (ARTICLE V(1))

1. Ground 1: Incapacity of Party and Invalidity of Arbitration Agreement (Article V(1)(*a*))

> "The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."

This provision concerns post-award judicial review of the tribunal's competence – i.e., the existence and validity of any purported arbitration agreement. As explained by Pieter Sanders, therefore, national courts will have "the final word on the competence of arbitrators"[70] during the post-award stage in accordance with Article V of the Convention and any national rules on set aside (annulment).

This understanding has been confirmed by the highest courts of Austria, Mexico, the Netherlands, the United Kingdom, and many other jurisdictions.[71]

70. Pieter Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 Y.B. COM. ARB. 172, 197 (Pieter Sanders ed., 1977).

71. *E.g.*, *D v. C*, Judgment, Case no. 3Ob153/18y (Austrian Supreme Court (Oberster Gerichtshof), 19 Dec. 2018), para. 37; Supreme Court of Justice of Mexico, First Chamber, *Amparo Directo* 71/2014, Judgment (May 18, 2016), para. 321; *Republic of Ecuador v. Chevron Corp.*, Judgment para. 4.2, Case no. 13/04679 EV/LZ (Netherlands Supreme Ct. Sept. 26, 2014); *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46, paras. 25-26.

a. Incapacity of Party

The types of issues arising under this ground include the "incapacity" defences, such as mental incompetence, physical incapacity, lack of authority to act in the name of a corporate entity or a contracting party being too young to sign.

In addition, the term "incapacity" in the context of Article V(1)(*a*) is interpreted in the sense of "lacking the power to contract". For example, this may arise where the applicable law prohibits a party, such as a State-owned enterprise, from entering into an arbitration agreement for certain types of potential disputes: e.g., in some jurisdictions, a State-owned enterprise may be prohibited by law from entering into an arbitration agreement in a contact relating to defence contracts (see, however, Chapter 2 at 3.a, quoting as an example the Swiss Private International Law Act).[72]

The Convention does not indicate how to determine the law applicable to the capacity of a party ("the law applicable to them"). This law must therefore be determined by applying the conflict-of-laws rules of the court where recognition and/or enforcement is sought, usually the law of the domicile of a physical person and the law of the place of incorporation of a company.

b. Invalidity of Arbitration Agreement

Article V(1)(*a*) also provides a ground for refusal where the arbitration agreement "referred to in article II" is "not valid under the law to which the parties have subjected it, or failing any indication thereon, under the

72. The Swiss Private International Law Act, Article 177(2) provides:

> "If one party to an arbitration agreement is a State, or an enterprise dominated held by or an organization controlled by a State, that is party to an arbitration agreement, it may not invoke its own law to contest its capacity to arbitrate or the arbitrability of a dispute or its capacity to be subject to an arbitration covered by the arbitration agreement."

law of the country where the award was made". This ground for refusal is commonly invoked in practice.

Respondents frequently argue under this ground that the arbitration agreement is not formally valid because it is not "in writing" as required by Article II(2) (see Chapter 2 at C.4.a). A related argument is that there was no agreement to arbitrate at all within the meaning of the Convention. Other common examples of the defences that may be raised under this ground include claims of illegality, duress or fraud in the inducement of the agreement.

From time to time a respondent may rely on this ground where it disputes that it was party to the relevant arbitration agreement. This issue is decided by the court by re-assessing the facts of the case, independent of the decision reached by the arbitrators. For example, in the *Sarhank Group* case, the respondent argued that there was no signed arbitration agreement in writing between the parties.[73] The United States Court of Appeals for the Second Circuit held that the district court incorrectly relied on the arbitrators' finding in the award that the respondent was bound by the arbitral clause under Egyptian law, which applied to the contract. Rather, the district court should have applied United States federal law to this issue when reviewing the award for enforcement. The Court therefore remanded the case to the district court "to find as a fact whether [the respondent] agreed to arbitrate ... on any ... basis recognized by American contract law or the law of agency".

In *Dallah Real Estate & Tourism Holding Co v. Pakistan* the English Supreme Court clarified the scope of the doctrine of competence-competence in England.[74] The Supreme Court held that while an arbitral tribunal has the power to determine its own jurisdiction as a preliminary matter, upon an application for enforcement under the New York Convention, where an objection to the tribunal's jurisdiction

73. *United States*: United States Court of Appeals, Second Circuit, 14 April 2005 (*Sarhank Group v. Oracle Corporation*), *Yearbook* XXX (2005) pp. 1158-1164 (US no. 523).
74. *United Kingdom*: [2010] UKSC 46.

is made, the court has the power to reopen fully the facts and issues to determine the jurisdictional issue.

The Supreme Court reviewed how the doctrine of competence-competence is applied in various jurisdictions around the world. It noted that "every country ... applies some form of judicial review of the arbitrator's jurisdictional decision. After all, a contract cannot give an arbitral body any power ... if the parties never entered into it."

Thus the fact that a tribunal can determine its own jurisdiction does not give it an exclusive power to do so. An enforcing court which is not at the seat of the arbitration has the power to re-examine the jurisdiction of the tribunal.

Whilst the Supreme Court (Lord Collins) accepted that the trend internationally is to limit reconsiderations of findings of tribunals and also stressed the pro-enforcement policy of the New York Convention, it found that neither of those took precedence. The Court held that under the 1996 Act (Section 30) in England a tribunal is entitled to inquire as a preliminary matter as to whether it has jurisdiction. However, if the issue comes before a court, the court is required to undertake an independent investigation rather than a mere review of the arbitrators' decision. The Supreme Court further considered that the position was no different in France, where the award had been made. Shortly after the decision of the English Supreme Court, the Paris Court of Appeal rejected a request to set aside the three awards at issue, holding that the arbitral tribunal's decision that it had jurisdiction was correct.[75] Although the Court did not express a view on the scope of judicial review of the arbitral tribunal's jurisdiction, it reviewed its decision fully.

More recently, UK and French courts reached different conclusions regarding an arbitral tribunal's jurisdiction in the well-known *Kabab-Ji v. Kout Food Group* case. The different outcomes resulted from the

75. *France*: Cour d'Appel, 17 February 2011 (*Gouvernement du Pakistan – Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company*).

application of different national laws to the relevant arbitration agreement. The UK Supreme Court denied enforcement of an ICC award won by a Lebanese company, Kabab-Ji, against its Kuwaiti former business partner, Kout Food Group, after finding that English law applied.[76] Nearly one year later, the French Court of Cassation upheld the same award, after confirming that French law applied to the arbitration agreement.[77]

The UK Supreme Court ruled that English law governed the arbitration agreement despite the seat being Paris. Applying the principles concerning the governing law of arbitration agreements that it previously established in the 2020 *Enka v. Chubb* case,[78] the Supreme Court reiterated that a choice of law to govern a contract containing an arbitration clause will generally be a sufficient indication of the law to which the parties subjected the arbitration agreement for the purposes of Article V(1)(*a*) of the Convention. As the parties had clearly expressly chosen the Franchise Development Agreement to be governed by English law, so too was the arbitration agreement in it. Under English law, the Court ruled that there was no real prospect of finding that Kout had become a party to the arbitration agreement.

The French Court of Cassation held that, under French law, an arbitration clause is separate to the contract in which it appears. The Court of Cassation said that the Paris Court of Appeal had rightfully exercised its sovereign discretion when it determined that the choice of English law as the governing law of the overall Franchise Development Agreement was not sufficient to establish the common will of the parties to submit the arbitration clauses to English law and thus to derogate from the substantive rules of international arbitration applicable at the seat of arbitration (Paris). It went on to affirm the ruling of the Paris Court of Appeal that Kout was bound by the arbitration agreement under French law.

76. *United Kingdom*: [2021] UKSC 48.
77. *France*: Cour de Cassation, Chambre Civile 1, Arrêt du 28 septembre 2022.
78. *United Kingdom*: [2020] UKSC 38.

The above conflicting decisions illustrate the potentially significant consequences of failing to specify the law applicable to the arbitration agreement where the law governing the substance of the contract is not the same as the law of the seat of the arbitration.

(See also Chapter 2 at B.1, regarding the scope of review by the court requested to refer the parties to arbitration.)

2. Ground 2: Lack of Notice and Due Process Violations; Right to a Fair Hearing (Article V(1)(*b*))

> "The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."

Article V(1)(*b*) provides for the ground for refusal that the party against whom the award is invoked was not given any, or any fair, opportunity to present its case because: (i) it was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings; or (ii) was otherwise unable to present its case.

This ground, however, is not intended for the court to take a different view to that of the tribunal on procedural issues. The party resisting enforcement has to show that it somehow was deprived of its right to have its substantive case heard and determined by the arbitral tribunal.

a. Right to a Fair Hearing

Article V(1)(*b*) requires that parties be afforded a hearing that meets the minimum requirements of fairness. The applicable minimum standards of fairness were described by the United States Court of Appeals for the Seventh Circuit as including "adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator". Thus the arbitrators have a broad discretion as to how they may conduct proceedings, etc.

b. Lack of Notice

It is unusual for a party not to be given notice of the appointment of the arbitrator or of the arbitration proceedings. If a party has actively participated in an arbitration, it is impossible for it to complain later that notice was inadequate.

In proceedings where the respondent defaults, on the other hand, proof of notice must be given serious attention at all stages.

There can be no notice, for example, where one party has changed address without informing the other party or is located in a part of the world where faxes or other means of communication cannot be reliably received. In those cases, the arbitrators and the claimant in the arbitration should do all that is reasonably possible to bring the existence of the arbitration and the appointment of the arbitral tribunal to the attention of the respondent and to have independent evidence of such efforts. If they fail to do so, enforcement of the resulting award may be denied. In one such case, the Swedish Supreme Court denied enforcement, finding that the arbitrators ignored the fact that communications sent to an earlier address of the Swedish party had been returned undelivered.[79]

Default, however, may be simply the choice of the party. Where actual notice of an arbitration has been received by the respondent but the respondent fails or refuses to participate in the arbitration, courts hold that there is no violation of due process under Article V(1)(*b*). If a party chooses not to take part in the arbitration, this is not a ground for refusing enforcement.

79. *Sweden*: Högsta Domstolen, 16 April 2010 (*Lenmorniiproekt OAO v. Arne Larsson & Partner Leasing Aktiebolag*), *Yearbook* XXXV (2010) pp. 456-457 (Sweden no. 7).

c. Due Process Violations: "Unable to Present His Case"

The well-known United States case of *Iran Aircraft Industries v. Avco Corp*. is an example of where recognition and enforcement were refused because the respondent was unable to present its case.[80] After consulting with the chairman of the tribunal (who was subsequently replaced), the respondent had decided on the chairman's advice not to present invoices to support an analysis of damages by an expert accounting firm. The respondent relied only on its summaries – but indicated that it was prepared to furnish further proof if required. The tribunal eventually refused the damages claim on the basis that there was no supporting evidence. The United States Court of Appeals for the Second Circuit denied recognition and enforcement of the award on the basis that the losing party had been unable to present its case on damages.

A number of awards have been refused recognition and enforcement where the arbitrators have failed to act fairly under the circumstances. Examples of these include:

- The Paris Court of Appeal upheld a decision refusing to enforce an award because there was no evidence that the respondent, who did not participate in the arbitration, had received the procedural orders setting out the arbitration timetable or notification of the hearing;[81]
- The Svea Court of Appeal refused enforcement of an ICDR award on the ground that four days' notice given to the respondent to attend the hearing was insufficient. The Court noted that although "relatively short notice periods are acceptable in arbitration proceedings", "a notice period of four days - during the summer

80. *United States*: United States Court of Appeals, Second Circuit, 24 November 1992 (*Iran Aircraft Industries and Iran Helicopter Support and Renewal Company v. Avco Corporation*), *Yearbook* XVIII (1993) pp. 596-605 (US no. 143).

81. *France*: Cour d'Appel, Paris, 15 January 2013 (*Otkrytoye Aktsionernoye Obshestvo "Tomskneft" Vostochnoi Neftyanoi Kompanii v. Yukos Capital*), *Yearbook* XXXVIII (2013) pp. 373-375 (France no. 54).

holiday period and including a weekend - must be deemed too short for Mr. B to have received 'adequate advance notice' on the main hearing;[82]

- The English Court of Appeal upheld a decision refusing to enforce an Indian award on the ground that the serious illness of one of the parties, unsuccessfully raised by that party during the hearing when seeking an adjournment, meant that it was unrealistic to expect him to participate in the arbitration, including to file a defence;[83]
- The Federal Court of Australia refused to enforce an award against one of the respondents in an arbitration under the auspices of the China International Economic and Trade Arbitration Commission (CIETAC) on the ground that she had not been properly notified of the arbitration because the notice of arbitration was sent to her husband's residential address, contrary to the notice clause in the relevant contract.[84]

Examples of unsuccessful objections founded on lack of due process include:

- The arbitrator had the same nationality as the claimant;[85]
- A party did not have the financial means to travel to the hearing;[86]

82. *Sweden*: Svea Hovrätt, Department 02, 20 September 2013 (*Subway International B.V. v. B*), *Yearbook* XLV (2020) pp. 390-391 (Sweden no. 9).
83. *United Kingdom*: Court of Appeal (Civil Division), 21 February 2006 and 8 March 2006 (*Ajay Kanoria, et al. v. Tony Francis Guinness*), *Yearbook* XXXI (2006) pp. 943-954 (UK no. 73).
84. *Australia*: Federal Court of Australia, 11 May 2021, File no. VID 637 of 2020 (*Beijing Jishi Venture Capital Fund (Limited Partnership) v. James Z Liu et al.*), *Yearbook* XLVI (2021) pp. 217-222 (Australia no. 52).
85. *Austria*: Oberster Gerichtshof, 7 June 2017 (*C v. F GmbH et al.*), *Yearbook* XLIII (2018) pp. 415-419 (Austria no. 34).
86. *United States*: United States District Court, Western District of North Carolina, Statesville Division, 11 June 2018 and 16 July 2018, *Yearbook* XLIV (2019) pp. 699-703 (US no. 965).

- The communications and the proceedings had been in a language the respondent did not know;[87]
- The tribunal had first postponed and then held the hearing remotely because of the COVID-19 pandemic;[88]
- The tribunal relied on a legal theory in the award that was not previously argued;[89]
- The tribunal awarded damages on a basis not pleaded by the parties;[90] and
- A company representative was unable to attend the hearing because he could not obtain a visa.[91]

3. Ground 3: Outside or Beyond the Scope of the Arbitration Agreement (Article V(1)(*c*))

"The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to

87. *Spain*: Tribunal Superior de Justicia, Madrid, 19 January 2021, no. 1/2021 (*Mebel Service SL v. Made for Stores SL*), *Yearbook* XLVII (2022) pp. 424-427 (Spain no. 103).
88. *United States*: United States District Court, Southern District of New York, 26 January 2022, 21-cv-6704 (PKC) (*Preble-Rish Haiti, S.A. v. Republic of Haiti, Bureau de Monétisation de Programmes d'Aide au Développement*), *Yearbook* XLVII (2022) pp. 542-548 (US no. 1043).
89. *United Kingdom*: Privy Council, 19 May 2022, Appeal No 0086 of 2020 (*Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) v. MatlinPatterson Global Opportunities Partners (Cayman) II LP and others*), *Yearbook* XLVII (2022) pp. 480-487 (UK no. 122).
90 *United Kingdom*: High Court of Justice, Queen's Bench, Commercial Court, 19 February 2015 (*Malicorp Limited v. Government of the Arab Republic of Egypt et al.*), *Yearbook* XLI (2016) pp. 585-589 (UK no. 101).
91 *Korea*: District Court, Busan, 9th Civil Division, 26 October 2011 (*Dongkuk Steel Corp. v. Yoon's Marine Ltd.*), *Yearbook* XLV (2020) pp. 318-321 (Korea no. 15).

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."

The grounds for refusal provided under Article V(1)(*c*) are that the award:

– Deals with a difference or dispute not contemplated by, or not falling within, the terms of the parties' submission to arbitration, or
– Contains decisions on matters beyond the scope of the parties' submission to arbitration.

The grounds in Article V(1)(*c*) embody the principle that the arbitral tribunal only has jurisdiction to decide the issues that the parties have agreed to submit to it for determination.

In determining what the parties have submitted to the arbitral tribunal for determination, regard must be had to the arbitration agreement and the claims for relief submitted to the arbitral tribunal by the parties. The language of the arbitration agreement is critically important; issues must remain within that scope.

Model clauses published by arbitral institutions are typically drafted to give the arbitral tribunal very broad jurisdiction to determine all disputes arising out of or in connection with the parties' substantive agreement (usually a contract). Ripeness and similar issues are usually a matter of admissibility (not jurisdiction) and therefore not reviewable by courts. (See also Chapter 2 at C.1 on the competence-competence of arbitrators and court review of arbitration agreements.)

The court has a discretion to grant partial enforcement of an award if the award is only partly beyond the jurisdiction of the arbitral tribunal, provided that the part falling within the jurisdiction of the arbitral tribunal can be separated.[92] This appears from the proviso at the end of

92. *United States*: District Court, Southern District of Florida, 12 May 2009 (*Four*

Article V(1)(*c*) ("provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains matters submitted to arbitration may be recognized and enforced").

4. Ground 4: Irregularities in the Composition of the Arbitral Tribunal or the Arbitration Procedure (Article V(1)(*d*))

> "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

Article V(1)(*d*) has two types of potential violations, concerning:

- the composition of the arbitral tribunal;
- the arbitral procedure.

a. Composition of the Tribunal

The first option of Article V(1)(*d*) applies if a party is deprived of its right to appoint an arbitrator or to have its case decided by an arbitral tribunal whose composition reflects the parties' agreement.

Cases where one party refuses to appoint an arbitrator and the arbitrator is then appointed by a court, or where arbitrators are successfully challenged and replaced in accordance with the applicable

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Seasons Hotels and Resorts B.V., et al. v. Consorcio Barr, S.A.), *Yearbook* XXXIV (2009) pp. 1088-1097 (US no. 668); District Court, Southern District of New York, 12 October 1989 (*FIAT S.p.A. v. The Ministry of Finance and Planning of the Republic of Suriname, et al.*), *Yearbook* XXIII (1998) pp. 880-885 (US no. 239); *China*: Supreme People's Court, 12 November 2003, [2003] Min Si Ta Zi no. 12 (*Gerald Metals Inc. v. Wuhu Smelter & Refinery Co., Ltd. and Wuhu Hengxin Copper (Group) Inc.*).

rules chosen by the parties and the applicable law, would not succeed under this ground.

Article V(1)(*d*) provides that a court must first look to see:

1. If the parties have agreed on the composition of the arbitral tribunal;
2. If they have, what they have agreed must be determined;
3. Whether that agreement has been violated;
4. Only if there is no agreement between the parties on the composition of the arbitral tribunal should the court apply the law of the country where the arbitration took place to determine if it was not in accordance with such law.

For example, the parties might have designated an appointing institution to appoint the chairman or arbitrator in the arbitration clause, but in fact someone else appoints the arbitrator. A similar problem arises if the arbitrator is to be chosen from a certain group of people, but is then chosen from another group. In this case the court should, however, carefully examine whether it is really necessary to refuse enforcement because the party opposing recognition and enforcement of the award was deprived of its rights, or whether, in essence, it was granted a fair arbitration procedure with only a minor procedural deviation. This is an illustration of the type of case in which the court can decide to grant enforcement if the violation is *de minimis* (see this Chapter above at C.5).

For example, in the *China Nanhai* case, the Hong Kong High Court held that although the specific agreement of the parties as to the composition of the tribunal had not been followed, the enforcing court should exercise its discretion to enforce the award, as it considered the violation involved to be comparatively trivial.[93]

93. *Hong Kong*: Supreme Court of Hong Kong, High Court, 13 July 1994 (*China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd.*), *Yearbook* XX (1995) pp. 671-680 (Hong Kong no. 8).

The arbitration agreement may prescribe certain qualities for one or more of the arbitrators, for example, that they shall have command of certain languages; be nationals of a particular country; be admitted to practice law in a particular jurisdiction; hold an engineering degree, etc. In these cases, the court should pay close attention to whether the fact that the arbitrator is missing a prescribed quality is in fact a procedural unfairness. For example, if the arbitration clause requires that the arbitrator shall be a "commercial man", or somebody with specific industry experience, and instead a lawyer without that qualification is appointed, it might be well justified to enforce the award notwithstanding this.

Examples of unsuccessful objections under this first option of Article V(1)(*d*) include:

- The Munich Court of Appeal denied the objection that the composition of the arbitral tribunal was not in accordance with the agreement of the parties where the arbitral body had been comprised of one arbitrator rather than two or more arbitrators as agreed in the arbitration clause. The Court noted that the respondent was aware of the composition of the arbitral tribunal but did not object during the arbitration;[94]
- In a case before the Spanish Supreme Court, the arbitration agreement provided for arbitration of disputes at the *Association Cinématographique Professionnelle de Conciliation et d'Arbitrage* (ACPCA) in France. When the respondent in the arbitration failed to appoint an arbitrator, the appointment was made by the president of the International Federation of Film Producers Associations. The Court denied the respondent's objection that this appointment was

94. *Germany*: Oberlandesgericht, Munich, 15 March 2006 (*Manufacturer v. Supplier, in liquidation*), *Yearbook* XXXIV (2009) pp. 499-503 (Germany no. 117).

in violation of the parties' agreement, finding that it complied with the relevant provisions in the ACPCA rules.[95]
– The Court of Appeal of Rome denied an objection advanced by the Republic of Kazakhstan on the basis that the state had not appointed its arbitrator. The Court found that the state had been duly informed of the arbitration and given two deadlines to appoint an arbitrator; only when the deadlines had passed, had the institution appointed an arbitrator on the state's behalf.[96]

Examples of successful objections under this first option of Article V(1)(*d*) include:

– In 1978, the Florence Court of Appeal found that a two-arbitrator arbitral tribunal with seat in London was in breach of the parties' arbitration agreement, although it was in accordance with the law of the country where the arbitration took place. The arbitration clause had provided that three arbitrators should be appointed, but the two party-appointed arbitrators did not appoint a third arbitrator as they were in agreement as to the outcome of the case – English law at the time permitted this;[97]
– The United States Court of Appeals for the Second Circuit refused to recognize and enforce an award on the ground that the parties' agreement as to the composition of the arbitral tribunal had been breached, as a court had appointed the chairman upon the application of a party, rather than the two party-appointed arbitrators

95. *Spain*: Tribunal Supremo, Civil Chamber, 11 April 2000 (*Union Générale de Cinéma, SA v. X Y Z Desarrollos, SA*), *Yearbook* XXXII (2007) pp. 525-531 (Spain no. 50).
96. *Italy*: Corte d'Appello, Rome, 27 February 2019, no. 1490/2019 (*The Republic of Kazakhstan v. Anatolie Stati et al.*), *Yearbook* XLIV (2019) pp. 562-568 (Italy no. 194).
97. *Italy*: Corte di Appello, Florence, 13 April 1978 (*Rederi Aktiebolaget Sally v. srl Termarea*), *Yearbook* IV (1979) pp. 294-296 (Italy no. 32).

being given time to attempt to agree upon the chairman, as provided for under the relevant arbitration agreement.[98]

b. Arbitral Procedure

The Convention does not intend to give the losing party a right to an appeal on procedural decisions of the arbitral tribunal. This option of Article V(1)(*d*) is not aimed at refusing to recognize or enforce an award if the court called upon is of a different view than the arbitrators, regarding, for example, whether or not a witness should have been heard, whether re-cross examination should have been allowed or how many written submissions should have been ordered.

Rather, this second option of Article V(1)(*d*) is aimed at more fundamental deviations from the agreed procedure, which include situations in which the parties agreed to use the rules of one institution but the arbitration is conducted under the rules of another, or even where the parties have agreed that no institutional rules would apply.

Examples of unsuccessful objections under this second option of Article V(1)(*d*) include:

– The Bremen Court of Appeal dismissed the respondent's argument that the arbitral proceedings, which were held in Turkey, were not in accordance with the Turkish Code of Civil Procedure because the arbitral tribunal did not grant the respondent's request for an oral hearing and disregarded its offer of new evidence. The Court held that the arbitral tribunal acted in accordance with the Arbitration Rules of the Istanbul Chamber of Commerce, to which the parties had agreed;[99]

98. *United States*: United States Court of Appeals, Second Circuit, 31 March 2005 (*Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*), *Yearbook* XXX (2005) pp. 1136-1143 (US no. 520).
99. *Germany*: Hanseatisches Oberlandesgericht, Bremen, 30 September 1999 (*Claimant v. Defendant*), *Yearbook* XXXI (2006) pp. 640-651 (Germany no. 84).

– Before the United States District Court in Northern Florida, the respondent Devon (the claimant in the arbitration, which had been held at the China Maritime Arbitration Commission (CMAC)) argued that the arbitration had not been in accordance with the law of PR China because the CMAC had rejected the other party's counterclaim but then permitted it to file a separate action that was subsequently consolidated with Devon's claim. The Court dismissed this argument, finding that Devon failed to show that the CMAC decision was improper under Chinese law.[100]

Examples of successful objections under this second option of Article V(1)(*d*) include:

– A Swiss court of appeal refused recognition and enforcement of a German award, finding that the arbitration procedure had not been in accordance with the agreement of the parties; the arbitration agreement provided for arbitration in Hamburg in which "all disputes should be settled in one and the same arbitral proceedings". Instead, the arbitration took place in two stages: first a quality arbitration by two experts and thereafter the arbitration proper by a panel of three arbitrators;[101]
– A United States court refused to recognize and enforce an USD 18 billion arbitration award rendered in Egypt based on its finding that the arbitration was conducted in direct contravention of the arbitration agreement's explicit procedural terms and "was so

100. *United States*: United States District Court, Northern District of Florida, Pensacola Division, 29 March 2010 (*Pactrans Air & Sea, Inc. v. China National Chartering Corp., et al.*), *Yearbook* XXXV (2010) pp. 526-527 (US no. 697).
101. *Switzerland*: Appellationsgericht, Basel-Stadt, 6 September 1968, (*Corporation X AG, buyer v. Firm Y, seller*), *Yearbook* I (1976) p. 200 (Switzerland no. 4).

riddled with irregularities that it resulted in criminal convictions for several of the arbitrators involved".[102]

- A Turkish court of appeals refused recognition and enforcement of a Swiss award on the ground that the procedural law agreed upon by the parties had not been applied;[103]
- The Italian Supreme Court enforced a Stockholm award but not a Beijing award made with respect to the same dispute. The Court held that the Beijing award was contrary to the parties' agreement that contemplated only one arbitration, either in Stockholm or in Beijing, depending on which party commenced arbitration first.[104]

5. Ground 5: Award Not Binding, Set Aside or Suspended (Article V(1)(*e*))

> "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

Article V(1)(*e*) provides for refusal of recognition and enforcement of an award if the respondent proves that the award has either:

- Not yet become "binding" on the parties, or

102. *United States*: United States District Court, Southern District of Texas, Houston Division, 17 November 2020 (*Waleed Bin Al-Qarqani et al. v. Arab American Oil Company et al.*), *Yearbook* XLVI (2021) pp. 480-484 (US no. 1015).
103. *Turkey*: Court of Appeals, 15th Legal Division, 1 February 1996 (*Osuuskunta METEX Andelslag V.S. v. Türkiye Electrik Kurumu Genel Müdürlügü General Directorate, Ankara*), *Yearbook* XXII (1997) pp. 807-814 (Turkey no. 1).
104. *Italy*: Corte di Cassazione, 7 February 2001, no. 1732 (*Tema Frugoli SpA, in liquidation v. Hubei Space Quarry Industry Co. Ltd.*), *Yearbook* XXXII (2007) pp. 390-396 (Italy no. 170).

– 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.

a. Award Not Yet Binding

The word "binding" was used by the drafters of the New York Convention in this context rather than the word "final" (which had been used in an equivalent context in the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards).[105] The use of the word "binding" was intended to make it clear that a party was entitled to apply for recognition and enforcement of an award once it was issued by the arbitral tribunal. This meant that this party did not need to obtain *exequatur* or leave to do so from the court of the State in which, or under the law of which, the award was made (known as a *double exequatur*), as was required under the 1927 Geneva Convention.

The fact that no double *exequatur* is needed under the Convention is universally recognized by courts and commentators.

Courts differ, however, as to how to determine the moment when an award can be said to be "binding" within the meaning of Article V(1)(*e*). This issue most often arises when parties rely on Article V(1)(*e*) to challenge the binding nature of partial or interim arbitral awards. Following the classic approach, some courts consider that the binding nature of the award is to be determined under the law of the country where the award was made.[106] Other courts follow the new theory whereby this question is considered independent of the law applicable to the award. In this context, courts sometimes rely on the agreement of the parties. If the parties have chosen to arbitrate under the rules of the International Chamber of Commerce, for example, the 2021 ICC Rules

105. Convention on the Execution of Foreign Arbitral Awards, signed at Geneva on 26 September 1927.

106. See, e.g., *France*: Tribunal de Grande Instance, Strasbourg, 9 October 1970 (*Animalfeeds International Corp. v. S.A.A. Becker & Cie*), *Yearbook* II (1977) p. 244 (France no. 2).

of Arbitration provide at Article 35(6) that: "Every Award shall be binding on the parties." Alternatively, some courts undertake an autonomous interpretation and hold that an award is binding on the parties when it is not, or is no longer, open to recourse on the merits by the tribunal.[107]

b. Award Set Aside or Suspended

1. Award set aside

Depending on the jurisdiction, this procedure may also be called "vacatur" or "annulment" procedure.

Only the courts of the State where the award was made or is determined to have been made, i.e., where the arbitration had its seat (see Chapter 1 at C.1.a), have jurisdiction to set aside the award. These courts are described as having "supervisory" or "primary" jurisdiction over the award. In contrast, the courts before which an award is sought to be recognized and enforced are described as having "enforcement" or "secondary" jurisdiction over the award, limited to determining the existence of Convention grounds for refusal of recognition or enforcement.

In order for the objection that the award has been set aside to succeed, in many countries the award must have been finally set aside by the court having primary jurisdiction. An application to set aside the award does not suffice. This prevents the losing party from being able to postpone enforcement by commencing annulment proceedings.

The situation where an application to set aside or suspend the award has been made is covered by Article VI, which provides that in this case the enforcement court may adjourn the decision on the enforcement of the award if it considers it proper (see this Chapter at F). The application

107. See, e.g., *Switzerland*: Tribunal Fédéral, First Civil Chamber, 9 December 2008 (*Compagnie X SA v. Federation Y*), *Yearbook* XXXIV (2009) pp. 810-816 (Switzerland no. 40).

must have been made, however, to the competent court referred to in Article V(1)(*e*), i.e., the court of primary jurisdiction.

2. Consequences of being set aside

Notwithstanding that an award has been set aside in the country in which, or under the law of which, the award was made, a court in another country may still grant recognition and enforcement outside the New York Convention regime. France is the best-known example of a jurisdiction that has declared an award enforceable notwithstanding the fact that it had been set aside in the country of origin. France does so, not on the basis of the New York Convention, but on the basis of French law, by opting out of the New York Convention through Article VII(1), the more-favourable-right provision. This provision allows courts to apply an enforcement regime that is more favourable to enforcement than the New York Convention, that is, that can lead to recognition and enforcement when the Convention would not (see Chapter 1 at E.1). Some courts grant recognition and enforcement of an annulled award within the New York Convention regime. Examples are the United States, England and the Netherlands.[108]

3. Award "suspended"

Article V(1)(*e*) also provides that enforcement of an award can be refused if the party against whom the award is invoked proves that the

108. *United States*: Court of Appeals, Second Circuit, 2 August 2016 (*Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex – Exploración y Producción*), *Yearbook* XLII (2017) pp. 763-770 (US no. P44); *Netherlands*: Hoge Raad, First Chamber, 24 November 2017 (*Not indicated v. OJSC Novolipetsky Metallurgichesky Kombinat*), *Yearbook* XLIII (2018) pp. 529-534 (Netherlands no. 62) (finding that discretion to enforce an award that has been set aside at the seat is an exception to the system of Article V(1), and courts shall therefore make use of it only in exceptional circumstances).

award has been "suspended" by a court in the country where, or under the law of which, the award was made. As seen above in this Section D.5.b at (i), Article VI of the Convention provides that a court may adjourn its decision on enforcement if the respondent has applied for suspension of the award in the country of origin.

The "suspension" of an award is not defined in the Convention. Courts have generally construed this term to refer to suspension of the enforceability of the award by *a decision of a court* (thus not by operation of the law, for example pending an action to set aside) in the country of origin.[109]

E. GROUNDS FOR REFUSAL TO BE RAISED BY THE COURT *EX OFFICIO* (ARTICLE V(2))

Article V(2) of the Convention provides:

> "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (*b*) The recognition or enforcement of the award would be contrary to the public policy of that country."

The grounds in Article V(2) protect the public interests of the State in which enforcement is sought and, accordingly, the court can rely upon them *ex officio*, following an application that has been made for recognition and enforcement of an award. Typically, the party resisting

109. *Switzerland*: Tribunal Fédéral, First Civil Chamber, 9 December 2008 (*Compagnie X SA v. Federation Y*), *Yearbook* XXXIV (2009) pp. 810-816 (Switzerland no. 40).

recognition and enforcement will also invoke these grounds when it believes that they are relevant.

1. Ground 6: Not Arbitrable (Article V(2)(*a*))

In summary, the "not arbitrable" ground for refusal under Article V(2)(*a*) is available where the dispute involves a subject matter reserved for the courts.

For example, clearly criminal cases are non-arbitrable; similarly, cases reserved exclusively for the courts of a jurisdiction are non-arbitrable, including:

– domestic relations, such as divorce and custody of children;
– property settlements;
– wills;
– bankruptcy; and
– tax controversies.

The modern trend is towards a smaller category of disputes being reserved solely to the jurisdiction of courts, as the result of a number of factors, including the trend toward containing costs, a greater openness of many courts to accept that the parties' agreement to arbitrate should be respected and the support of international arbitration by national legislation. In this respect it should also be noted that "not arbitrable" has a different meaning in an international as opposed to a domestic context (see this Chapter below at E.2 for the distinction between international and domestic public policy). (See also Chapter 2 at C.3 on subject matters "capable of settlement by arbitration".) As an example of this trend, in 2023, the Belgian Supreme Court overturned decades-old jurisprudence on the arbitrability of disputes concerning the termination of exclusive distribution agreements. It ruled that disputes about the termination of exclusive distribution agreements can be settled through arbitration, even where such an agreement is governed

by foreign substantive law, regardless of whether such foreign law offers protections similar to those under Belgian law.[110]

Whether a subject matter of an arbitration is non-arbitrable is a question to be determined under the law of the country where the application for recognition and enforcement is being made. The non-arbitrability should concern the material part of the claim and not merely an incidental part.

Few cases of refusal of enforcement under Article V(2)(*a*) have been reported. One example is a decision by the Federal *Arbitrazh* (Commercial) Court for the Moscow District that found that a Slovak award was unenforceable because it had been rendered after the Russian respondent had been declared bankrupt by an *arbitrazh* court. Under the bankruptcy law of the Russian Federation, *arbitrazh* courts have exclusive jurisdiction over the determination of the amount and nature of a bankrupt's claims against a debtor. The Court actually framed its decision under Article V(2)(*b*) of the Convention, as arbitrability may be considered as belonging to public policy.[111]

2. Ground 7: Contrary to Public Policy (Article V(2)(*b*))

Article V(2)(*b*) permits a court in which recognition or enforcement is sought to refuse to do so if it would be "contrary to the public policy of that country".

However, Article V(2)(*b*) does not define what is meant by "public policy". Nor does it state whether domestic principles of public policy or the international concept of public policy should apply to an application for recognition and enforcement under the New York Convention. The

110. *Belgium*: (overturning Cour de Cassation, First Chamber, 28 June 1979 (*Audi-NSU Union AG v. SA Adelin Petit & Cie*), *Yearbook* V (1980) pp. 257-259 (Belgium no. 2)).

111. *Russian Federation*: Federal *Arbitrazh* (Commercial) Court, Moscow District, 1 November 2004 (*AO Slovenska Konsolidachna, A.S. v. KB SR Yakimanka*), *Yearbook* XXXIII (2008) pp. 654-657 (Russian Federation no. 15).

international concept of public policy is generally narrower than the domestic public policy concept. As seen in this Chapter above at E.1, this distinction also applies to arbitrability.

Most national courts have adopted the narrower standard of international public policy when applying the Convention. In the United States, for example, the "public policy defense is construed narrowly to apply only where enforcement would violate the United States' most basic notions of morality and justice".[112] Similar language has been used in several other jurisdictions.[113] The French judiciary has found that a violation of public policy must be "flagrant, effective and concrete".[114] Hong Kong courts require a "substantial injustice arising out of the award which is so shocking to the Court's conscience as to render enforcement repugnant".[115] In India, "a contravention of a provision of law is insufficient to invoke the defence of public policy"; rather, a violation of public policy is one that offends the core values of national policy.[116]

112. *United States*: District Court, District of Columbia, 31 May 2017 (*Venco Imtiaz Construction Company v. Symbion Power LLC*), *Yearbook* XLIII (2018) pp. 633-637 (US no. 933).
113. See, e.g., *Belize*: Court of Appeal of Belize, 8 August 2012 and Caribbean Court of Justice, 26 July 2013 (*The Attorney General of Belize v. BCB Holdings Limited, et al.*), *Yearbook* XXXVIII (2013) pp. 324-329 (Belize no. 2); *Ireland*: High Court, Dublin, 19 May 2004 (*Brostrom Tankers AB v. Factorias Vulcano SA*), *Yearbook* XXX (2005) pp. 591-598 (Ireland no. 1); *Australia*: Federal Court of Australia, New South Wales District Registry, General Division, 22 February 2011 (*Uganda Telecom Limited v. Hi-Tech Telecom Pty Ltd*), *Yearbook* XXXVI (2011) pp. 252-255 (Australia no. 36).
114. *France*: Cour de Cassation, First Civil Chamber, 4 June 2008 (*SNF sas v. Cytec Industries BV*), *Yearbook* XXXIII (2008) pp. 489-494 (France no. 47).
115. *Hong Kong*: High Court of the Hong Kong Special Administrative Region, 30 April 2009 (*A v. R*) 3 HKLRD 389.
116. *India*: High Court of Delhi, New Delhi, 11 April 2017 (*Cruz City 1 Mauritius Holdings v. Unitech Limite*d), *Yearbook* XLII (2017) pp. 407-411 (India no. 54).

The recommendations of the International Law Association issued in 2002 (the "ILA Recommendations") as to "Public Policy" have been regarded as reflective of best international practice.[117]

Among the general points of the ILA Recommendations are that the finality of awards in "international commercial arbitration should be respected save in exceptional circumstances" and that such exceptional circumstances "may in particular be found to exist if recognition or enforcement of the international arbitral award would be against international public policy".

The ILA Recommendations state that the expression "international public policy" is used to designate the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy).

The ILA Recommendations also state that the international public policy of any State includes:

(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;
(ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "*lois de police*" or "public policy rules"; and
(iii) the duty of the State to respect its obligations towards other States or international organizations.

117. Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards, *Arbitration International*, Volume 19, Issue 2, 1 June 2003, pp. 213–215, <https://doi.org/10.1093/arbitration/19.2.213>.

a. Examples of Recognition and Enforcement

In a German case before the Court of Appeal of Celle, the seller sought to enforce an award of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation (ICAC).[118] The buyer contended that permitting enforcement would violate public policy either because there were procedural irregularities in the arbitration proceedings or because the arbitral award gave effect to a disproportionately high contractual penalty. The Court rejected the buyer's arguments holding:

> "In the specific case of foreign arbitral awards, the departure in the foreign arbitration from mandatory rules of domestic procedure is not [automatically] a violation of public policy. Rather, there must be a violation of international public policy. Hence, the recognition of foreign arbitral awards is as a rule subject to a less strict regime than [the recognition of] domestic arbitral decisions. The issue is not whether a German judge would have reached a different result based on mandatory German law. Rather, there is a violation of international public policy only when the consequences of the application of foreign law in a concrete case is so at odds with German provisions as to be unacceptable according to German principles. This is not the case here."

In the French case *SNF v. Cytec,* SNF contracted to purchase a chemical compound from Cytec under two separate contracts.[119] The second provided for Cytec to be the exclusive supplier. The arbitral tribunal held that the second contract violated European competition law. It then rendered an award in favour of Cytec. Before the *Cour de Cassation*, SNF argued in effect that the Court should not permit enforcement of

118. *Germany*: Oberlandesgericht, Celle, 6 October 2005 (*Seller v. Buyer*), *Yearbook* XXXII (2007) pp. 322-327 (Germany no. 99).

119. *France*: Cour de Cassation, First Civil Chamber, 4 June 2008 (*SNF sas v. Cytec Industries BV*), *Yearbook* XXXIII (2008) pp. 489-494 (France no. 47).

an award which was based on an agreement in restraint of competition and hence was contrary to EC law and public policy. The Court held that where (as in this case) the matter in issue was international public policy, the courts would only intervene to prevent enforcement in the case of a "flagrant, effective and concrete" violation of international public policy.

That the legal reasoning underlying an award or the conduct of the arbitral tribunal is in some way flawed does not breach public policy as long as this flaw does not affect the fundamental conceptions of morality and justice of the legal system where enforcement is sought, i.e., does not violate international public policy. For example, the Hong Kong SAR Court of Final Appeal held that the holding of an inspection in the absence of the respondent was not a ground for refusing enforcement because the respondent was informed that it had taken place and did not ask for a re-inspection in the presence of its representatives.[120]

Other examples of recognition and enforcement notwithstanding an alleged violation of public policy are:

- Lack of financial means: the Portuguese Supreme Court of Justice rejected the argument that there was a violation of public policy because the Portuguese respondent did not participate in the arbitration in the Netherlands because of a lack of financial means;[121]
- Lack of impartiality by arbitrators: courts hold that "appearance of bias" is insufficient; there must have been "actual bias", i.e., the arbitrator must have acted in a partial manner;[122]

120. *Hong Kong*: Court of Final Appeal of the Hong Kong Special Administrative Region, 9 February 1999 (*Hebei Import and Export Corporation v. Polytek Engineering Company Limited*), *Yearbook* XXIV (1999) pp. 652-677 (Hong Kong no. 15).
121. *Portugal*: Supremo Tribunal de Justiça, 9 October 2003 (*A v. B. & Cia. Ltda., et al.*), *Yearbook* XXXII (2007) pp. 474-479 (Portugal no. 1).
122. See, e.g., *Germany*: Oberlandesgericht, Stuttgart, 18 October 1999 and

– Lack of reasons in award: courts of countries where reasons in awards are mandatory generally accept to enforce awards that contain no reasons but have been made in countries where such awards are valid.[123]

b. Examples of Refusal of Recognition and Enforcement

Examples of refusal of recognition and enforcement under Article V(2)(*b*) are:

– The Court of Appeal of Bavaria refused recognition and enforcement of a Russian award 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;[124]
– The Federal *Arbitrazh* (Commercial) Court for the District of Tomsk (upheld on appeal to the Federal *Arbitrazh* Court for the West-Siberian District), in the Russian Federation, denied enforcement of an ICC award rendered in France, finding that the loan agreements in respect of which the award had been rendered were an illegal arrangement between companies of the same group and that the dispute was simulated;[125]

Bundesgerichtshof, 1 February 2001 *(Dutch Shipowner v. German Cattle and Meat Dealer*), *Yearbook* XXIX (2004) pp. 700-714 (Germany no. 60); *United States*: United States District Court, Southern District of New York, 27 June 2003 and United States Court of Appeals, Second Circuit, 3 August 2004 (*Lucent Technologies Inc., et al. v. Tatung Co.*), *Yearbook* XXX (2005) pp. 747-761 (US no. 483).

123. See, e.g., *Germany*: Oberlandesgericht Düsseldorf, 15 December 2009 (*Seller v. German Buyer*), *Yearbook* XXXV (2010) pp. 386-388 (Germany no. 135).
124. *Germany*: Bayerisches Oberstes Landesgericht, 20 November 2003 (*Seller v. Buyer*), *Yearbook* XXIX (2004) pp. 771-775 (Germany no. 71).
125. *Russian Federation*: Federal *Arbitrazh* (Commercial) Court, District of Tomsk, 7 July 2010 (*Yukos Capital S.A.R.L. v. OAO Tomskneft VNK*),

- The Amsterdam Court of Appeal denied recognition and leave to enforce three awards rendered in respect of bitcoin loans concluded through an online platform. Under the platform's conditions, arbitration was automatically triggered upon a loan default, and a debtor who wished to defend itself in the arbitration was required to send a request by email within seven days after receiving a notice of default. The Court found that the defendant had not been notified of the pending arbitrations in violation of public policy.[126]
- The German Court of Appeal Court granted enforcement in respect of part of an ICAC Moscow award that directed the respondent to pay a main sum and costs, but denied enforcement of the part of the award directing the respondent to pay a contractual penalty for delay. The Court noted that the contractually agreed daily rate of 0.5 percent corresponded to an annual rate of 180 percent, which it found to be exorbitant and incompatible with German public policy.[127]

F. STAY OF ENFORCEMENT PENDING THE RESOLUTION OF ANNULMENT PROCEEDINGS (ARTICLE VI)

Article VI of the Convention applies in the scenario where a party has commenced proceedings to set aside or suspend an award before the courts of the place the award was made, whilst the award creditor is seeking enforcement in another country. In other words, Article VI

Yearbook XXXV (2010) pp. 435-437 (Russian Federation no. 28); Federal *Arbitrazh* Court, West-Siberian District, 27 October 2010 (*Yukos Capital S.A.R.L. v. OAO Tomskneft VNK*).

126. *Netherlands*: Gerechtshof, Amsterdam, 29 January 2019 (*X v. Y*), *Yearbook* XLIV (2019) pp. 623-625 (Netherlands no. 67).
127. *Germany*: Kammergericht, Berlin, Twelfth Civil Chamber, 7 February 2019 (*Not indicated v. Not indicated*), *Yearbook* XLV (2020) pp. 261-263 (Germany no. 166).

addresses the situation in which annulment proceedings, on the one hand, and enforcement proceedings, on the other, are being conducted in parallel.

This provision expressly authorizes the enforcement court to adjourn or suspend the decision on the enforcement of the award if it considers it proper. Article VI also allows enforcement courts to order suitable security upon application of the party seeking enforcement. Article VI provides:

> "If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

Adjourning enforcement proceedings may prevent the issuance of conflicting decisions by the enforcement court and the court of the place of arbitration. Moreover, under Article V(1)(*e*) of the Convention, one of the grounds for refusing to enforce an award is that it "has been set aside or suspended"; therefore, it may be premature to continue with the enforcement proceedings when there is a possibility that the award might be annulled. At the same time, adjournment entails the risk of delaying and in some instances even frustrating enforcement.

In the context of these conflicting concerns, it is widely recognized that courts should exercise the discretion to stay the enforcement of an award carefully and rationally. The Convention does not establish specific criteria that courts should consider when deciding whether or not to stay enforcement proceedings. Many courts have adopted a multifactor approach weighing different considerations, including:

- The status of the foreign proceedings and the estimated time for those proceedings to be resolved;
- Whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;
- The likelihood of success of the annulment application;
- The characteristics of the foreign proceedings, including the party that initiated such proceedings and the time when they were initiated (e.g., whether they predate the enforcement proceedings so as to raise concerns of international comity);
- Whether there are any circumstances indicating an intent to hinder or delay resolution of the dispute as well as any evidence of lack of good faith;
- Whether adjourning would likely make enforcement more difficult;
- The balance of possible hardships to each of the parties, keeping in mind that the party seeking enforcement is entitled to request suitable security to address any risk of dissipation by the award debtor;
- The general objectives of arbitration, particularly the expeditious resolution of disputes and the avoidance of protracted and expensive litigation; and
- The pro-enforcement philosophy underlying the New York Convention and the applicable arbitration law.[128]

128. *United Kingdom*: High Court of Justice, 14 April 2021 *(Hulley Enterprises Limited and others v. the Russian Federation)* [2021] EWHC 894, para. 213, *Yearbook* XLVI (2021) pp. 425-446 (UK no. 118); High Court of Justice, 27 April 2005 (*IPCO Nigeria Limited v. Nigerian National Petroleum Corporation*) [2005], para. 8, *Yearbook* XXXI (2006) pp. 853-977 (UK no. 70); *United States*: United States Court of Appeals, Second Circuit, 2 September 1998 (*Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*) [1998] 97-7224, para. 21, *Yearbook* XXIVa (1999) pp. 786-913 (US no. 280).

If the enforcement proceedings are suspended, the party seeking enforcement may request that the enforcement court order the other party to give suitable security. In considering whether to grant a request to order security, courts have considered various elements including:

- The likelihood of success of the annulment application. It has been considered that "if [the award] is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security";[129] and
- Whether enforcement would be rendered more difficult in case of delay. In this respect, courts have noted that:

  "Court[s] must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand there are and always will be (sufficient) assets within the jurisdiction, the ease for security must necessarily be weakened."[130]

129. *United Kingdom*: Court of Appeal, Civil Division, 12 March 1993 (*Soleh Boneh International Ltd. v. Water Resources Development (International) Ltd., Government of the Republic of Uganda and National Housing Corporation*) [1993], para. 13, *Yearbook* XIX (1999) pp. 717-754 (UK no. 38). See also Hong Kong: High Court, 5 May 2016 (*L v. B*) [2016], para. 9, *Yearbook* XLI (2016) pp. 487-493 (Hong Kong no. 28).
130. *United Kingdom*: Court of Appeal, Civil Division, 12 March 1993 (*Soleh Boneh International Ltd. v. Water Resources Development (International) Ltd., Government of the Republic of Uganda and National Housing Corporation*) [1993], para. 13, *Yearbook* XIX (1999) pp. 717-754 (UK no. 38). See also Hong Kong: High Court, 5 May 2016 (*L v. B*) [2016], para. 9, *Yearbook* XLI (2016) pp. 487-493 (Hong Kong no. 28).

G. CONCLUSION

This survey of the exclusive grounds for the refusal of a request for the recognition and enforcement of an arbitral award and the principles according to which these grounds should be interpreted reflects the pro-enforcement nature of the Convention that is to be respected and applied judiciously by the courts.

ANNEXES

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ANNEX I

The 1958 New York Convention

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Done in New York, 10 June 1958

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply 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.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

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

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on

matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States, nor deprive any interested party of any right he may have to avail

himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.
2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the

extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit of such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.
3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition and enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(*a*) Signatures and ratifications in accordance with article VIII;

(*b*) Accessions in accordance with article IX;

(*c*) Declarations and notifications under articles I, X and XI;

(*d*) The date upon which this Convention enters into force in accordance with article XII;

(*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the states contemplated in article VIII.

For an updated list of Contracting States to the Convention, see the website of the United Nations Treaty Collection at <http://treaties.un.org>.

ANNEX II

The UNCITRAL Model Law on Arbitration

1985 UNCITRAL
Model Law on International Commercial Arbitration,
with amendments as adopted in 2006

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application[1]

(1) This Law applies to international commercial[2] arbitration, subject to any agreement in force between this State and any other State or States.
(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)

1. Article headings are for reference purposes only and are not to be used for purposes of interpretation.
2. The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(3) An arbitration is international if:

(*a*) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(*b*) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(*c*) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(*a*) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(*b*) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(*a*) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(*b*) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(*c*) "court" means a body or organ of the judicial system of a State;

(*d*) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the

right of the parties to authorize a third party, including an institution, to make that determination;

(*e*) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(*f*) where a provision of this Law, other than in articles 25(*a*) and 32(2)(*a*), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 2 A. International origin and general principles (As adopted by the Commission at its thirty-ninth session, in 2006)

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(*a*) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(*b*) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II. ARBITRATION AGREEMENT

Option I

Article 7. Definition and form of arbitration agreement (As adopted by the Commission at its thirty-ninth session, in 2006)

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(2) The arbitration agreement shall be in writing.
(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement
(As adopted by the Commission at its thirty-ninth session, in 2006)

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.
(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
(3) Failing such agreement,
(*a*) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
(*b*) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.
(4) Where, under an appointment procedure agreed upon by the parties,
(*a*) a party fails to act as required under such procedure, or
(*b*) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
(*c*) a third party, including an institution, fails to perform any function entrusted to it under such procedure,
any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.
(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.
(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the

reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.
(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(*a*) Maintain or restore the status quo pending determination of the dispute;

(*b*) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(*c*) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(*d*) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)(*a*), (*b*) and (*c*) shall satisfy the arbitral tribunal that:

(*a*) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(*b*) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(*d*), the requirements in paragraphs (1)(*a*) and (*b*) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(*a*), is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.
(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.
(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.
(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.
(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.
(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement[3]

(1) Recognition or enforcement of an interim measure may be refused only:

(*a*) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)(*a*)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(*b*) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)(*b*)(i) or (ii), apply to the recognition and enforcement of the interim measure.

3. The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5. Court-ordered interim measures

Article 17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it

considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22. Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.
(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.
(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.
(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.
(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(*a*) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(*b*) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(*c*) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(*a*) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(*b*) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29. Decision-making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.
(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.
(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.
(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(*a*) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(*b*) the parties agree on the termination of the proceedings;

(*c*) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(*a*) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(*b*) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(*a*) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(*a*) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was 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 this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(*b*) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.[4]

(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)

4. The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(*a*) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was 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; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(*b*) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(*a*)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

For further information see the UNCITRAL website at <www.uncitral.org> or contact the UNCITRAL Secretariat:

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ANNEX III

The UNCITRAL Recommendation 2006

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

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958, has been a significant achievement in the

promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

For further information see the UNCITRAL website at <www.uncitral.org> or contact the UNCITRAL Secretariat:

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ANNEX IV

Online Sources

Case law on the New York Convention can be searched online on the ICCA website:

<www.arbitration-icca.org>

The website is free. It contains a list of the over 3,000 court decisions applying the Convention that have been published since 1976 in the leading publication in this field, ICCA's *Yearbook Commercial Arbitration*. Decisions are indexed by Article of the Convention and by topic. The decisions themselves are published in the volumes of the *Yearbook* and are also available by subscription in the KluwerArbitration database at <www.kluwerarbitration.com>. All materials in this database are fully searchable through a variety of search tools.

Case law on the Convention can also be searched online on the New York Convention website of the University of Miami, USA:

<www.newyorkconvention.org>

The website is free. It also contains a list of the Convention decisions published in the *Yearbook* since 1976, indexed by Article and topic, as well as

- the authentic texts of the New York Convention;
- translations of the Convention in several languages;
- a commentary by Professor Albert Jan van den Berg;
- a list of Contracting States.

NOTES