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**GROUNDS FOR REFUSAL OF ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS
UNDER THE NEW YORK CONVENTION OF 1958**

With Special Reference to the Kingdom of Saudi Arabia

By

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LLB, LLM

A Thesis Submitted to the Faculty of Law, Business and Social Sciences,
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(PhD)

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to

My Mother, Father, Wife, Son Abdulrahman

Abstract

The New York Convention of 1958 has been applied for the past 48 years in many contracting states, and for 12 years in Saudi Arabia. The fundamental objective of the convention is to make foreign arbitral awards more simply and extensively enforceable worldwide, and less subject to challenges based on national law. It therefore limits the exceptions on which enforcement of foreign award may be refused to the grounds listed exclusively in its Art. V. Hence, this thesis aims to examine and evaluate the grounds for refusal of enforcement of foreign awards under Art. V of the New York Convention according to both the theoretical discussions and, more importantly, the applications and interpretations by national courts of the states parties to the Convention in general. The thesis pays particular attention to the operation of Art. V of the NYC in Saudi Arabia in the light of Shari'ah rules, Saudi laws, juridical practice of the Saudi enforcing courts.

This thesis comprises eleven chapters. It starts with introductory chapter to outline the aim, importance, and structure of the thesis. Chapter two demonstrates the chief characteristics associated with application and interpretation of Art. V.

Chapter three deals with the ground of incapacity of the parties (Art. V(1)(a)). Chapter four discusses the ground of invalid arbitration agreement (Art. V(1)(a)). Chapter five examines the ground of violation of due process (Art. V(1)(a)). Chapter six considers the ground of excess of jurisdiction by arbitrators (Art. V(1)(c)). Chapter seven concentrates on the ground of defective arbitral tribunal and procedure (Art. V(1)(d)). Chapter eight concerns the ground that the award has not become binding or was suspended or set aside (Art. V(1)(e)).

Chapter nine goes into the ground of non-arbitrability of the subject matter of the dispute (Art. V(2)(a)). Chapter ten debates the ground of violation of public policy (Art. V(2)(b)). Finally, the thesis closes with chapter eleven where the general conclusion and recommendations are given.

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Abbreviations

| | |
|---------------------------------------|--|
| ADRLJ | The Arbitration and Dispute Resolution Law Journal |
| Am Bus L J | American Business law Journal |
| Am J Comp L | American Journal of Comparative Law |
| Am J Intl Arb | American Journal of International Arbitration |
| Am Rev Intl Arb | American Review of International Arbitration |
| Arab L Q | Arab Law Quarterly |
| Arb Intl | Arbitration International |
| Boston Univ Intl L J | Boston University International Law Journal |
| Colum J Transnat'l L | Columbia Journal of Transnational Law |
| Croatian Arb YB | Croatian Arbitration Yearbook |
| Disp Resol J | Dispute Resolution Journal |
| ECOSOC | The United Nations Economic and Social Council |
| Fordham Intl L J | Fordham International Law Journal |
| ICC | International Chamber of Commerce |
| ICCA | International Council for Commercial Arbitration |
| ICSID | The International centre for Settlement of Investment Disputes |
| ILA | International Law Association |
| Intl Arb I. R | International Arbitration Law Review |
| Intl Comp & Comm L Rev | International Company and Commercial Law Review |
| Intl Lawy | The International Lawyer |
| IRSAL of 1985 | The Implementation Rules of Saudi Arbitration Law of 1985 |
| J Intl Arb | Journal of International Arbitration |

| | |
|---|---|
| JCI Arb | The Journal of The Chartered Institute Of Arbitrators |
| Loyola Los Ang Intl & Comp L J | Loyola of Los Angeles International and Comparative Law Journal |
| LQR | Law Quarterly Review |
| Melbourne J Intl L | Melbourne Journal of International Law |
| NYC | The New York Convention of 1958 |
| Pace Intl L Rev | Pace International Law Review |
| PBUH | Peace Be Upon Him |
| SA | Saudi Arabia |
| SAL of 1983 | The Saudi Arbitration Law of 1983 |
| St Thomas L F | St.Thomas Law Forum |
| SWT | Abbreviation letters denoting the Sublime name of Almighty Allah, (S) Subhaanahu (Glory be to Allah), (W) and (T) Ta'aalaa (The Exalted). |
| UN Doc | United Nation Document |
| UNCITRAL | United Nation Commission on International Trade Law |
| Univ Pennsylvania J Intl Econ L | University of Pennsylvania Journal of International Economic Law |
| Vindobona J Intl Comm L & Arb | The Vindobona Journal of International Commercial Law and Arbitration |
| Virginia J Intl L | Virginia Journal of International Law |
| Washington Convention of 1965 | The Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 |
| WTO | The World Trade Organization |
| YBCA | Yearbook Commercial Arbitration |
| Maryland J Intl L & Trade | Maryland Journal of International Law and Trade |

CHAPTER ONE

General Introduction

1.1 Introduction

In the last three decades the extraordinary growth in international commerce has witnessed a dramatically increased demand for international arbitration as a means of resolving disputes. International arbitration is now the most common method of resolving disputes in international trade and commerce. This is because arbitration usually offers significant advantages in comparison with litigation before national courts, such as procedural flexibility, expedition, cost, confidentiality, and the parties' freedom to choose such matters as the place and time of arbitration, the applicable laws, and the composition of arbitral tribunals. There is also the fact that a great number of independent arbitral institutions exist to provide arbitration services on a national, regional or international basis.¹

However, the main factor in the success of international commercial arbitration is perhaps the extensive enforceability of arbitral awards throughout the world. International commercial arbitration would be diminished in value if awards had no effective enforcement mechanism. Accordingly, the world has witnessed several regional and international treaties relate to the enforcement of foreign arbitral awards. Yet, the most important and widely accepted is the United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which often referred to as the New York Convention of 1958 (hereafter: the NYC).

1.2 The Importance of the NYC

¹ eg, the International Chamber of Commerce (ICC) in Paris, the American Arbitration Association (AAA) in New York, the London Court of International Arbitration (LCIA), the WIPW Arbitration and Mediation Centre in Geneva, the International Center for the Settlement of Disputes (ICSID) in Washington, the Hong Kong International Arbitration Centre (HKIAC), The Singapore International Arbitration Centre (SIAC), the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and the GCC Commercial Arbitration Centre in Bahrain.

The NYC has been broadly considered as the most successful convention in international arbitration if not in international private law.² Thus, Lord Mustill has said of the NYC that:

this convention has been the most successful international instrument in the field of arbitration, and perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.³

Likewise, Lew, Mistelis and Krèoll state that the NYC “is the backbone to the acceptance of international arbitration by the business world”.⁴ Since its establishment in 1958, the NYC has increasingly attracted countries to its membership and continues to do so to the present day. The NYC has been so far ratified by more than 136 states, including most major trading nations and many developing countries from all regions of the world.⁵

In 1994, Saudi Arabia adhered to the NYC.⁶ This step was welcomed as a happy event for arbitration users in Saudi Arabia as well as internationally. The Saudi

² See, A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn, Sweet & Maxwell, London 1999) pp 67, 455; AJ van den Berg, 'Striving for uniform interpretation' (Enforcing arbitration awards under the New York Convention: experience and prospects 1998) 40; R Merkin, *Arbitration law* (Lloyd's of London Press, London 2004) para 1-8; J Lew, L Mistelis and S Krèoll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague ; London 2003) paras 2-18, 26-20; R Garnett and others, *A Practical Guide to International Commercial Arbitration* (Oceana Publications, Dobbs Ferry NY 2000) 101; A Dicey, J Morris and L Collins, *Dicey and Morris on the Conflict of Laws* (13th edn, Sweet & Maxwell, London 2000) para 16-5; G Born, *International Commercial Arbitration : Commentary and Materials* (2nd edn, Transnational Publishers; Kluwer Law International, NY; The Hague 2001) 21; K Annan, 'Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration' (Enforcing arbitration awards under the New York Convention: experience and prospects 1998) 2; D Sutton and J Gill, *Russell on Arbitration* (22nd edn, Sweet & Maxwell, London 2003) 369 fn 4; D Di Pietro and M Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* (Cameron May, London 2001) 11; P Fouchard, 'Suggestions to Improve the International Efficacy of Arbitral Awards' (ICCA Congress Series no 9 Paris 1998) 604.

³ M Mustill, 'Arbitration: History and Background' (1989) 6 (2) *J Intl Arb* 43 at 49.

⁴ Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* p v and para 2-14.

⁵ See, for the states parties to the NYC, UNCTRAL, 'Status; 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards'
<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (27/9/2006).

⁶ By issuing Royal Decree No. M/11 dated 16/7/1414 H (1994) for adoption the NYC in Saudi Arabia. Published in the official Gazette, issue. 3489, dated 10.08.1414 II, (21.01.1994).

Council of Ministers gave the Board of Grievances⁷ jurisdiction over enforcement of foreign awards falling under the NYC.⁸

1.3 Art. V of the NYC

The NYC deals essentially, as its title suggests, with the "Recognition and Enforcement of Foreign Arbitral Awards".⁹ Its vital function is to provide an international legal framework facilitating the enforcement of arbitral awards all over the world. Thus, it simplifies the requirements for enforcing foreign arbitral awards, requiring only that the party seeking enforcement supplies the relevant court with: (i) the arbitral award or a certified copy thereof, (ii) the arbitration agreement or a certified copy thereof.¹⁰ In addition, a certified translations of the award and the arbitration agreement is required if they are not in the official language of the country where enforcement is sought.¹¹ Once these formalities are satisfied, the NYC requires the courts of member states to grant enforcement of the award, unless one or more of the grounds for refusing enforcement set out in Art. V are established.

Art. V constitutes the heart¹² and essence of the NYC, since it seeks to limit the grounds upon which national courts may refuse to enforce foreign arbitral awards. The main object of these grounds is to ensure consistency with the parties' arbitration agreement, the basic principles of due process, and the notions of arbitrability and public policy recognised by the enforcing state.

1.4 The Aim of the Thesis

⁷ The Saudi judicial system is currently bifurcated. The *Shari'ah* courts have general jurisdiction, but the Board of Grievances has exclusive power to decide disputes regarding Saudi Government contracts and certain types of commercial disputes such as those related companies law and intellectual property.

⁸ Saudi Council of Ministers Resolution No. 78 dated 14/7/1414 H (1994) for adoption the NYC in Saudi Arabia, para 2.

⁹ For the full text of the NYC, see, Appendix. A.

¹⁰ NYC of 1958, Art. IV(1)

¹¹ *ibid*, Art. IV(2).

¹² See, P Sanders, 'The History of the New York Convention' (ICCA Congress Series no 9 Paris 1998) 13.

This thesis has general and particular goals. The general goal is to examine and evaluate the provisions of Art. V of the NYC in light of both relevant theoretical discussions and the practical interpretations and applications of Art. V by the courts of signatory states. The particular goal is to examine and evaluate the interpretation and application of Art. V in Saudi Arabia according to the Shari'ah rules, Saudi arbitration laws and the practices of Saudi courts.

1.5 The Importance of the Thesis

Despite that fact that the NYC has been deemed to be the most successful convention in the international arbitration field, it was established 48 years ago and some of its text is now accused of being old-fashioned or featuring practical shortcomings in light of developments in international trade and arbitration, such as advances in the means of communication. Thus, several suggestions for amendment even replacement have been made.¹³

Accordingly, it is important to examine the alleged shortcomings of the provisions of Art. V to decide whether there is a genuine need for amendment or replacement, or whether other remedies would be more appropriate.

Furthermore, the NYC operates in more than 136 contracting States with different backgrounds and legal systems, and although at one level it provides uniform rules governing the enforcement of foreign arbitral awards and limiting the grounds upon which enforcement may be refused, Art. V often refers back to the national laws of the enforcing State. These may vary from country to country, leading to diverse applications and interpretations of Art. V by different national courts. This has been

¹³ See, eg, UN Doc. A/CN.9/127; K Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1995) 18 *Fordham Intl L J* 920 pp 956-957; N Kaplan, 'New developments on written form' (Enforcing arbitration awards under the New York Convention: experience and prospects 1998) pp 17-18; SN Lebedev, 'Court assistance with interim measures' (Enforcing arbitration awards under the New York Convention: experience and prospects 1998) 23; J Paulsson, 'Awards set aside at the place of arbitration' (Enforcing arbitration awards under the New York Convention: experience and prospects 1998) 25; W Melis, 'Considering the advisability of preparing an additional Convention, complementary to the New York Convention' (Enforcing arbitration awards under the New York Convention: experience and prospects 1998) 46.

considered as a weakness of the NYC, and has led to several attempts to amend it.¹⁴ However, a more practical and achievable approach would seem to be to achieve unification of judicial interpretation by means of the comparative case law method. In this respect, Prof Sanders states that, the compilation and publication of court decisions on the interpretation of the NYC would be useful, and would lead to some degree of harmonization.¹⁵ Prof van den Berg also emphasises that:

Current international commercial arbitration cannot function without the assistance of the national courts. The New York Convention is built upon this principle. It can even be said that the Convention effectively derives its authority from the national courts. The manner in which they interpret and apply the Convention is the main source of its effectiveness.¹⁶

Therefore, in order to maintain the NYC's great success and to achieve greater harmonisation in the application of the grounds for refusing enforcement under Art. V, this thesis aims to investigate how those grounds have been interpreted by courts including Saudi courts, and whether those interpretations are consistent with the general policy and the spirit of the NYC in supporting enforcement of foreign awards, and what new developments have emerged. This would be of particular importance in encouraging Saudi courts to take into account the principles and trends relating to the application of the NYC, and in finding out whether lessons could be learnt from developed arbitration systems, which might be applied in Saudi.

On the other hand, the NYC has been part of the Saudi legal system for the past 12 years. Thus, this thesis also intends to provide interested non-Saudi judges, academics, and legal practitioners with a clear conception about how the Saudi courts apply and interpret Art. V of the NYC. This would be of particular importance for arbitrators who want their awards to be enforceable in Saudi Arabia. Generally

¹⁴ eg, in 1976 the UN Commission on International Trade Law was encouraged by the Asian-African Legal Consultative Committee (AALCC) to consider the possibility of preparing a protocol to be annexed to the NYC with a view to clarifying and complementing it. See, UN Doc. A/CN.9/127. See also, Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' pp 956-957; Kaplan, 'New developments on written form' pp 17-18; Lebedev, 'Court assistance with interim measures' 23; Paulsson, 'Awards set aside at the place of arbitration' 25; Melis, 'Considering the advisability of preparing an additional Convention, complementary to the New York Convention' 46.

¹⁵ Sanders, 'The History of the New York Convention' 13-14.

¹⁶ AJ van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation, Deventer 1994) 5.

speaking, arbitrators "shall make every effort to make sure that the award is enforceable at law"¹⁷ of the country where the enforcement might be sought. This is a duty to use one's best attempts, rather than a duty to secure a result. It should be borne in mind that arbitrators, unlike courts, have no power to enforce their award, their function being concluded once the award has been made, while no arbitrator in the world can ever guarantee that the award is enforceable in whatever country where enforcement may be sought.¹⁸ Yet, to achieve a successful arbitration, arbitrators are expected to do their best to know what is probably unenforceable in state where enforcement may be sought, and render their awards accordingly. The current study thus will attempt to assist arbitrators to do so.

In addition, Arbitration is not new to Saudi Arabia since its legal system is based upon Islamic *Shari'ah* laws, which have not only recognised arbitration but commended its merit for the past 1427 years, and Muslims therefore have long used arbitration to resolve disputes. However, Saudi Arabia is the only country in the world whose legal system is totally dominated by *Shari'ah* rules. Thus, the only example of true Islamic interpretation of the NYC is its application by the Saudi courts.

This thesis is also of paramount importance as regards the widespread conception among foreigners that Saudi Arabia is hostile towards international arbitration and in particular the enforcement of foreign awards. Unfortunately, there is a considerable lack of awareness about the application of the NYC in Saudi Arabia due to the absence of reported decisions on the NYC by Saudi courts. Such decisions have not yet been published, and thus are very difficult to access. More importantly, there is also an obvious lack of research and comparative study concerning the interpretation of the grounds of Art. V in Saudi Arabia. As a result, it is generally thought that enforcement of foreign arbitral awards in Saudi Arabia is either impossible or at least extremely difficult, even after the Saudi adherence to the NYC in 1994.¹⁹ By way of example, one author said that:

¹⁷ See, ICC Arbitration Rules of 1998, Art. 35.
Available at <http://www.iccwbo.org/court/english/arbitration/rules.asp>. [Accessed 28/08/2003].

¹⁸ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* pp 443, 446.

¹⁹ See, eg, Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' 920-958; HG Gharavi, *The*

Saudi Arabia has traditionally been hostile to the recognition and enforcement of non-domestic arbitral awards, finding these awards contrary to Saudi Arabian law and public policy.²⁰ ... Saudi Arabia's adoption of the New York Convention remains consistent with its historical resistance to international arbitration. ... Article V(2)(b) of the New York Convention provides a safe harbor wherein Saudi Arabia does not have to recognize a non-Saudi Arabian award that is contrary to its public policy. Article V(b)(2) allows Saudi Arabia to embrace the international community and its rules for international dispute resolution and enforcement, without rejecting its own history and public policy.²¹

Such a negative view is even shared by some Saudis. For example, a Saudi arbitrator stated, with regard to the enforcement of a foreign award in Saudi Arabia, that "I feel as if we Saudis had promised things which we could not realize"²², while another Saudi commentator opined that "the local courts do not tend to enforce foreign arbitration decisions, particularly if they are from non-Arab countries" and "there is little guarantee that a foreign judgment or arbitral award will be enforced" by Saudi courts.²³

It may be added that these negative ideas about Saudi Arabia's attitude towards enforcement of foreign awards are based, to a large extent, upon the alleged conflict between the spirit of the NYC and the Shari'ah rules applied in Saudi Arabia. In particular, it is said that Art.V(2)(b) of the NYC, which states that recognition and enforcement may be refused by a competent authority if enforcement of the award

International Effectiveness of the Annulment of an Arbitral Award (International arbitration law library, Kluwer Law International, The Hague; London 2002) pp 39, 115; M Reisman, 'Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration' (ICCA Congress Series no 18 Montreal 2006) 10; P Mason, 'International Commercial Arbitration; Saudis Accept N.Y. Convention'(1994) 49 (2) *Disp Resol J* 22 at 26; W Cattani, 'Saudi Arabia'(1995) 29 *Intl Lawy* 245; F Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?(2001) 13 (1) *Pacc Intl L Rev* 1 at 23; A El-Ahdab, *Arbitration in Arab Countries* (Nolul Paris 1990 "in Arabic") vol. I pp 242-243; A El-Ahdab, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part 2'(1986) 3 (6) *J Intl Arb* 23 pp 50-51; A El-Ahdab, 'Saudi Arabia Accedes to the New York Convention'(1994) 11 (3) *J Intl Arb* 87 pp 88-91.

²⁰ Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' 922.

²¹ *ibid*, 953.

²² M. Al Houchane, Conference on Euro-Arab Arbitration (Tunisia, 1985). Cited in El-Ahdab, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part 2' pp 50-51.

²³ MJ Najjar, 'An Overview of the Saudi Legal System'
<<http://www.law.du.edu/c/lliot/mbruemme/overview.htm>> (14/5/2003)

would be contrary to the public policy of the country in question, will mean that any foreign awards contrary to Islamic principles will not be enforced in Saudi, due to the kingdom's strict adherence to *Shari'ah*.²⁴ For example, one writer said that:

The scope of this public policy exception, which could affect the implementation of the New York Convention in any Contracting State, is of particular relevance in the context of Saudi Arabia, where the *Shari'ah* is the paramount law and, in effect, the ultimate expression of Saudi Arabian public policy. *Shari'ah* precepts are not always reconcilable with modern commercial practice. The Saudi Arabian Board of Grievances (the competent court), in reliance on the public policy exception, is likely to refuse to enforce arbitral awards or such parts thereof as are deemed to be contrary to the *Shari'ah*.²⁵

Thus, this thesis will attempt to cover the above-mentioned gaps by providing a comprehensive and comparative study of how each ground for refusing enforcement under Art. V might actually be applied in Saudi Arabia. The thesis will identify those cases in which those grounds have been applied by the Saudi courts, and analyse them to highlight the true position of the Saudi courts. Specifically, this thesis will address certain unanswered questions, including whether *Shari'ah* rules ever prevent enforcement of foreign awards in Saudi Arabia, and whether any non-conformity with the *Shari'ah* rules or Saudi law block enforcement. For example, since Saudi arbitration law requires that arbitrators be Muslim, will the Saudi courts enforce foreign arbitral awards made by non-Muslims? Similarly, Saudi regulations oblige arbitral tribunals to follow *Shari'ah*. If a foreign award is governed by non-Islamic *Shari'ah* laws, will the Saudi courts refuse to enforce such awards or will deem these requirements not to be relevant to international arbitration? What is the effect of legal restrictions imposed by Saudi law upon public entities as regards their capacity to submit to arbitration? If a part of the foreign award is found to be non-enforceable, will the Saudi courts enforce the rest of the award? Review of the national arbitral awards by the Saudi courts is not limited to cases of violation of the principles of *Shari'ah*, but may also include a full review of the facts and law when an objection to

²⁴ See, eg, Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' pp 920-958; Cattán, 'Saudi Arabia' 246; Najar, 'An Overview of the Saudi Legal System'; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 91.

²⁵ Cattán, 'Saudi Arabia' 246.

the award is submitted by one or more of the parties.²⁶ Will this also be the case in respect of foreign awards under the NYC? Will the Saudi courts take into account that international public policy may be not exactly the same as national public policy, and thus apply a less strict standard of public policy to foreign awards? The thesis will consider such issues.

Finally, the Saudi legal system has witnessed significant developments since the early 1990's, especially in the commercial sphere. The economic realities of the rapid commercial and industrial development of the country²⁷ have stimulated systematic reviews of commercial laws to improve economic performance. As a consequence, Saudi Arabia promulgated the following laws: a new foreign investment law (together with the establishment of a new General Investment Authority) in 2000;²⁸ the Capital Markets law which sets out the framework for the capital market, including the establishment of the Saudi Arabian Securities and Exchange Commission, (SEC) in 2003;²⁹ a new competition law in 2004; a unified anti-dumping law in 2006. Furthermore, Saudi Arabia became a full WTO Member in 2005. Moreover, several new draft laws and major reforms of existing laws are at various stages of promulgation, including new draft laws on mining, insurance, taxation, company formation, patent protection and the labour market, e-commerce law and e-government law. It can hence be seen that significant reforms have been instituted in order to reduce barriers to business activity and make the country more attractive to

²⁶ See, SAL of 1983, Art.19.

²⁷ Saudi Arabia is the largest economy in the Middle East, comprising 25 percent of the Arab world's GDP. It is the world's leading oil exporter, possessing one-fourth of the world's proven oil reserves. See, US-SAB Council, 'the Saudi Arabian Economy' < <http://www.us-saudi-business.org/saudiarabia/Economy.asp> > (accessed 20/9/2006).

²⁸ This is, indeed, a major step which may be considered as the corner stone of a new drive to make the country more attractive to foreign investors, and streamline business related laws and regulations. See, SAGIA, 'Capital Markets' <<http://www.sagia.gov.sa/innerpage.asp?ContentID=551&Lang=en>> (accessed 26/08/2003).

²⁹ During the period from Between 1996 to 2005, the number of transactions, volume and value traded increased dramatically in the Saudi Stock Market. Market capitalization has increased by 1,490% and the all share index has increased by 1,122.04%. See, Tadawul, 'Saudi Stock Market' <http://www.tadawul.com.sa/wps/portal/!ut/p/_s.7_0_A/7_0_4B0/.cmd/ChangeLanguage/.?en?cID=6_1_9E&nID=7_0_491> (accessed 20/9/2006).

At the end of April 2005, the Saudi Market capitalization was worth over \$435 billion making it by far the largest market in the Middle East. It represents 47 percent of the total capitalization of Arab stock markets and 53 percent of Gulf Cooperation Council (GCC) stocks markets. See, The Saudi Arabia Information Resource, 'Saudi Stock Market' (2005) <<http://www.saudinf.com/main/y8194.htm> > (accessed 20/9/2006).

foreign capital investment. At the same time, this will improve the Kingdom's access to international capital markets and create greater opportunities for Saudi businessmen. It is, therefore, certain that business disputes will become more common. However, having confidence in the country's legal system is essential for foreigners who may do business with Saudi businessmen or enterprises, whether within or outside Saudi Arabia.

Thus, in 2000 the Law of Procedure before *Shari'ah* Courts, which applies to civil litigation, was passed, and the Saudi Arbitration Group was established³⁰ in order to deal with the latest arbitration developments throughout the world, and to improve the Saudi arbitration system at national and international levels.³¹ In 2001, the Law of Legal Practice³² and the Law of Criminal Procedure were enacted. Moreover, the Saudi domestic arbitration law is currently under revision, and the government is about to set up a centre for international commercial arbitration in Riyadh with the aim of pushing forward the liberalization and efficiency of the arbitral process. Thus, one can clearly see that Saudi Arabia has been taking steps to improve its legal system, and it is open to new ideas and the prospect of reform, and is determined to incorporate any positive changes into its system, as and when required.

Yet, nothing has been done regarding international arbitration law and the enforcement of foreign arbitral awards, despite the fact that confidence regarding the enforceability of foreign awards in Saudi Arabia is among the most important factors that foreign investors take into account when deciding to deal with Saudi parties whether in Saudi Arabia or abroad. Accordingly, and since the Saudi Arabia is currently reviewing its arbitration law and about to establish international arbitration center in Riyadh, it would be essential for this thesis to suggest possible amendments and reforms which might introduce more flexibility, transparency, and efficiency into the process of enforcement of foreign arbitral awards in Saudi Arabia. In particular,

³⁰ Prince Bander Al-Saud is the Chief of the Saudi Arbitration Group. See, Prince B AL-Saud, 'Opening Remarks' in *The International Bureau Of the Permanent Court of Arbitration* (ed) *Strengthening Relations with Arab And Islamic Countries through International Law* (Kluwer Law International, the Hague 2001) 4.

³¹ *ibid.*

³² I was a member of the drafting panel in Majlis Al-Shoura (The Saudi parliament) that drafted the foreign investment law of 2000, the Law of Procedure before *Shari'ah* Courts of 2000 and the Law of Legal Practice of 2001.

the thesis should determine whether there is a need for a new Saudi act implementing the NYC, and a Saudi international arbitration law.

1.6 The Structure of the Thesis

The thesis is divided into eleven chapters: Chapter two aims to discuss the essential characteristics of Art. V. The succeeding chapters deal with the grounds for resisting enforcement established by Article V, Chapter three with party incapacity, Chapter four with the invalidity of the arbitration agreement, Chapter five with the violation of due process, Chapter six with arbitrators exceeding their jurisdiction, Chapter seven with irregular arbitral procedure or tribunal, Chapter eight with the award has not become binding or being set aside, Chapter nine with non-arbitrability of the subject matter of the dispute and Chapter ten with violation of public policy. Chapter eleven provides the thesis's general conclusion and recommendations.

CHAPTER TWO

Essential Characteristics of Art. V

2. Introduction

Although the NYC establishes a general standard that foreign arbitral awards must be recognized and enforced, Art. V provides limited grounds upon which enforcement of foreign arbitral awards may be refused. The application of the NYC for more than 46 years by national courts in 137 countries has created a significant jurisprudence under Art. V. This will be addressed presently, but first it might be thought useful to highlight the main characteristics of Art. V in order to obtain a better understanding of that provision, before considering each ground of refusal individually. Thus, this chapter first provides a brief outline of Art. V before considering the idea that the Article provides exhaustive grounds for resisting enforcement, discussing the issue of reversing the burden of proof, and finally examining the wide discretion of enforcing court in favour of enforcement.

2.1 Outline of Art. V

Art. V is divided into two sets of provisions. First, Art.V(1) sets out five grounds for refusing enforcement which are largely concerned with safeguarding the most fundamental principles of justice and party autonomy. These include party incapacity; the invalidity of the arbitration agreement; violation of due process; exceeding the scope of the submission; defective composition of the tribunal; significant procedural irregularity, and the fact that the award has not yet become binding or has been set aside. These grounds can only be invoked by the losing party who has to prove them, while the enforcing court cannot raise them of its own motion.¹

¹ NYC of 1958, Art. V (1) states that:

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

By contrast, Art. V(2) focuses on the law of the place where enforcement is sought, allowing each contracting state to protect its national interests and moral standards by allowing enforcement to be denied on the grounds of inarbitrability and violation of public policy, which issues can be raised by the enforcing court of its own motion.²

2.2 Exhaustive Grounds

2.2.1 General

It is critical to ask whether the enforcement of foreign awards may be resisted only on the grounds set forth in Art. V. There is a consensus among scholars³ and courts,⁴

(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 his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

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

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

² *ibid*, Art. V (2) states that:

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.

³ See, eg. AJ van den Berg, 'Consolidated Commentary'(2003) XXVIII YBCA 562at 651; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 265; Sutton and Gill, *Russell on Arbitration* 371; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 459; F Davidson, *International Commercial Arbitration : Scotland and the UNCITRAL Model Law* (W Green & Son Ltd, Edinburgh 1991) 222; F Davidson, *Arbitration* (W Green, Edinburgh 2000) 392; Garnett and others, *International Commercial Arbitration* 102; Born, *International Commercial Arbitration* 707; E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) para

apart from the Supreme Court of Queensland,⁵ that Art. V provides an exhaustive list of the grounds for refusing enforcement of foreign arbitral awards. This is basically because Art. V states that enforcement of the award may be refused "only if" the resisting party furnishes proof of existence of one of the grounds listed in Art. V(1). Hence relying upon other grounds is not possible, even a ground which would otherwise be available under the law of the state where enforcement is sought⁶ or under the law governing the arbitration process.

Judicial support for this position is found, for example, in the statement of the English High Court, in *Norsk Hydro ASA v The State Property Fund Of Ukraine* that:

There is an important policy interest, reflected in this country's treaty obligations, in ensuring the effective and speedy enforcement of international arbitration awards; the corollary, however, is that the task of the enforcing court should be as 'mechanistic' as possible. Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of a New York Convention award may be refused, the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions.⁷

Equally, the US Court of Appeals in *Karaha Bodas Co LLC v Perushahaan Minyak Dan Gas Bumi Negara*⁸ noted that:

While courts of a primary jurisdiction (the country where the arbitration is held) may apply their own domestic law in evaluating a request to annul or set aside an arbitral award, courts in countries of secondary jurisdiction

251; Sanders, 'The History of the New York Convention' 12; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 135.

⁴ See, eg, *Yusuf Ahmed Alghanim & Sons v Toys "R" Us Inc* 126 F3d 15 (US Court of Appeals 2nd Circ 1997) 23; *Norsk Hydro ASA v The State Property Fund Of Ukraine* 2002 WL 31476341 (UK QBD Admin Ct) para 17; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F 3d 274 (US Court of Appeals 5th Circ 2004) 288; *Societe d'Etudes et de Commerce SA v Weyl Beef products BV* (2001) XXIV YBCA 827 (Netherlands Court of First Instance 2000) 828.

⁵ *Resort Condominiums International Inc v Bolwell* (1995) XX YBCA 628 (Australia Queensland Supreme Court 1993)

⁶ Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 135.

⁷ *Norsk Hydro ASA v The State Property Fund Of Ukraine* para 17.

⁸ *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* .

(where enforcement of the foreign arbitral award is sought) may refuse enforcement only on the grounds specified in Article V (of the NYC).⁹

Likewise, the Netherlands Court has asserted that the grounds for resisting enforcement are definitively listed in Art. V.¹⁰

By contrast, only one court seems to have paid no attention to the exclusivity principle under Art. V. The Supreme Court of Queensland in *Resort Condominiums International Inc v Bolwell et al*¹¹ reached the view that the Convention grounds were not exhaustive in the light of the Australian implementing legislation which reproduces Art. V, but omits the word "only". The Court held that the Court had a general discretion to refuse enforcement apart from specific grounds set out in Art. V, observing that "the omission of the word 'only' from the opening words of s.8(5) of the Act, when compared with the opening words of Art. V of the Convention, is a further pointer to the existence of a residual discretion".¹² The Court also derived support for this view by alleging the New York District Court had held in *Dworkin-cosell Interair Courier Services Inc v Avraham* that the defences to an application to enforce a foreign award were not limited to the specific matters referred to in the Convention.¹³ Thus the Court refused to order enforcement in the exercise of its discretion.¹⁴

This approach has been strongly criticized. This is because firstly, the Court relied upon the terminology of the Australian implementing legislation, rather than the wording of the NYC itself. It is suggested that, despite the omission of the word 'only', the Australian Legislature cannot intend to implement the NYC, while at the same time radically altering its whole substance by giving the court a residual discretion to refuse enforcement. It is a serious matter to implement the NYC in a way which does not make enforcement of a foreign award mandatory in all cases falling outside the grounds listed in Art. V. Not only is this inconsistent with the text of the

⁹ *ibid* 288.

¹⁰ *Societe d'Etudes et de Commerce SA v Weyl Beef products BV* 828.

¹¹ *Resort Condominiums International Inc v Bolwell*.

¹² *ibid* 643.

¹³ *ibid* 642.

¹⁴ *ibid* 649.

NYC, but it tends fatally to undermine its main purpose, scheme and philosophy, as well as its well known pro-enforcement bias.¹⁵ Secondly, as Prof van den Berg notes, the reference to case of *Dworkin-Cosell v Avraham*¹⁶ is mistaken as this case 'concerned the setting aside of an arbitral award and the question whether the award, made in new York, was final and binding under federal arbitration law'.¹⁷ More importantly, the US court in that case confirmed that, as a general rule, the only defences against a foreign arbitral award are those enumerated in Art. V.¹⁸

2.2.2 The Possibility of Indirect Exceptions.

Under Art. V(1)(e) enforcement may be refused if the award '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'. Does this imply that a further ground of refusal may be introduced when an enforcing court is asked to deal with an awards which is not made abroad, but which is considered as non-domestic¹⁹ in accordance with Art I(1) of the NYC.²⁰ This matter was dealt with by the US Court of Appeals in the leading case of

¹⁵ See, M Pryles, 'Interlocutory order and Convention awards: the case of *Resort Condominiums v. Bolwell*' (1994) 10 (4) *Arb Intl* 385 at 393; N Kaplan, 'A Case by Case Examination of Whether National Courts Apply Different Standards When Assisting Arbitral Proceedings and Enforcing Awards in International Cases as Contrasting with Domestic Disputes. Is There a Worldwide Trend towards Supporting an International Arbitration Culture?' (ICCA Congress Series no 8 Seoul 1996) pp 205-07; AJ van den Berg, 'Consolidated Commentary' (1996) XXI YBCA 394 at; Garnett and others, *International Commercial Arbitration* 102 fn 330.

¹⁶ *Dworkin-cosell Interair Courier Services Inc v Avraham* 728 FSupp 156 (US District Court SD NY 1989).

¹⁷ See, van den Berg, 'Consolidated Commentary' (1996) 480.

¹⁸ *Dworkin-cosell Interair Courier Services Inc v Avraham* 161.

¹⁹ Non-domestic awards may include several categories, as follows: (a) an award made in the enforcement country under the arbitration law of another country; (b) an award made in the enforcement country under its arbitration law, but involved a foreign or international element; (c) an award that is regarded as a-national in that it is not governed by any arbitration law. See van den Berg, 'Consolidated Commentary' (2003) at 569; (d) an award made in the enforcement country under its arbitration law, but involved parties having their principal place of business outside of that state. See, *Sigval Bergesen v Joseph Muller Corp* 710 F2d 928 (US Court of Appeals 2nd Cir 1983) 932.

²⁰ NYC of 1958, Art. I (1) provides that "...It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".

According to the legislative history of the NYC, Art. I(1) represents a compromise between (a) the common law states which adopted the territorial approach to determine the nationality of an award that is enforceable under NYC, as adopted in the first clause of Art. I(1). And (b) the civil law states were of the opinion that factors other than the seat of the arbitration, such as the procedural law, should be taken into account to determine the enforceable award under the NYC, as adopted in the second clause of Art. I(1).

*Sigval Bergesen v Joseph Muller Corp.*²¹ The Court took the view that there is an overlap between the Convention and the Federal Arbitration Act in which a non-domestic award rendered in the US may be reviewed. Moreover, the US District Court in *Certain Underwriters v BCS Insurance Co*²² stated that since Art. V(1)(e) permits courts to refuse enforcement of awards which have been set aside under the law of the country where the award was made, it permits the District Court to apply the FAA to vacate a non-domestic award rendered in the United States.

It is submitted in favour of this interpretation of Art. V (1)(e) that excluding an applicant in such circumstances from applying to the court to have the award set aside under domestic law would be clearly unfair. This is because there is no indication that the NYC intends to deprive a state which adopts it of its authority to set aside an award which that state regards as non-domestic. This interpretation is also consistent with the commonly held view that an application to set aside an award can be never be made under the NYC itself, but only can be sought under the law of the seat of the arbitration.²³ In this way, Art. V(1)(e) may indirectly extend the grounds for refusing enforcement under Art. V so as to include all grounds on which an award may be challenged under the law of seat of arbitration, automatically enhancing the chances for the losing party to avoid enforcement. It may thus undermine aim of limiting the grounds for refusing enforcement under Art. V and restrict the degree to which the application of the NYC can be harmonized.²⁴ This might appear to run contrary to the main purpose of the NYC which is to ensure the easy enforcement of foreign arbitral awards.

See UN Doc. E/Conf.26/L.42 p 2; UN Doc. E/Conf.26/SR.16; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 22; AJ van den Berg, 'Non-domestic Arbitral Awards Under the 1958 New York Convention'(1986) 2 (3) *Arb Intl* 191; Davidson, *Arbitration* 403; R Mehren, 'Enforcement of Arbitral Award in the United States'(1998) 1 (6) *Intl Arb L R* 198 at 199.

²¹ *Sigval Bergesen v Joseph Muller Corp* 934 .

²² See, *Certain Underwriters v BCS Insurance Co* 239 FSupp2d 812 (US District Court ND Illinois 2003) 815. See also *Spector v Torenberg* 852 FSupp201 (US District Court SD NY 1994) pp 205-6 and fn 4.

²³ See, Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* pp 136-37.

²⁴ cf. van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 265; D Kolkey, 'Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitration'(1988) 22 *Intl Lawy* 693 at 694.

Yet it might be argued that there is no real possibility of any additional grounds for refusing enforcement to be indirectly included under Art. V(1)(e) if the time-limits for making a challenge are taken into account. A distinction should be made between two periods of time for challenging a non-domestic award. Before the time-limit for challenging an award under a given national law is up, the relevant court can (if this is contemplated by the law) set aside a non-domestic award in the same way as a domestic award. But once that time-limit has elapsed, the court may not set aside such an award, but may only refuse to enforce it under one of the grounds listed in Art. V. Therefore, there is in practice no exceptional case in which grounds for refusing enforcement are recognised beyond those specified in Art. V. This interpretation is consistent with the unanimous judicial opinion²⁵ that the NYC may not be invoked to set aside an award.

2.2.3 Further Limitation under Art. VII

Art. VII(1) of the NYC provides that:

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.²⁶

Thus, a further limitation on the grounds for refusing enforcement may be found in the enforcing state, in that while Art. V lays down the maximum grounds on which enforcement of foreign awards may be refused, the NYC allows contracting states to adopt a position which is more favourable to enforcement than Art. V. By allowing parties to take advantage of more favourable provisions in national laws or bilateral and multilateral treaties,²⁷ Art VII(1) stresses the pro-enforcement bias of the NYC.

²⁵ See, eg, *Shenzhen Nan Da Indus v FM Int'l Ltd* (1991) XVIII YBCA 377 (Hong Kong Supreme Court 1991) 381 and fnns 10 & 11; van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 20.

²⁶ NYC of 1958, Art. VII(1).

²⁷ See, Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* 170; Lew, Mistelis and Kr  oll, *Comparative International Commercial Arbitration*

2.3 The Burden of Proof

A significant improvement the NYC makes on the Geneva Convention of 1927 is that the burden of proof of the existence of the grounds for refusing enforcement under Art. V(1) is placed on the party resisting enforcement of the award. This is made clear by the introductory sentence of Art. V(1) which states that "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party *furnishes* to the competent authority where the recognition and enforcement is sought, *proof*" one or more of the grounds for refusing enforcement enumerated in Art V(1).²⁸ It may also be noted that the NYC presumes the validity of awards since it requires the party seeking enforcement only to supply the original or certified copy of both the award and the arbitration agreement.²⁹ In relation to placing the burden of proving invalidity on the party resisting enforcement, the well-known commentator Prof Sanders observes that "this again stands to reason because the grounds for refusal deal with exceptional cases. Logically, these grounds should be invoked by the party who opposes the exequatur".³⁰ Many commentators see the move away from requiring the party seeking enforcement to prove the validity of the award, as under the Geneva Convention of 1927, to be one of the key reforms made by the NYC.³¹

pp 697-98. van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 81.

²⁸ NYC of 1958, Art.V(1).

²⁹ *ibid*, Art. IV(1) provides that:

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.

³⁰ Sanders, 'The History of the New York Convention' 13.

³¹ See, eg, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 264; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1673; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 459 fn 65; R Bishop and E Martin, 'Enforcement of Foreign Arbitral Awards' (2001) <<http://www.kslaw.com/library/pdf/bishop6.pdf>> (13/8/2005) 9; van den Berg, 'Consolidated Commentary' (2003)651.

The courts have also noted the placing of the onus of proof upon the resisting party.³² So the Federal Supreme Court of Switzerland has stated that 'the burden of proof is reversed in Art. V, which lists the grounds on which recognition and enforcement may exceptionally be refused'.³³ This view was confirmed by both the US District Court in *Henry v Murphy*³⁴ as well as the Supreme Appeal Court of Kuwait.³⁵

On the other hand, it should be noted that under Art. V(2) the relevant court may refuse enforcement of its own motion on the basis situation of non-arbitrability or violation of public policy.³⁶ May the party against whom enforcement is sought raise such grounds, and if so, does he bear the burden of proof in this context? While the NYC does not deal explicitly with such matters, it seems obvious that it must be open to a party to rest his defence on such grounds.³⁷ Moreover, it has been held by an English commercial court that while the grounds for refusing enforcement under Art. V(2) may always be applied by the court of its own motion, if a defendant wish to rely upon these grounds, he undertakes the burden of proving them.³⁸ Nevertheless, it might be argued that it sometimes occurs that defendants argue that enforcement would somehow be contrary to the public policy, and the court agrees to consider that issue without requesting them to furnish any proof.

³² See, *A Ltd v BAG* (2003) XXVIII YBCA 835 (Switzerland Supreme Court 2002) 841; *Henry v Murphy* 2002 WL 24307 (US District Court SD NY 2002) 3; *contact party v contract party* (1997) XXII YBCA 748 (Kuwait Supreme Court 1988) 751. See, also, Sanders, 'The History of the New York Convention' 13; van den Berg, 'Consolidated Commentary' (2003) 651; van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* pp 9, 264; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 460; Davidson, *Arbitration* pp 391-392; Sutton and Gill, *Russell on Arbitration* 371; Garnett and others, *International Commercial Arbitration* 103; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 251; G Gaja, *International Commercial Arbitration: New York Convention* (Oceana, Dobbs Ferry NY 1978) para I.C.1; Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* pp 133-4; S Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' (2002) 5 (5) *Intl Arb L R* 160 at 165.

³³ *A Ltd v BAG* 841.

³⁴ *Henry v Murphy* 3.

³⁵ *contact party v contract party* (Kuwait Supreme Court 1988) 751.

³⁶ NYC of 1958, Art. V(2) provides that "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". See also, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 459.

³⁷ See, Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* 133.

³⁸ *Minmetals Germany GmbH v Ferco Steel Ltd* 1999 WL 249913 (UK QBD Com Ct).

2.4 Court Discretion.

Art. V provides the enforcing court with discretion in support of the pro-enforcement bias of the NYC. There is a wide discretion in favour of enforcement which allows the court to disregard the grounds for refusing enforcement even when proven, while those grounds should be narrowly construed.

2.4.1 Wide Discretion in Favour of Enforcement.

The opening sentence of Art. V(1) provides that “recognition and enforcement may be refused” if the defendant furnishes proof of one of the listed grounds. Does the use of the word “may” suggest that the enforcing court has discretion whether or not to refuse enforcement if the existence of one or more of the grounds is proven? And if so, how wide might that discretion be? No clarification appears from the NYC nor its legislative history regarding this matter. However, the majority of the framers of Art. 36 of the UNCITRAL Model Law on International Commercial Arbitration, which is identical to Art. V, intended that the discretion should be very narrow. They argued that, for the sake of certainty and predictability, “may be refused” should normally mean “shall be refused”. So the court should have no discretion except for “some flexibility as regards individual reasons for refusal (e.g. exclusion of minimal or trivial infractions of procedural rules)”.³⁹ Accordingly, if the grounds are established the court should normally refuse enforcement.⁴⁰ Some countries go further, Germany for example,⁴¹ binding the court to refuse enforcement if the refusal grounds are proven⁴², the word “may” being interpreted by the German courts as an absolute obligation which leaves no discretion.⁴³

³⁹ cf. UN Doc. A/CN. 9/233 , para 140; Davidson, *International Commercial Arbitration : Scotland and the UNCITRAL Model Law* 224; RL Hunter, *The law of arbitration in Scotland* (2nd edn, Butterworths, Edinburgh 2002) pp 374-75.

⁴⁰ Davidson, *Arbitration* 385.

⁴¹ The same applies for Austria and Burgstaller. See, Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' in 44.

⁴² *ibid* 166.

⁴³ *ibid* 172.

By contrast, the prevailing interpretation of the word "may" under Art. V is that it provides a residual discretion to grant enforcement. This approach has been supported by most authors and courts.⁴⁴ So, Redfern & Hunter state that the court is not obliged to refuse enforcement even if grounds for refusal are proven to exist because "the opening lines of paragraph (1) and (2) of Article V say that enforcement "may" be refused. They do not say that it "must" be refused. The language is permissive, not mandatory".⁴⁵ Prof. Berg, similarly asserts that even if one of the grounds is proved, "the court still has a certain discretion to overrule the defence and to grant the enforcement of the award",⁴⁶ a view also shared by Prof Davidson.⁴⁷

Equally, the High Court of Hong Kong has stated that:

even if a ground of opposition is proved, there is still a residual discretion left in the enforcing court to enforce nonetheless. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all the circumstances.⁴⁸

The court continued that this conclusion is quite in accordance with the pro-enforcement bias of the NYC and the attitude of most courts around the world.⁴⁹ In another case, an English High Court asserted that the court retains a residual

⁴⁴ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 265; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 460; Sutton and Gill, *Russell on Arbitration* 371; Davidson, *Arbitration* 392; Davidson, *International Commercial Arbitration : Scotland and the UNCITRAL Model Law* 224; Garnett and others, *International Commercial Arbitration* 102; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 133; WL Craig, W Park and J Paulsson, *International Chamber of Commerce arbitration* (3rd edn, Oceana Publications, Dobbs Ferry, NY 2000) 685; J Paulsson, 'May or Must under the New York Convention: an Exercise in Syntax and Linguistics'(1998) 14 (2) *Arb Intl* 227; A Giardina, 'The Practical Arbitration of Multilateral Conventions' (ICCA Congress Series no 9 Paris 1998) pp 448-49; Mehren, 'Enforcement of Arbitral Award in the United States' 200; Fouchard, 'Suggestions to Improve the International Efficacy of Arbitral Awards' 607; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 16; Kaplan, 'A Case by Case Examination' pp 187, 204; A Broches, *Commentary on the UNCITRAL model law on international commercial arbitration* (Kluwer Law and Taxation Publishers, Deventer 1990) 188. Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* 707; Sutton and Gill, *Russell on Arbitration* para 8-014.

⁴⁵ Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 460.

⁴⁶ van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 265.

⁴⁷ Davidson, *Arbitration* 392.

⁴⁸ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* [1995] 2 HKLR 215 (Hong Kong High Court 1994) 225.

⁴⁹ *ibid* 226.

discretion under the NYC to enforce an award in any case.⁵⁰ Similarly, an English commercial court has affirmed that 'it is clear from the terms of the statute that refusal to enforce a Convention award is a matter for the discretion of the Court'.⁵¹

Yet, how is this discretion to be applied? It was suggested that it is for the enforcing judge to determine how the residual discretion should be exercised to achieve a just result in the circumstances, since the NYC itself gives no guidelines as to how this discretion is to be applied.⁵² This view may be criticized since it seems to invite varying inconsistent applications of the provision from country to country, which is, however contrary to the NYC's aim of harmonising the regime governing the enforcement of foreign arbitral awards in all contracting states.

In view of the above observations, it may be thought appropriate to suggest a compromise between the pro-enforcement bias and the protection of the rights of defendants. On one hand, the right of resisting party should be taken into account, so the enforcement court should generally refuse to enforce a foreign arbitral award if one of grounds listed in Art. V(1) is properly proved. The NYC safeguards the defendant's basic rights by allowing him to resist enforcement in two ways – firstly by challenging the award in the courts of the country where the award was made, and secondly by asking the enforcing court to refuse enforcement on the very limited grounds of Art. V(1).⁵³ On other hand, the enforcing court should exceptionally have a discretion to enforce the award notwithstanding the proven grounds, where strong reasons exist for doing so.⁵⁴ This exception can be justified in two ways. Firstly,

⁵⁰ *Qinhuangdao Tongda Enterprise Development Co And Another v Million Basic Co Ltd* [1993] 1 HKLR 173 (UK HC) 175.

⁵¹ *China Agribusiness Development Corp v Balli Trading* [1998] 2 Lloyd's Rep 76 (UK QBD Com Ct 1997) 79. See also, *Chromalloy Aeroservices Inc v Arab republic of Egypt* 939 F Supp 907 (US District Court Colu 1996) 909.

⁵² Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 134.

⁵³ See, *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39 (Hong Konk High Court 1993) pp 48-49.

⁵⁴ A common example to this effect is that in a number of cases the courts have enforced foreign arbitral awards although they have been set aside in the country where they were made. For notable examples, see *Chromalloy Aeroservices Inc v Arab republic of Egypt*, where the US Court enforced an award that had been set aside in Egypt, and *Hilmarton Ltd v Omnium de Traitement et de Valorisation OTV* (1994) XIX YBCA 655 (France Supreme Court 1994), where the France Court enforced an award that had been set aside in Switzerland.

because of the NYC's permissive language as mentioned above. Secondly, due to the fact that the NYC, in the light of its pro-enforcement bias, ensures under Art. VII(1)⁵⁵ that whenever another treaty, or the law of the enforcing states turns out to be more favourable to the enforcement of a foreign award than the NYC, the more favourable provision shall prevail over the rules of the NYC.⁵⁶ Hence, a foreign award should be enforced, despite the existence of a ground for refusing enforcement under Art. V, if it would otherwise have been enforceable in that state.

2.4.2 Grounds for Refusing Enforcement Restrictively Applied

Not only the grounds for refusing enforcement under Art. V are exhaustive, they are generally interpreted and applied narrowly.⁵⁷ In the Report of the Secretary-General of UNCITRAL this was said to be a recognizable trend⁵⁸, while Redfern and Hunter have suggested that this is the intention of the NYC.⁵⁹ Moreover, Prof van den Berg stated:

As far as the grounds for refusal of enforcement of the award as enumerated in Article V are concerned, it means that they *have to be construed narrowly*. More specifically, concerning the grounds of refusal

Another issues have been raised such as: "when the ground was not raised at the appropriate stage in the arbitration, or where a party by his conduct has waived the right to object" or "where the party concerned had unreasonably failed to invoke the supervisory jurisdiction of the courts where the award was made". See, Davidson, *Arbitration* 392. AJ van den Berg, 'The Application of the New York Convention by the Courts' (ICCA Congress Series no 9 Paris 1998) 12; Sutton and Gill, *Russell on Arbitration* 371 ff 24.

⁵⁵ NYC of 1958, Art. VII(1) provides that "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".

⁵⁶ See, *Chromalloy Aeroservices Inc v Arab republic of Egypt* 909; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 265; Garnett and others, *International Commercial Arbitration* 103; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 267.

⁵⁷ See, UN Doc. A/CN.9/168 p 107; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 267-68; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 460; Garnett and others, *International Commercial Arbitration* 102; Mehren, 'Enforcement of Arbitral Award in the United States' 202; W Chang, 'Enforcement of Foreign Arbitral Awards in the People's Republic of China' (ICCA Congress Series no 9 Paris 1998) pp 474, 484, 486; RM Schwartz, 'The US Bankruptcy Courts' Failure to Interpret the New York Convention as a Treaty Obligation'(1998) 14 (2) *Arb Intl* 231 at 234.

⁵⁸ UN Doc. A/CN.9/168 p107.

⁵⁹ Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 460.

of Article V(1) to be proven by the respondent, it means that their existence should be accepted in serious cases only; obstruction by respondents on trivial grounds should not be allowed. Concerning the grounds for refusal of Article V(2) to be applied by the court on its own motion, it means that a court should accept a public policy violation in extreme cases only.⁶⁰

This approach also finds support in judicial decisions. For instance, the Italian Supreme Court insisted that “the Convention aims at favouring recognition and its provisions containing positive or negative conditions must be interpreted narrowly”.⁶¹ Equally the US Appeal Court held that the defences to enforcement of foreign awards under the convention must be narrowly construed,⁶² stating that ‘a narrow construction would comport with the enforcement-facilitating thrust of the Convention.’⁶³ The High Court of Hong Kong has also stressed that ‘the grounds of opposition are not to be inflexibly applied’.⁶⁴

2.4.3 No Review on the Merits of the Award

An additional key principle which must be recognised when dealing with Art. V is the enforcing court may not review the merits of an award. At the stage of enforcement the court may not re-examine either the factual or the legal basis of a foreign award. The NYC contains no provision permitting judicial review of the merits of an award on the basis of a mistake of fact or law. As the grounds on which enforcement may be refused under Art. V are exhaustive, such judicial review is not permitted simply because it is not included within the grounds listed in Art. V,⁶⁵ which are of course applied restrictively. Moreover, permitting enforcement to be refused because of court disagreement with the substance of arbitrator’s award could not be allowed, as this would cause foreign awards to be dependent on the national legal system of the

⁶⁰ van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 267-68.

⁶¹ *De Maio Giuseppe e Fratelli snc v Interskins Ltd* (2002) XXVII YBCA 492 (Italy Supreme Court 21Jan 2000) 496.

⁶² *Parsons & Whittemore Overseas Co v RAKTA* 508 F2d 969 (US Court of Appeals 2nd Cir 1974) 976.

⁶³ *ibid* .

⁶⁴ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* 225.

⁶⁵ *Yusuf Ahmed Alghanim & Sons v Toys "R" Us Inc* .

enforcing country⁶⁶ and open for appeal there again. This would certainly deprive international arbitration of one of its most significant advantages.

The principle that an award may not be reviewed on its merits has unanimously been confirmed by both commentators⁶⁷ and courts. For example, the English High Court in the case of *Norsk* held that:

Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of a New York Convention award may be refused, the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions.⁶⁸

The Appeal Court of Luxembourg has also stated that enforcing courts are not allowed under the Convention to review the manner in which the arbitrators decided on the merits⁶⁹, while the District Court of Moscow has rejected an objection because it was based on the merits of the award.⁷⁰ Furthermore, the US Court of Appeal in *Yusuf Ahmed Alghanim v Toys "R" Us, Inc*⁷¹ noted that many US courts have concluded that the grounds under Art. V 'do not include miscalculations of fact or manifest disregard of the law'.

Nonetheless, although the enforcing court has no general power to review the substance of a foreign award, the court might undertake a limited investigation in order to ascertain whether the enforcement of the foreign award would be contrary to

⁶⁶ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* paras 264, 374.

⁶⁷ See, van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* pp 265, 269-73; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 459; Garnett and others, *International Commercial Arbitration* 103; Born, *International Commercial Arbitration* pp 797, 809; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* paras 264, 376; R Greig and I Reznik, 'Current Developments in Enforcement of Arbitration Awards in the United States'(2002) 68 (2) JCI Arb 120 at 126.

⁶⁸ *Norsk Hydro ASA v The State Property Fund Of Ukraine* para 17.

⁶⁹ *Sovereign Participations International SA v Chadmore Developments Ltd* (1999) XXIV YBCA 714 (Luxembourg Court of Appeal 1999) 721.

⁷⁰ *IMP Group v Aeroimp* (1998) XXIII YBCA 745 (Russian District Court 1997) 749.

⁷¹ *Yusuf Ahmed Alghanim & Sons v Toys "R" Us Inc* 20.

the public policy of the enforcing country.⁷² However such a review would be limited.⁷³

2.5 The Position in Saudi Arabia

2.5.1 Exhaustive Grounds

A Saudi court has confirmed that enforcement of foreign awards may be refused only on limited grounds listed under the Convention,⁷⁴ which principle was then affirmed by the Appeal Court.⁷⁵ In another case, a Saudi court refused to consider a petition to enforce a foreign award made against a firm that had closed down because its owner had died. The court believed that it could not enforce the award on the heritage of the losing party, since it laid outwith its jurisdiction. But the Court of Appeal voided that decision, on the basis that death of a party is not one of the grounds for refusing enforcement recognised by the NYC.⁷⁶

2.5.2 Burden of Proof

The Saudi courts follow, as a rule, the principle that the party opposing enforcement bears the burden of proving the existence of the grounds for refusing enforcement. For example, a Saudi court has dismissed a Saudi party's petition to deny enforcement of an arbitral award, partly because the defendant failed to prove his claim that he was not given proper notice of the arbitral proceedings and therefore was absent when the award was made. The court went on to state that since notice of the arbitral proceedings was sent to him and his lawyer three times by registered mail, it

⁷² *Sovereign Participations International SA v Chadmore Developments Ltd* 721. c.f. van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 265, 267; Garnett and others, *International Commercial Arbitration* 103.

⁷³ See, *Yusuf Ahmed Alghanim & Sons v Toys "R" Us Inc* 19; *Alcatel Space SA v Loral Space & Communications Ltd* 2002 WL 1391819 (US District Court SD NY 2002) 4.

⁷⁴ the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003) pp 4-5.

⁷⁵ the 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004) p 2.

⁷⁶ the 2nd Review Committee, decision No. 10/T/2 dated 1419 H (1998) pp 2-3.

considered his defence as vexatious delay.⁷⁷ This decision was affirmed by the Appeal Court.⁷⁸

2.5.3 Court Discretion

With regard to the residual discretion implied by the use of the word “may”, although the official Arabic version of the Convention which applies in SA does not contain a term identical to “may”, it was however drafted in permissive not mandatory language.⁷⁹ The Arabic version of Art. V provides that “It is *not permissible* to refuse recognition and enforcement of the award on the request of the party against whom it is invoked, unless that party furnish to the competent authority where the recognition and enforcement is sought, the proof that . . .” This means that it is permissible, but not obligatory, to refuse enforcement if one of the grounds is proven. As one can see, the Arabic version employs a permissive language in the same way as the word “may” in English version does, whereas the French text appears to demand that enforcement be refused if one of the grounds in Art V(1) is established.

Moreover, the Circular of the Grievance Board regarding Enforcement of Foreign Judgments and Arbitral Awards makes it clear that the Saudi courts are not allowed to review the merits of awards nor investigate their substance seeking mistakes of fact or law.⁸⁰ This principle has been subsequently affirmed by the Saudi courts.⁸¹ For example, the appeal court (the 2nd Review Committee) has held that review of the merits of foreign arbitral awards is contrary to Art. V of the NYC.⁸² The Appeal

⁷⁷ the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996) p 7.

⁷⁸ the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997) p 4.

⁷⁹ In contrast, it was wrongly submitted that the Arabic version of Art. V of the NYC does not have a permissive language like the English version, but it has a mandatory language like the French version. See, eg, Paulsson, 'May or Must under the New York Convention: an Exercise in Syntax and Linguistics' 227.

⁸⁰ the Circular of the Grievance Board regarding Enforcement of Foreign Judgments and Arbitral Awards, no 7 dated 15/8/1405 H (1985), Art. 2 Art.

⁸¹ See, the 2nd Review Committee, decision No. 235/T/2 dated 1415 H (1994); the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996) p 5; the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997) p 3; the 2nd Review Committee, decision No. 10/T/2 dated 1419 H (1998) p 2; the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003) p 18.

⁸² the 2nd Review Committee, decision No. 10/T/2 dated 1419 H (1998) p 2.

Court also has also nullified the decision of a lower court (10th Subsidiary Panel)⁸³ partly because the lower court had re-examined the merits of the foreign award.⁸⁴ In addition, a court has held that the courts are not entitled to re-examine the merits of awards nor research their substance, their task being limited to checking whether the conditions required for enforcement are satisfied.⁸⁵ This conclusion was confirmed by the Appeal Court.⁸⁶

2.6 Conclusion

It has been seen that Art. V of the NYC is divided into two parts. Art. V(1) contains five grounds on which enforcement may be resisted. These protect parties' autonomy regarding arbitral procedures and the right to a fair trial. These grounds can be raised only by the losing party, who then has to prove them. Art. V(2) then contains two grounds on which enforcement may be resisted which can be raised by the court itself to protect the national interest of the enforcing state.

The key feature of Art. V is that the list of grounds on which enforcement may be resisted is exhaustive. Art. V provides a maximum number of grounds on which the enforcement of foreign awards may be refused, and no other ground under which enforcement might be resisted under the law of the enforcing state can be invoked. In addition, under Art. VII (1), the seven grounds listed under Art. V can be further limited if the country where enforcement is sought has more liberal provisions than Art. V.

Another main feature is that, while the Geneva Convention of 1927 demanded that the party seeking enforcement prove the validity of the award, the NYC insists that the party opposing enforcement proves the existence of grounds for refusing enforcement. Those grounds must be interpreted narrowly, and therefore enforcement should not be refused except in serious cases. Moreover, even where such a ground is proved, the

⁸³ the 10th Subsidiary Panel, decision No. 20/D/F/10 dated 1416 H (1995).

⁸⁴ the 2nd Review Committee, decision No. 235/T/2 dated 1415 H (1994).

⁸⁵ the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996) p 5.

⁸⁶ the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997) p 3.

enforcing court may still have a residual discretion to grant enforcement when it feels appropriate to do so.

The final key principle is that when considering a petition to enforce a foreign award, the enforcing court is not allowed to review the merits of that award.

The foregoing features and principles all together constitute a general policy under the NYC to facilitate and promote enforcement of foreign awards on the one hand, and to narrow the chances of refusing enforcement on the other hand. This general policy is known as “the NYC’s pro-enforcement bias”.

Most importantly, these principles have been recognised and confirmed by the Saudi courts.

CHAPTER THREE

Incapacity of Party

3.1 Introduction

The first defence to enforcement under Art. V (1) of the NYC is as follows:

- (a) The parties to the agreement (of arbitration) ... 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.¹

It can be observed that the above provision establishes two quite separate grounds: the first ground is that a party to arbitration agreement was under some incapacity. The second ground is the invalidity of the arbitration agreement itself.² One can also observe that incapacity of a party to enter into an arbitration agreement is in fact one of the causes of an invalid agreement.³ Therefore, this chapter concerns itself with the question of party incapacity as a ground for refusing enforcement. General considerations as well as the effectiveness of incapacity defence and the law applicable to parties' capacity will be outlined first. Then, it will discuss the capacity of natural person to resort to arbitration. Third, it will consider the capacity of juristic person. Fourth, it will discuss the issue of authority to arbitrate. Fifth, the most important issue of state and state agencies' capacity to recourse to arbitration will be examined. The Saudi position will finally be highlighted.

3.2 General Consideration

As a general principle, Parties to a contract or an agreement must have legal capacity to enter into such contract. Thus, the contract will be invalid if one of the parties is

¹ NYC of 1958, Art. V(1)(a).

² See, Davidson, *Arbitration* 199.

³ See, I. Hu, 'Setting Aside an Arbitral Award in the People's Republic of China' (2001) 12 (1) *Am Rev Intl Arb* 1 at 9.

under some incapacity. The same is also true with regard to an arbitration agreement.

⁴ The NYC hence includes this ground and entitles the court to refuse to enforce a foreign award if the party opposing the award can prove that a party to the arbitration agreement was under some incapacity.

As far as the arbitration agreement is concerned, it may be thought useful to mention that the incapacity, in general, is a lack of full legal competence to enter to an arbitration agreement. Accordingly, the general rule is that any natural or legal person who has no capacity to enter into a valid contract will equally has no capacity to enter into an arbitration agreement. ⁵

3.3 Effectiveness of Incapacity Defence?

The question that now needs to be determined is whether the party who has entered into an arbitration agreement could rely on his incapacity as a ground for refusing enforcement? Prof Davidson states that it would appear from the wording of Art. V(1)(a) of the NYC "that a party may rely on his own lack of capacity, even if he has entered into the contract and participated in the arbitral proceeding in full knowledge of, but with out mentioning this disability". ⁶ However, this position may not be the case if it appears to breach the principle of good faith. Therefore, some applicable rules intend to protect a party who is in good faith who believed that he entered into a contract with a person of full capacity or power to do so. For example, in the French private international law, a party cannot rely on his lack of capacity or on the absence of power of his apparent representative, where the other party could legitimately have been unaware of that incapacity or absence of power. ⁷ Likewise, the Rome Convention provides that:

⁴ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 144; D Wedam-Lukic, 'The Jurisdictional Problems of Arbitration (with special regard to the regulation in Slovenia and Croatia)'(1994) 1 Croatian Arb YB 51 at 57.

⁵ cf. Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 144.

⁶ Davidson, *Arbitration* 392.

⁷ This rule was first established in connection with a party's capacity by the French Supreme Court in *Lizardi* case of 1861. The position was later extended to a party's absence of power in several cases. See Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.⁸

The enforcing courts should therefore take into account the principle of good faith when they examine the defence of incapacity of the parties.

3.4 Law Applicable to Parties' Capacity

The question emerges then is that what is the required capacity for a party to enter into arbitration agreement? In simple terms, who may refer disputes to arbitration and who may not? The NYC refers the issue, under first part of Art. V(1)(a), to "the law applicable to them" in order to determine their capacity of entering into arbitration agreement.⁹ The next logical question as to which law is applicable to the parties for determining their capacity? The NYC, however, provides no additional indication of what this applicable law is. Therefore, there are two different considerable interpretations can be found in this respect.

First and most common interpretation is that the phrase of Art. V(1)(a) "under the law applicable to them" appear to mean that the question of party's capacity is govern by the personal law which requires to be determined by reference to the conflict of laws rules of the place of arbitration¹⁰ or enforcement.¹¹ The conflict of laws rules can usually be found under the law of contract.¹² These conflict rules, however vary

para.470; Wedam-Lukic, 'The Jurisdictional Problems of Arbitration (with special regard to the regulation in Slovenia and Croatia)' 58.

⁸ Rome Convention on the Law Applicable to Contractual Obligation of 1980, Art. 11. Available at <http://www.rome-convention.org/instruments/i_conv_orig_en.htm> (10 August 2004).

⁹ NYC of 1958, Art. V(1)(a).

¹⁰ See, Davidson, *Arbitration* 393.

¹¹ See, *Union de Cooperativas Agricolas Epis Centre v La Palentina SA* (2002) XXVII YBCA 533 (Spain Supreme Court 1998) 535; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 276; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 454.

¹² See, Sutton and Gill, *Russell on Arbitration* 81; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 144.

country to country and depend upon the party nature whether is a natural or a legal person or whether a private or a state. These generally consider the law of natural person's nationality or his domicile or usual residence, and the law of place of incorporation or the main place of business, as well as the constitution of the state body or the law which regulates its activities.¹³

It may be mentioned here that it was argued that there is no need for applying the conflict of law rules here since the letter of the phrase "under the law applicable to them" of Art. V(1)(a) determines the personal law of the parties to be applied in order to decide whether they have a capacity of entering into an arbitration agreement or not.¹⁴ Nonetheless, since the phrase "under the law applicable to them" does not give a complete but a half-way conflict rule, the applicable personal law of parties still need to be determined by the conflict of laws rules of the forum.¹⁵

Second alternative interpretation is that the phrase "the law applicable to them" can be taken to mean the substantive rules which relies mainly on the customs and principles applicable in an international commercial context, regardless any reference to national laws. In relation to this interpretation, it is submitted that:

However, the Convention could be interpreted differently. There is nothing to prevent courts from construing 'the law applicable to them' as meaning the substantive rules they deem applicable in an international context.¹⁶

As can be observed from the foregoing discussion the question of party's incapacity depends upon a number of connecting factors according to whether one is dealing with a natural or a legal person which both include many different aspects. However, discussing each one of them would go beyond the scope of this thesis. Consequently, the question of incapacity of parties under Art. V(1)(a) would be limited to four main

¹³ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 276.

¹⁴ See, P Schlosser *Das Recht der Internationalen Privaten Schiedsgerichtsbarkeit I* (Tubigen 1975) no. 355, cited in *ibid* 277 fn 124.

¹⁵ See, *ibid* 277.

¹⁶ Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 457.

categories of physical or legal persons lacking the capacity, including: first, natural persons and, second, corporate entities. Third, authority. Finally, state entities.

3.5 Capacity of Natural Person

According to the traditional and common interpretation of Art. V (2) (a) of the NYC¹⁷ and the traditional principles of the conflict of laws rules, the capacity of a natural person who wishes to conclude an arbitration agreement, is generally governed by the personal law of the party in question.¹⁸ In civil law countries, such as France and Germany, the personal law of the party capacity to make a reference to arbitration will be the law of his nationality, or if he is a stateless or has refugee status, the law of his domicile or usual residence,¹⁹ whereas in common law countries the personal law applicable to a party's capacity will be that of his domicile or normal residence.²⁰ Moreover, some US jurisdictions determine the question of party capacity by reference to the applicable law of the contract or under the law of the place where the agreement was concluded.²¹ In this context, Redfern and Hunter argued that, in relation to an international contract, not only the law of the party's place of domicile and residence are taken into account to decide whether he has legal capacity to enter into an arbitration agreement as is the case in the context of a national contract, but the law of the contract may be necessary to be considered as well²² as an aspect of respecting the parties autonomy.

¹⁷ NYC of 1958, Art. V (1)(a) states that "The parties to the agreement ... were, under the law applicable to them, under some incapacity".

¹⁸ See, *Union de Cooperativas Agricolas Epis Centre v La Palentina SA* 535; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 461.

¹⁹ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 457; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 276.

²⁰ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 145; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 276; Dicey, Morris and Collins, *Conflict of Laws* vol 1, pp 1101-3.

²¹ See, American Law Institute, *Restatement of the law second : conflict of laws* (American Law Institute Publishers, Minnesota 1971) § 198. See also, Fouchard Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 457; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 276-277.

²² Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 145.

However, the suggestion of considering the contract or parties autonomy to indicate the capacity of a natural person appears to be at least very doubtful. This for the reason that the natural person himself, unlike incorporation or a state, cannot confer capacity in himself to act legally, but this can only be done by his personal law to protect him (e.g. if he is a minor or unsound mind) or to protect other party (e.g. if he is a bankrupt).

On the contrary, it is submitted that the capacity of the parties may be resolved by the substantive rules method rather than the traditional principles of the conflict of laws rules. The substantive rules method refers to the substantive law of international arbitration or the fundamental principles in international trade independently from any reference to a system of choice of national laws. It is argued in favour of this method that it seems appropriate for the court reviewing an award to apply substantive concepts of the law applicable limited to those considered essential in an international context.²³ Although applications of this position appear to be unclear, it is, however, suggested that several substantive rules could easily be drawn from the fundamental requirements of justice. For example, any natural person will be considered to have the capacity to conclude an arbitration agreement, if he carries on an economic activity on a professional basis. In France, for instance "A minor who practises a profession is not entitled to rescission against undertakings which he has taken upon himself in the practice thereof."²⁴ In fact, this approach appear to be based on the principle of good faith as mentioned above.

However, some commentators react unfavourably to the substantive rules method in this respect, arguing that it would be difficult under the substantive law of international arbitration to determine technical issues as the state or age of being an infant or minor, or additionally when an adult should require protection in international trade.²⁵ Yet, it is argued this is not necessarily the case because in practice, "cases involving arbitration agreements entered into by a minor or by a

²³ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 436.

²⁴ French Civil Code, Art. 1308.

²⁵ See, H. Synvet, note following CA Paris, Dec. 17, 1991, *Gatoil v National Iranian Oil Co.*, 1993 REV. ARB. pp 281, 295, cited in Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 466 fn 35.

protected adult are likely to remain hypothetical for some time hence".²⁶ Moreover, minors or protected adults can be protected by considering a transaction included by them as rescission only if it constitutes an unfair bargain as this shows they were indeed unable to act in their own interest. This provision is applied for example in France in favour of minors not emancipated²⁷ and legally protected adults.²⁸ This provision has the advantage of enabling the court to examine whether the rescission of transactions concluded by the individual claiming protection should be applied or not. Therefore, this position could be transposed to the context of the international arbitration agreement and applied more generally.²⁹

It is further argued in favour of the substantive laws method that the question of whether the capacity to enter into an arbitration agreement presupposes the capacity to contract or the capacity to commence legal proceedings can also be decided by using the substantive rules method. For example, it is generally inferred from Art. 2059 of the France Civil Code that the capacity to contract is sufficient to enter to an arbitration agreement.³⁰ Belgian law provides that "Whosoever has the capacity or is empowered to compromise may conclude an arbitration agreement".³¹ Whereas other countries laws, such as Egyptian law, requires the capacity to dispose of assets.³² Therefore, it is concluded that it would be more reasonable, as far as international commercial business is concerned, to assume that the capacity to conclude day-to-day business contract is sufficient to enter into international arbitration agreement, rather than the capacity to dispose of assets.³³

Consequently, it may generally be concluded that most natural persons have the capacity to enter into an arbitration agreement the same as they do legal binding contracts. Nevertheless, their capacity may be disabled by some factors. For instance,

²⁶ *ibid* para 466

²⁷ French Civil Code, Art. 1305.

²⁸ *ibid*, Art. 491-492.

²⁹ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 466.

³⁰ *ibid* para 467

³¹ Belgian Judicial Code of 1998, Art. 1676(2).

³² Egyptian Arbitration Law of 1994, Art. 11.

³³ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 467

minors, as well as the mentally disordered and the bankrupt.³⁴ In such case, they normally have a legal representative. The legal representative authority is, in principle, governed by the law of their source of power. For example, the law governing a minor protection determines the powers of the legal representative of this minor.

In practice, it has been observed that the problem of incapacity as a ground for refusing enforcement rarely arises in international commercial arbitration.³⁵ In fact, no case has been reported, so far to the best of knowledge, in which enforcement of foreign awards was challenged on the ground of incapacity of individuals.

3.6 Capacity of Juristic Person

The capacity of a juristic person, such as corporation, involves a number of relating factors, depending on the conflict of law rules selected. For instance, in some common law countries, the capacity of a juristic person is governed mainly by its constitution and the law of the place of incorporation or business.³⁶ In other legal systems, especially those of civil law countries, such as France, the question of the capacity of a juristic person is judged by the law of the country where its headquarters is located³⁷ or may be sometimes where its registered office is situated.³⁸ Nevertheless, as mentioned above with individual, it is argued that in relation to international commercial agreement it may be thought necessary to regard the law governing the agreement as well³⁹ as a consequence for the party autonomy.

³⁴ See, Sutton and Gill, *Russell on Arbitration* 82.

³⁵ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 144. c.f. Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 138.

³⁶ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 457; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 145; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 276.

³⁷ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 457.

³⁸ See, J-I. Delvolvêe, J Rouche and GH Pointon, *French arbitration law and practice* (Kluwer Law International, The Hague ; London 2003) 59.

³⁹ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 145.

On the other hand, it is submitted that the capacity of a juristic person to enter into an arbitration agreement is one of the areas where the issue of capacity can be easily resolved by the use of substantive rules. In this respect, it is argued that the substantive rule that would be adopted by courts with no difficulty is that all juridical persons involving with commercial activities are considered to have the capacity to enter into a binding agreement to arbitrate disputes relating to those activities.⁴⁰

To take an example from English law, a corporation has, in general, full capacity to enter into an arbitration agreement unless an express provision in its constitution affects its capacity to do so.⁴¹ However, in the context of international trade such restriction would be unusual in the light of the fact that arbitration becomes the most favoured means for resolving international commercial disputes.⁴²

It is worth mentioning that the issue of the juristic persons' incapacity has rarely been called, and if so, it appeared to be unsuccessful. For example, The Spanish Supreme Court has dismissed an objection based on the claimant incapacity since the defendant (Spain) did not prove that claimant (France) lacked the capacity to conclude an arbitration agreement under the applicable law which was the French law.⁴³ On the other hand, the authorities or powers of their representatives are the difficulty has frequently emerged in practice.⁴⁴ Therefore, the issue of authority will be discussed below.

3.7 Authority

Although it goes without saying that the Juristic person, such as a corporation, is operated by its directors and officers according to its constitution and its own governing law,⁴⁵ it is however observed that there may be confusion in everyday legal language between the capacity of party and the authority to contract. Yet, they

⁴⁰ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 465.

⁴¹ See, Sutton and Gill, *Russell on Arbitration* 83.

⁴² See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 146.

⁴³ See, *Union de Cooperativas Agricolas Epis Centre v La Palentina SA* 535.

⁴⁴ See, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* 141.

⁴⁵ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 145.

are in fact different. The question of capacity would be involved when an agreement is concluded in a person's own name and in his own interest, whereas the question of authority would appear when an agreement is entered into other than in the signatory's interest, but it in the interest of another natural or Juristic person.⁴⁶ Furthermore, a corporation itself, for example, may be capable to bind itself to an arbitration agreement by authorised agent (e.g. a director) to do so under its own governing law. But if such agreement is entered into by an agent who not empowered thereon, the question of lack such authority may be raised when a dispute turned out.

Notwithstanding the above distinction, it is generally accepted, in practice, that the word "capacity" in the NYC also covers the absence of the power to inter into arbitral agreement on behalf of other, regardless the difference between them in principle.⁴⁷

Authorities are, in principle, governed by the law of their source of power. Therefore, the powers to act legally for a Juristic person, as with the capacity of a Juristic person itself, may be governed under two possible methods. First, under traditional method of the conflict of laws rules, the representative powers of a juridical person are generally governed by the law under which that juridical person operates. In some countries, especially those of civil law background such as France, the law governs the question of whether the person who signed the arbitration agreement for a corporation was properly authorised is the law of the country where the corporation is registered or where the actual headquarters are located and operate.⁴⁸ Some other legal systems, such as in England, the law governs the issue of power to represent a corporation is the law of the incorporation place.⁴⁹

⁴⁶ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 453.

⁴⁷ See, *Dalmine SpA v M & M Sheet Metal Forming Machinery AG* (1999) XXIV YBCA 709 (Italy Supreme Court 1997) 710; *Union de Cooperativas Agricolas Epis Centre v La Palentina SA* 535. See also, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1695.

⁴⁸ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 461.

⁴⁹ See, Dicey, Morris and Collins, *Conflict of Laws* vol 2, pp 1101-1103; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 461.

Second, under the substantive rules position, there are three related approaches which may be important to be taken into account when considering the question of the representative power of a corporation. They are as the following:

(a) It would be sufficient to have a general authorization to contract for the purpose of entering into a binding international arbitration. Consequently, there is no need for a specific authorization to be given by the principal to sign a particular arbitration agreement, as this restriction is not compatible with international commerce. An example of such restriction can be found in France Civil Code which provides that "An agent may do nothing beyond what is expressed in his agency: the authority to compromise does not include that to enter into an arbitration agreement".⁵⁰ Likewise, a specific power to enter into an arbitration agreement is required under the Austrian Civil Code.⁵¹ In the light of these provisions, if a corporation representative signs an agreement to submit a dispute to arbitration although he is not invested with the legal power to do so, it might be open to the corporation to call its representative's power into question upon the ground of lack of capacity thereof.

However, "to guard against this possibility, it is not unusual for states to have specific rules of law that restrict or abrogate the doctrine of *ultra vires* (i.e. acting beyond the powers or authority), so as to protect persons dealing in good faith with corporations".⁵² This is the case, for example, in the First Directive on Company Law within European Union.⁵³ In the same line, the Paris court of appeal in *Intercast v Ets . Peschaud et Cie. International of 1980* adopted the so-called doctrine of apparent authority to international arbitration agreement. The Court held that since the parties legitimately believed that the mandate held by a company director entitled him to

⁵⁰ French Civil Code, Art. 1989.

⁵¹ See, Austrian Civil Code, Art. 1008. See, H Kapfer, PL Baeck and Austria, *The general civil code of Austria* (Published for the Parker School of Foreign and Comparative Law, Columbia University, by Oceana Publications, Dobbs Ferry, N.Y. 1972) 195; Fouchard Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 468.

⁵² See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 146.

⁵³ First Council Directive on Company Law of 9 March 1968 (68/151/EEC-I) Proposal 4.

enter into arbitration agreements, the company was bound by the actions of its apparent agent even though it may not have given a formal authorization to its director.⁵⁴

(b) Corporate representatives responsible for management are empowered to enter into enforceable arbitration agreements against the corporation, disregarding any restrictive provision under its regulation or laws governing its activities.

(c) In the context of the international commerce, there are no particular requirements of form of the power to conclude an arbitration agreement should be imposed to provide that the parties' consent is certain.⁵⁵

Finally, the defence of the absence of the power to conclude an arbitration agreement has also been proved to be rather ineffective in practice. For example, an objection based on the claimant's lack of authority has been dismissed by the Spanish Supreme Court since the defendant did not prove that the party to the agreement lacked power to act on behalf of the legal entity.⁵⁶ The same objection has been rejected by the Italian Supreme Court.⁵⁷

3.8 Capacity of State and State Entities

3.8.1 General

Unlike the incapacity of a natural person or corporations, the issue of incapacity of a state, a public body or public agency to enter into arbitration agreements with a foreign private party is a typical problem that occurs frequently in international transactions.⁵⁸

⁵⁴ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 470 and fn 59.

⁵⁵ *ibid* para 468.

⁵⁶ *Union de Cooperativas Agrícolas Epis Centre v La Palentina SA* 535.

⁵⁷ *Dalmine SpA v M & M Sheet Metal Forming Machinery AG* 709.

⁵⁸ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 278; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 138.

The essential question that needs to be determined in this respect as to whether a State or a state agency has the capacity to agree to refer a dispute to arbitration? In general, the answer may depend effectively upon three elements. In first place, it depends mainly on the constitution of the state body or the law that regulates its activities.⁵⁹ Moreover, it may, however, depend upon the law of forum where the State is sued. In addition to these, the issue of the State capacity to enter to arbitration agreement may sometimes depend upon the relevant international conventions, which have been adopted by that State.⁶⁰ A direct example of such convention can be found in the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States.⁶¹ Its Art. 36(1) provides that:

Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.⁶²

In addition, the European Convention on International Commercial Arbitration⁶³ entitles the legal persons of public law to refer their disputes to arbitration. This Convention provides under its Art. II the right of legal persons of public law to resort to arbitration as the following:

(1) In the cases referred to in Article I, paragraph 1, of this Convention, legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration

⁵⁹ See, Sutton and Gill, *Russell on Arbitration* 89; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 278; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 138.

⁶⁰ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 278; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 138.

⁶¹ The Washington Convention of 1965 was done on 19th March 1965 at Washington under the auspices of the international Bank for Reconstruction and Development (the World Bank) and It entered into force on 14th October 1966. In the same year, the International centre for Settlement of Investment Disputes (ICSID) was created under the Convention. As April 2006, the Washington Convention of 1965 has been ratified by 155 States. See, The World Bank Group, 'ICSID' <<http://www.worldbank.org/icsid>> (accessed 21/08/2004).

⁶² Washington Convention of 1965, Art. 36 (1).

⁶³ The European Convention on International Commercial Arbitration, which is commonly referred to as the European Convention of 1961 or the Geneva Convention of 1961, was signed on 21st April 1961 in Geneva under the auspices of Commission for Europe of the United Nations, and entered into force on 26th July 1964. See, Juris International, 'European Convention on International Commercial Arbitration' (1961) <<http://www.jurisint.org/en/ins/153.html>> (accessed 23/08/2004).

agreements.

(2) On signing, ratifying or acceding to this Convention any State shall be entitled to declare that it limits the above faculty to such conditions as may be stated in its declaration.⁶⁴

3.8.2 Diversity of National Laws

Consequently, Countries solve the issue of the capacity of the state or its agencies in a different way.⁶⁵ Many common law countries, such as England,⁶⁶ some Latin American countries such as, Bolivia and Chile, as well as some civil law countries, such as Germany and Switzerland,⁶⁷ establish no limitation upon the capacity of state, state entity to enter into arbitration agreements. Additionally, Belgium has abolished the prohibition which used to be imposed upon public bodies to resort to arbitration.⁶⁸

On the contrary, some other countries impose some restrictions upon their state and public authorities to enter into arbitration agreement. For instance, in Peru, Art. 2 of General Arbitration Law provides that "Peruvian public agencies do not need government approval for domestic arbitration".⁶⁹ It was therefore thought that Peruvian public agencies are forbidden to enter into arbitration held outside the territory of Peru.⁷⁰ However, it may be, in fact, inferred that Peruvian state and its public agencies are permitted to submit its dispute to arbitration held abroad as far as they have prior authorization. Similarly, in some countries the state entities is obliged to obtain a particular permeation before entering into arbitration agreement as it the

⁶⁴ European Convention on International Commercial Arbitration of 1961, Art. II(1)(2).

⁶⁵ See, in general, R David, *Arbitration in International Trade* (Kluwer Law and Taxation Publications, Deventer 1985) 177.

⁶⁶ See, Sutton and Gill, *Russell on Arbitration* 89. See also, eg, English Arbitration Act 1996, s.106, which provides that the Crown has the capacity to be a party to an arbitration agreement.

⁶⁷ Swiss Private International Law of 1987 Art. 177(2), which states that "A state, or an enterprise held by, or an organization controlled by a state, which is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement".

⁶⁸ Belgian Judicial Code of 1998, Art. 1676.2. see also, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 146 fn 53.

⁶⁹ Peru General Arbitration Law No. 26572 of 20th December 1995, cited in J Tieder, 'Factors to Consider in the Choice of Procedural and Substantive Law in International Arbitration'(2003) 20 (4) J Intl Arb 393 at 402.

⁷⁰ See, *ibid.*

case in Oman,⁷¹ Argentina and Venezuela.⁷² In France, whilst matters concerning public bodies or institutions and more generally in all matters concerning public policy may not be allowed to be resolved by arbitration, "however, categories of public institutions of an industrial or commercial character may be authorized by decree to enter into arbitration agreement".⁷³ Yet, the France Court of Appeal states that this provision not to be applicable in the context of international arbitration, but only in domestic arbitration.⁷⁴ In US, although FAA put no specific restrictions upon states or state entities to arbitrate certain disputes, some US courts held that United States generally cannot enter into enforceable arbitration agreement pursuant to US law.⁷⁵

3.8.3 Effectiveness of State Incapacity Defence?

As some States or states agencies are prohibited under their national laws to resort to arbitration, a crucial question then needs to be answered is that whether a state or state agency to be entitled to rely on its incapacity under its own law to defeat an arbitration agreement. A negative answer appears to meet the approval of most commentators⁷⁶ and courts.⁷⁷ However, it may be appropriate to mention first the old approach and, second, the new approach.

⁷¹ Omani Board for Settlement of commercial Disputes of 1984, Art. 59.

⁷² See, Davidson, *Arbitration* 177.

⁷³ French New Code of Civil Procedure of 1981, Art. 2060.

⁷⁴ *Myrtoon SS v Ministere de la marine marchande* (France Court of Appeal 1957), cited in Davidson, *Arbitration* 178. Similarly, the decision of Paris Court of Appeal, 17 Dec 1994, cited in Tieder, 'Factors to Consider in the Choice of Procedural and Substantive Law in International Arbitration' 402 fn 31.

⁷⁵ See, *BV Bureau Wijsmuller v United States* (1978) III YBCA 290 (US District Court NY SD 1976); see, in general, Born, *International Commercial Arbitration* 238.

⁷⁶ See, van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 276; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 146; Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* 139.

⁷⁷ See, *Societe Arabe des Engrais Phosphates v Gemanco srl* (1997) XXII YBCA 737 (Italy Supreme Court 1996); *Societe Tunisienne d'Electricitee et de Gas v Societe Entrepose* (1978) III YBCA 283 (Tunisia Court of first instance 1976); *The Gov of Greece v Foreign Shipowner-charterer* (1989) XIV YBCA 634 (Greece Court of Appeal 1976).

The old approach adopted the view that a state and its agencies can rely on their incapacity under the relevant national law. This approach was adopted, for example, by the Syrian Administrative Court in *Fougerolle*.⁷⁸ In this case, the Court dismissed the application of enforcing two awards made by ICC arbitration in Geneva against the Syrian Ministry of Defence. The court reasoned its decision as that according to the law of the council of State, the Syrian party lacked the required capacity to sign the arbitral agreement without the preliminary approval, which must be given by the competent Committee of the Council of State.

On the other hand, the new international trend is that a state or state bodies may not be allowed to rely upon their incapacity under their own national law to repudiate arbitration agreement in the context of the international transaction. This approach is basically based upon the distinction between domestic and international contracts. It assumes that although, in the context of domestic case, a state or its public agencies may be restricted to resort to arbitration agreement under the national law, they still, however, bound by an arbitral clause in international commercial transactions which has been freely concluded.

As has been mentioned above, this approach of conceptual distinction between the situations of international and domestic in the present issue may be considered as the new international trend due to widespread supporting by commentators and courts.⁷⁹ In this respect, Prof. van den Berg states that this approach of distinction is increasingly gaining acceptance.⁸⁰ Equally, Redfern and Hunter emphasize that "it is plainly unsatisfactory for a state or a state agency to be entitled to rely on its own law to defeat an agreement that it has freely entered into".⁸¹

⁷⁸ *Fougerolle SA v Ministry of Defence of the Syrian Arab Republic* (1990) XV YBCA 515 (Syria Administrative Court 1988).

⁷⁹ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 279; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 146; Born, *International Commercial Arbitration* 238.

⁸⁰ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 279.

⁸¹ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 146.

As regarding the judicial support for the new approach, the Italian Supreme Court⁸² has dealt with the problem of capacity of state bodies in international commercial arbitration and arrived to a conclusion that may be regarded as the most advanced approach in this issue. The dispute has arisen out between two Tunisian companies and an Italian company. The Tunisian companies claimed before the arbitral tribunal of ICC in Paris that the arbitration agreement was null and void as they were not allowed to conclude an arbitration agreement under Tunisian law. However, their objection was dismissed and an award was rendered in favour of the Tunisian defendants. Then, the Tunisian companies sought enforcement of the award before the Italian Court of Appeal against the Italian company. At the outset, the Court refused to enforce the award in the basis that the two Tunisian companies were public bodies which were not allowed to resort to arbitration under Tunisian law. However, The Italian Supreme Court reversed the lower court decision, holding that:

We consider that, under the law applicable to international commercial, which necessarily governs the arbitration clause in present case, legal persons of public law may, unless the parties have explicitly agreed otherwise, undoubtedly agree to arbitration, independent of domestic prohibitions, by expressing their consent and sharing in the international marketplace, the conditions common to all operators.⁸³

The same approach was earlier adopted in several cases. An example of these is a decision of a Court of first instance of Tunis. The court rejected the defence of a state body which claimed that the arbitration agreement was not binding as it was forbidden to refer dispute to arbitration under its national law. The court holds that such prohibition should be applied only in domestic context, but not in relation to international commercial arbitration. The court made reference to French case law in which French public bodies may not refer to arbitration in domestic connection, but are bound by an arbitration agreement in international relation.⁸⁴ Likewise, the Appeal Court of Athens states that the Greek Ministry of Trade bound by international arbitration agreement, Since the conditions required for the Greek State to conclude arbitration agreements, are only concerned with domestic application and

⁸² *Societe Arabe des Engrais Phosphates v Gemanco srl (1996)*.

⁸³ *ibid* 742.

⁸⁴ *Societe Tunisienne d'Electricitee et de Gas v Societe Entrepose* 283.

cannot be an obstacle for the State to conclude an international arbitration agreement.⁸⁵

3.8.4 Incapacity or Arbitrability

It may be worth mentioning that it has been argued that restrictions imposed upon a state's capacity to include an arbitration agreement should be treated as matter of arbitrability rather than as issues of capacity. This is for the reason that this restriction is not a true limitation on capacity, such as the case of mental disability, but in fact it is self-inflicted as it could be waived at any time by the state concerned. Moreover, it has been suggested that it appears to be at the very least that the capacity and the arbitrability may merge as the Swiss Law, Art. 177(2),⁸⁶ refers to the two concepts in the same section.⁸⁷ However, making a brief distinction between the issue of capacity and the issues of arbitrability, might be helpful to decide the above issue. The issue of capacity concerns mainly with the parties as to whether they are legally capable to enter into an arbitration agreement, while the issue of arbitrability is particularly concerned with the subject matter of the disputes as to whether it is capable of settlement by arbitration. In the light of this distinction, it might appear to be clear that the restriction imposed by a state on its capacity to enter into an arbitration agreement should be treated as a matter of capacity as far as it concerns with parties' ability to go to arbitration.

3.8.5 State Immunity

Although the defence of a state immunity from jurisdiction of the arbitral tribunal or from the enforcement of foreign arbitral award may somehow be discussed under the public policy defence,⁸⁸ it appears, however, to be more appropriate to be discussed here under the state capacity. This is because the issue of state immunity is often

⁸⁵ *The Gov of Greece v Foreign Shipowner-charterer* pp 634-635.

⁸⁶ Swiss Private International Law of 1987 Art.177(2).

⁸⁷ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 147 fn 60.

⁸⁸ See, eg, Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 190.

considered with the issue of a state capacity by both courts and authors.⁸⁹ Besides, a state may, as occurred in some cases,⁹⁰ argue that it is not bound by an arbitral agreement even though it was signed by its state agent or representative that have capacity to arbitrate, they are however not empowered to waive its state immunity. This would, in fact, mean that the representative lacks the proper capacity to waive the state immunity from arbitration or enforcement of arbitral award.

Instead of relying on its incapacity, a state may rely on its immunity to reject enforcement of foreign arbitral award against its interest. Thus, the key question needs to be raised is that whether the NYC is applicable to disputes between states and private party, notwithstanding the sovereign immunity of states?

Although, the NYC provides in Art. I(1) that the Convention shall apply to arbitral award arising out of disputes between persons, whether physical or legal, the question, however, still remains uncertain as to whether states can be also included in the category of legal persons. Therefore, two doctrines have risen regarding the issue of states immunity from the arbitration and enforcement.

First doctrine is called as absolute immunity.⁹¹ In this approach a state enjoy a full immunity from arbitration or enforcement of arbitral award. This approach has been granted by a US District Court in *BVB Bureau Wijsmuller v Unites States*. In this case, the Court rejected to enforce an agreement for arbitration in London between a Dutch salvage company and the US directing defendant, holding that no officer or representative has the requisite authority to remove armour of the sovereign's immunity from suit, but this can be only done by the Congress. Finding no such waiver, the court concluded that it has "no hesitation in holding that the present

⁸⁹ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 147; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 280.

⁹⁰ See, eg, *BV Bureau Wijsmuller v United States* .

⁹¹ See, in general, for the question of state immunity from suit and execution, H Fox, 'State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution Against State Property?'(1996) 12 (1) *Arb Intl* 89; M Blessing and T Burckhardt, 'Sovereign Immunity-A Pitfall in State Arbitration' in E Bucher, C Reymond and A International Council for Commercial (eds) *Recueil de travaux suisses sur l'arbitrage international : Congres interimaire : Papers* (Schulthess, Zurich 1984) pp 107-123; NB Turck, 'French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards'(2001) 17 (3) *Arb Intl* 327; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* pp 190-195.

arbitration agreement, contained in the LOF contract, is “null and void” in respect of the United States because of the sovereign immunity principles”.⁹²

Another example for supporting the absolute immunity can be found in the well known case of *SPP Ltd v Egypt*.⁹³ In this case the arbitral tribunal rendered its award against Egyptian Government entity of tourism, finding that the agreement in question had been signed by the Minister of Tourism using the wording “approved, agreed and ratified by the minister”, and such a phrase was adequate to prove the consent of the minister to be bound by the agreement. The tribunal expressly states that there should be no doubt that such an agreement to arbitrate should be regarded as a waiver of any immunity and that therefore international or municipal rules granting sovereign immunity should not be applied.⁹⁴ The award was then upheld by the District Court of Amsterdam.⁹⁵ However, it was set aside afterwards by the French Court of Appeal. The Court made its decision in the ground that no presumption of waiver of the Egyptian State's immunity from jurisdiction can be inferred from Egyptian Law, nor its agreement to submit to the arbitration clause contained in the contract between SPP and EGOTH.⁹⁶ Moreover, the ratification which follows the signatures of SPP and EGOTH constitutes, not a solemn commitment by the State to enter into the contract, but specifically the material manifestation of approval by the supervising authority mentioned in the Statement.⁹⁷ The French Supreme Court later affirmed this decision.⁹⁸

Second doctrine is known as restricted immunity. This approach intends to make a distinction between acts of a state for governmental purpose (known as *acta jure imperii*), and its acts for commercial purpose (known as *acta jure gestionis*). In the case of governmental activities, the state has the benefit of absolute immunity from enforcement of arbitral agreements and awards, but in the case of commercial

⁹² *BV Bureau Wijsmuller v United States* 291.

⁹³ *SPP Ltd v The Arb Republic of Egypt* 22 ILM 752 (International Chamber of Commerce Court of Arbitration 1983).

⁹⁴ *ibid* 772.

⁹⁵ *SPP Ltd v Egypt* (1985) X YBCA 487 (Netherlands District Court 1984) 489.

⁹⁶ *Egypt v SPP Ltd* (1985) X YBCA 113 (France Court of Appeal 1984) 117.

⁹⁷ *ibid* 119.

⁹⁸ *Egypt v SPP Ltd* (1988) XIII YBCA 152 (France Supreme Court 1987) pp 154-155.

activities, the state has no immunity from enforcement of an arbitral agreement, and might be from enforcement of an award, in which the state is engaged in the same manner as private person.⁹⁹

This approach of restricted immunity has gained widespread support in the scholarly work of commentators on the Convention¹⁰⁰ and in the judicial decisions of the States signatories to the NYC. In this regard, Prof. van den Berg expresses that the defence of immunity from suit has proven to be rather unsuccessful due to the increasingly accepted distinction between *acta jure imperii* and *acta jure gestionis*.¹⁰¹

With regard to the judicial support, this doctrine has also been applied in many cases. For example, the Dutch Supreme Court in *SEEE v Yugoslavia*¹⁰² discarded the defence that the Dutch Court would have no jurisdiction over Yugoslavia because the latter enjoyed immunity from suit. The court holds that there is a worldwide heading to restrict a state's immunity from the jurisdiction of foreign courts where the state

⁹⁹ It may appear to be difficult to identify which acts are *acta jure imperii* and which acts are *acta jure gestionis*. Nonetheless, it may be worthwhile to refer to European Convention on States Immunity of 1972, especially Art. 26. See also, *Banca Carige SPA Cassa di Risparmio di Genova E Imperia v Banco Nacional de Cuba and Anothe* [2001] 2 Lloyd's Rep 147 (UK Ch D 'Companies Ct'), where the English Court held that:

On the other hand BNC and BCC entered into what was in form a private law contract and completed it as such. There is no evidence that the sale was pursuant to any legislative or executive direction. In this respect the agreement is in a quite different position from the rest of the reorganization which was effected by legislation. In the language of Lord Wilberforce in *The I Congresso del Partido* at p. 373; p. 263, everything was done as between vendor and purchaser: there was no exercise and no need for exercise of sovereign powers. The private law character of the transaction is not discoloured by the context in which the agreement was executed i.e. the fact that the parties to it regarded the transfer of the shares to BCC as an obvious and necessary sequel to the statutory reorganization. Nor is its private law character controverted by the purpose or motive behind the transaction of serving the interests of the state.

¹⁰⁰ See, L Cappelli-Pereiballi, 'The Application of the New York Convention to Disputes Between States and Between Entities and Private Individuals: The Problem of Sovereign Immunity'(1978) 12 (1) Intl Lawy 197; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 279; Born, *International Commercial Arbitration* 238; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 147; Fox, 'State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution Against State Property?' QC 90; Blessing and Burckhardt, 'Sovereign Immunity- A Pitfall in State Arbitration' 108; Turck, 'French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards' 327; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* pp 190-195.

¹⁰¹ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 279-280. See also, Blessing and Burckhardt, 'Sovereign Immunity- A Pitfall in State Arbitration' 108.

¹⁰² *SEEE v Yugoslavia* (1976) I YBCA 195 (Netherlands Supreme Court 1973).

entering into relation with private parties in areas governed by private law. In such case a state cannot enjoy the immunity from suit because the private party should have the same legal protection as if it dealt with another private party.¹⁰³ Similarly, J Tillinger from the Swedish Court of Appeal expressly stresses in this relation that:

It has become even more common during recent years that States and State-owned organs act as parties to agreement of a commercial nature. If such agreement provide for arbitration, it is shocking *per se* that one of the contracting parties later refuses to participate in the arbitration or to respect a duly rendered award. When a State party is concerned, it is therefore a natural interpretation to consider that said party, in accepting the arbitration clause, committed itself not to obstruct the arbitral proceedings or their consequences, by invoking immunity.¹⁰⁴

Moreover, a US district court has rejected a plea of state immunity made by Nigeria against award rendered in Switzerland, holding that the conclusion of an arbitral agreement indicates an implicit waiver of immunity.¹⁰⁵

3.8.6 Applicability of the NYC to a State Dispute with a Private Party?

In addition, the approach of restricted immunity may find a further support from the legislation history of the NYC as the problem of states was mentioned in the report of ECOSOC. The report observed that:

Article I provides that the Convention would apply to arbitral awards arising out of differences "between persons, whether physical or legal". The Representative of Belgium had proposed that the article should expressly provide that public enterprises and public utilities should be deemed to be legal persons for purposes of this article if their activities were governed by private law. The Committee was of the opinion that such a provision would be superfluous and that a reference in the present report would suffice.¹⁰⁶

¹⁰³ *ibid* 197.

¹⁰⁴ *American Oil Company v Socialist People's Arab Republic of Libya* (1981) 20 International Legal Materials 893 (Sweden Appeal Court 1980) pp 895-896.

¹⁰⁵ *Ipitrade International SA v Nigeria* 465 FSupp 824 (US District Court of Columbia 1978) 826.

¹⁰⁶ UN Doc. E/2704; UN Doc. E/AC. 42/4/Rev.1, para 24 p 7.

It may be concluded from the foregoing report that it appears without shadow of a doubt that the drafters of the NYC intended to include state bodies in the category of legal persons. This interpretation is generally accepted in the context of states commercial activities¹⁰⁷

3.8.7 No Immunity from Suit only or from Enforcement as well?

Yet, It may be vital to note that although it is well settled and accepted, under the doctrine of restricted immunity, that by submitting to arbitration, a state is waiving its immunity from jurisdiction, it may, however, not be the case regarding the immunity from execution. It is submitted that a state immunity from execution should be deemed to be absolute in order to avoid delicate political situations.¹⁰⁸ In this respect, The Washington Convention of 1965 would clearly lend support to this view. The Convention sets up under Art. 55 that:

Nothing in Article 54 (which concerns the enforcement of an award) shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.¹⁰⁹

In contrast, a number of courts have recently applied the doctrine of restricted immunity from execution.¹¹⁰ For example, in 2000 the French Supreme Court in *Creighton Ltd v Qatar* holds that by submitting a dispute to ICC arbitration, a state (Qatar) imply that it intend to waive its immunity from execution since the rules of arbitration of ICC plainly states that by submitting their dispute to ICC arbitration, the

¹⁰⁷ See, Cappelli-Perciballi, 'The Application of the New York Convention to Disputes Between States and Between Entities and Private Individuals: The Problem of Sovereign Immunity' 198; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 279. P. Contini, 'International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards'(1959) 8 (3) Am J Comp L 283 at 294.

¹⁰⁸ See , Davidson, *Arbitration* 177; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 281; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 139.

¹⁰⁹ Washington Convention of 1965, Art. 55.

¹¹⁰ See, *Ipirade International SA v Nigeria* 826; *Creighton Ltd v Qatar* (2000) XXV YBCA 458 (France Supreme Court 2000). See also, Turck, 'French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards' 327.

parties undertake to carry out the award without delay and that the arbitral award is final.¹¹¹

In fact, there seems to be little justification for the distinction between immunity from jurisdiction and immunity from execution. Indeed, it is highly likely that there is no significant merit for arbitration if by submitting to arbitration, a state waives its immunity from arbitral proceeding, but preserves immunity from enforcement of arbitral award. Indeed the above opinion, that a state enjoys immunity from enforcement of foreign award, would lead to produce negative consequences, threatening the value of international commercial arbitration with state and state agencies, and would disturb the NYC applications on such arbitration. This because the question of enforcement of foreign arbitral awards is a very important aspect in international arbitral process and one of the primary concerns in the decision to choose arbitration as a method of solving international commercial disputes.

3.9 The Position in Saudi Arabia

3.9.1 Capacity of Natural Person

It may be thought important to mention here the Saudi position regarding the capacity of a natural person to resort to arbitration because of the fact that most, if not all, foreign arbitral awards which brought before the Saudi competent court for enforcement are against Saudi parties. Therefore, the Saudi laws will be applied to determine the Saudi parties' capacity if they try to oppose the enforcement on the ground of their lack of capacity to conclude arbitration agreement.

Under the Saudi law, a full legal capacity of a party is required to conclude a valid arbitration agreement. The SAL provides that "an agreement to arbitrate may not be made except by those who have capacity to act".¹¹² This provision is also confirmed

¹¹¹ *Creighton Ltd v Qatar* 459.

¹¹² SAL of 1983, Art. 2.

by the IRSAL which states that "The agreement to arbitrate shall only be valid if entered into by persons of full legal capacity to act".¹¹³

The above requirement of full capacity immediately raises the question of what is the full capacity of acting? Both The SAL and IRSAL neglect to deal with the question of determination the required capacity or the legal age to enter to an arbitral agreement. Also, there is no Saudi law determines, in general, the legal age of competence to enter into a legally binding agreement. Some writers submitted that the age of full legal capacity of a Saudi person to enter into contracts is the age of 18 years according to *The Al-Shura Council's* (Saudi parliament) earlier decree¹¹⁴. However, this view appears to be at least doubtful because this decree of *The Al-Shura Council* has not been given the Royal assent, whereas *The Al-Shura Council's* resolutions or bills cannot come in force as law in themselves without being given the Royal assent.¹¹⁵ Therefore, the *Shari'ah* law must be recalled in this respect and the standards given by *Shari'ah* law will be applied as far as the Saudi laws give no precise age of the full capacity to enter into arbitration, as well as due to the fact the *Shari'ah* is the general foundation of all Saudi regulations.¹¹⁶

According to *Shari'ah* law, the capability of the parties to contracts is of prime importance for the validity of the contract. Thus, no person can validly conclude a legal transaction without first having attained physical and intellectual maturity that being the equivalent of majority to enjoy full capacity.

With regard to the arbitration agreement, *ahliyyat al-ida*¹¹⁷ is the full capacity required to enter into such agreement. The question come up then as what is the legal age of *ahliyyat al-ida*? Unlike other legal systems, the *Shari'ah* law gives no precise

¹¹³ IRSAL of 1985, Art. 2.

¹¹⁴ Saudi Al-Shura Council decree no 114 dated 5/11/1374 H (1955).

¹¹⁵ Saudi Al-Shura Council Law of 1992, Art. 17.

¹¹⁶ Saudi Basic Law of Governance of 1992, Art. 7 Provides that "rule in the kingdom of Saudi Arabia draws its authority from the HOLY Qur'an and the Prophet's Sunnah which both rule over this regulation and all other State Laws".

¹¹⁷ The capacity in *Shari'ah* ruling is of two categories. First, *Ahliyyat Al-Wujub*, which means that the capacity to dispose of rights. In other words, the receptive legal capacity that is good for receiving but cannot incur. Second, *ahliyyat al-ida*, which means that the capacity to exercise rights. In simple terms, the capacity that can incur rights as well as obligations. *ahliyyat al-ida* therefore presumes the existence of *Ahliyyat Al-Wujub*, but not the conversely as the latter is granted for a person since he is born.

age for *ahliyyat al-ida* because it differ from person to another and may a young person have reached a stage of both mental and physical development characteristic of an adult although he is still below the legal age such as 18. On the other hand, the *Shari'ah* sets out certain standards for granting *ahliyyat al-ida* for a person when he (a) attains physical puberty (*bulugh*) and (b) enjoys sound judgment, known also as prudence in his judgment (*rushd*) as well as (c) he is not sequestrated or interdicted. This standard was also confirmed by the Law of Commercial Court which states that every one become mature or reach the maturity age has the right to apply all kinds of commercial vocations. ¹¹⁸

While the above position may be regarded as a disadvantage, it may be read however to compose an important aspect for facilitating enforcement of arbitral awards and protecting the party who deals fairly or with good faith with young parties, since this position enables the relevant court to have a wide discretion to constrict the applications of the defence of incapacity. Nevertheless, it appear to be appropriate to suggest that Saudi legislator should indicate that a Saudi person gains a full legal capacity of acting by two ways: (a) reaching the age of 18 years with no disabilities, or (b) by attaining physical puberty and enjoying sound judgment if the person is under 18 years.

In addition, it may be useful to mention that according to the SAL, a guardian of minor as well as a guardian of a person, whom capacity has been affected by any negative factor such as mentally illness and bankruptcy, cannot in general refer disputes to arbitration except when he is empowered to do so by relevant court. In this regard, the IRSAL lays down that "A guardian of minors, appointed guardian or endowment administrator may not resort to arbitration unless being authorized to do so by the competent court". ¹¹⁹

3.9.2 Capacity of Juristic Person

¹¹⁸ Saudi Commercial Court Law of 1931, Art. 4.

¹¹⁹ IRSAL of 1985, Art.2.

It submitted that, under the Saudi position, the capacity of a juristic person is generally governed by its constitution and the law of the place of its headquarters.¹²⁰ However, it is argued that the place of the headquarter has to be the same as the place of incorporation or business to apply the law of that place upon the legal capacity of juristic person as it mentioned under Art. 14 of the Saudi Regulation of Companies of 1965.¹²¹

In principle, companies can bind themselves to arbitration agreement, unless their constitutions affect their capacity to do so. Furthermore, a company is also bound by an arbitration agreement concluded by its director.¹²²

3.9.3 State and State Entities

According to The SAL, the Saudi state entities and public authorities are restricted from resorting directly to arbitration without prior approval from the President of the Council of Ministers. Art. 3 of the SAL expressly provides that:

Government Agencies are not allowed to resort to arbitration for settlement of their disputes with third parties except after having obtained the consent of the President of the Council of Ministers.¹²³

It may appear to be helpful to out line the background of the above provision in order to fully understand the genuine motivations of including Art. 3. The position of the capacity state bodies to refer their disputes to arbitration has gone through five different historical stages. They are as follows:

3.9.3.1 First Stage

Since the beginning of oil exploration until the 1950s, the Saudi State or its public entities used to employ arbitration as the primary means of resolving disputes between

¹²⁰ See, M Al-Jaber, *Saudi Commercial Law* (4 edn, 1996 'in Arabic') pp 213-214.

¹²¹ See, A Salamah, *Intermediate in Saudi International Private Law* (King Saud University, Riyadh 1998 'in Arabic') pp 440, 441.

¹²² Saudi Companies Law of 1965. Art. 29.

¹²³ SAL of 1983, Art.3.

them and foreign private parties.¹²⁴ This approval of Saudi State for arbitration can be illustrated by several practices in that time. For example, Saudi State included arbitration clauses in concession agreements with foreign companies for the exploration and transportation of oil, such as the concession agreement with the Arabian American Oil Company known as ARAMCO. Moreover, SA adhered in 1954 to the Arab League Convention on Enforcement of Judgments and Awards of 1952, which imposes an obligation upon the contracting States to enforce any arbitral award made in the other contracting States. This Convention was designed primarily to facilitate the enforcement of foreign judgments as well as foreign awards between only the member States of the Arab league.¹²⁵ In addition, Saudi Government took the initiative and proposed to resolve a dispute with an American company by arbitration in the *ARAMCO* case of 1958.

3.9.3.2 Second Stage

The Saudi State affirmative attitude toward arbitration changed fundamentally after the famous *ARAMCO* arbitration case of 1958¹²⁶ and the arbitration therefore lost

¹²⁴ See, G Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia'(1987) 9 Univ Pennsylvania J Intl Econ L 211 at 214; N Turck, 'Saudi Arabia ' in AJ van den Berg and P Sanders (eds) *International Handbook on Commercial Arbitration* (Kluwer Law and Taxation, Deventer 1994); J Paulsson and others (eds), *International Handbook on Commercial Arbitration* (Kluwer Law International The Hague ; London 1994)9.

¹²⁵ The convention of Enforcement of Judgments, which known as The Arab League Convention on Enforcement of Judgments of 1952 or sometimes as The Cairo Convention of 1952, was established on 14th September 1952 at Cairo under the auspices of The league of Arab States, and entered into force on 28th June 1954. It was signed at first by seven Arab Countries. This Convention was designed primarily to facilitate the enforcement of foreign judgments as well as foreign awards between only the States of the Arab league. it also provide a number of grounds for refusal of enforcement¹²⁵ which are regarded as a similar to those indicated in the Geneva Convention of 1927; in particular, if the award has not yet become final in country in which was made. This convention, however, no longer exists due to the fact that it was replaced by the Riyadh Convention of 1983. See, W Rifat, *National and International Commercial Arbitration in the Kingdom of Saudi Arabia* (Jeddah Chamber of Commerce and Industry, Jeddah 1998 'in Arabic')206; N Turck, 'Arbitration in Saudi Arabia '(1990) 6 (3) Arb Intl 281 at 289. For a full text of the Convention, see, Paulsson and others (eds), *International Handbook on Commercial Arbitration* suppl 17.

¹²⁶ *Saudi Arabia v Arabian American Oil Co (ARAMCO)* (1963) 27 ILR 117 . The facts of this case is briefly as the following:

On 20 April 1954, Mr. Aristotle Onassis signed an agreement with the Saudi Government, according to which Mr. Onassis was permitted to form a Saudi local company called Satco (Saudi Arabian Tanker Company). Satco was granted a quasi-monopoly for all transport of crude oil from the Kingdom at rates which were rather favourable for Mr. Onassis. The agreement was ratified by Royal Decree No. 5737 of 1954. Aramco refused to comply with the Onassis agreement, asserting that according to a concession agreement of 1933 between it and the Saudi Government, it had the absolute right to choose

dramatically the previous approval of Saudi Government. This raises the question as to whether this negative conversion toward arbitration, as some writers have suggested, was an indignant reaction because of the fact it lost the case.¹²⁷ This seems to be quite inaccurate answer due to the fact that to every arbitrations case, there is almost always a clear winner and loser. This fact did not appear to be absent from the consideration of Saudi Government since it took the initiative and proposed to resolve the dispute with ARAMCO by arbitration. Moreover, it is submitted that the dispute matter of the *ARAMCO* case, which is about the Onassis agreement,¹²⁸ was not really very advantageous for SA.¹²⁹

Therefore, it is very probable that this change of Saudi Government's attitude toward arbitration was not plainly because it lost the *ARAMCO* case, but there should be another factual factors led the Government to reconsider the question of the validity of the international commercial arbitration and whether it would meet the requirements of the Kingdom regarding the most important natural resource (i.e. oil). Such factor can be easily found within some findings made by the arbitral tribunal. For example, the arbitral tribunal repeatedly stated that:

The regime of mining concession, and, consequently, also of oil concession, has remained embryonic in Moslem law ... (and) Hanbali law contains no precise rule about mining concessions and a fortiori about oil concession ... (and) the law in force in Saudi Arabia did not contain any definite rule relating to the exploitation of oil ... (thus) the interpretation of contracts is not governed by rigid rules (i.e. *Shari'ah* law); it is rather an art, governed by principles of logic and common sense, which purports to lead to an adaptation, as reasonable as possible, of the provisions a contract to the facts of a dispute.¹³⁰

In the light of above findings, the Saudi government's dissatisfaction with the award can be better explained by the way in which the arbitral tribunal excluded the Saudi law based upon the *Shari'ah* rules, even though they were the applicable law

the means of transport of crude oil. Aramco and the Saudi Government agreed to submit their dispute to arbitration in Geneva by Mr. Von Sauser-Hall.

¹²⁷ See, Turck, 'Saudi Arabia' 'Saudi Arabia' 9; Sayen, 'Arbitration' 214 fn 14.

¹²⁸ See, *Saudi Arabia v Arabian American Oil Co (ARAMCO)* .

¹²⁹ See, Sayen, 'Arbitration' 214 fn 14; Turck, 'Saudi Arabia' 9.

¹³⁰ See, *Saudi Arabia v Arabian American Oil Co (ARAMCO)* pp 162-3, 167-8, 171-2.

according to Art. 4 of the arbitration agreement.¹³¹ The refusal of the tribunal to apply the national law based on the *Shari'ah*, regardless parties' autonomy was similarly applied in the famous *Abu Dhabi* case of 1951¹³² and again in *Qatar* case of 1953.¹³³ Such awards, as it is observed, caused a significant reticence and a certain distrust regarding international commercial arbitration in Arab Countries. Taking these awards into account, the *ARAMCO* arbitration emerged to give good justification for the impression that international arbitration was in fact a western device meets only with the interest of western parties.¹³⁴ It has been noted that the Saudi Government was dissatisfied due to the fact that arbitrations were frequently conducted under non-Saudi rules, both inside and outside of SA.¹³⁵

¹³¹ The Arbitration Agreement between the Saudi Government and ARAMCO, Art IV. It determines the applicable law as follows:

"the Arbitration Tribunal shall decide this dispute

in accordance with the Saudi Arabian Law as hereinafter defined in so far as matters within the jurisdiction of Saudi Arabia are concerned;

in accordance with the law demand by the Arbitration Tribunal to be applicable, in so far as matters beyond the jurisdiction of Saudi Arabia are concerned;

Saudi Arabian law, as used herein, is the Moslem law;

as taught by the school of Imam Ahmed ibn Hanbal;

as applied in Saudi Arabia".

See, *ibid* 153.

¹³² It was stated in the award that:

If a national law must be applied, it is that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region, there is any set or body of legal principles applicable to the construction of modern commercial instruments.

See, A El-Ahdab, 'Why Create the Arab Association for International Arbitration?' (1992) 9 (3) *J Intl Arb* 29 at 30.

¹³³ It was held in the award that:

I need not set out the evidence before me about the origin, history and development of Islamic Law as applied in Qatar or as the legal procedure in that country. I have no reason to suppose that Islamic Law is not administered there strictly, but I am satisfied that the Law does not contain any principles which would be sufficient to interpret these particular contracts.

See, *ibid* 30.

¹³⁴ See, HJ Brown and Al. Marriott, *ADR principles and practice* (Sweet & Maxwell, London 1993) pp 81-83; El-Ahdab, 'Why Create the Arab Association for International Arbitration?' 30.

¹³⁵ See, Sayen, 'Arbitration' 216.

With the foregoing background in mind, the Saudi Government in 1963 released a ministerial decree no 85 by which it forbade any Saudi governmental body to refer its dispute with a private party to arbitration. On the other hand, the decree imposed the Saudi governmental bodies to submit their disputes to the Saudi combatant court (i.e. the Board of Grievances) and must be subject to Saudi laws as well.¹³⁶

It may observe that this restriction is applicable to the both national and international since the decree was general and gave no distinction between them. However, the decree provided two exceptions to this restriction: (a) Concession contracts of extreme interest to the Saudi State. (b) Technical disputes. In these cases, the board of Grievances is entitled to appoint the third arbitrator, if the other arbitrators fail to agree upon one. The award may be appealed before the board of Grievances both in form and merit.¹³⁷

3.9.3.3 Third Stage

As the need of international arbitration became more essential to resolve international commercial disputes, the Saudi Government reconsidered its attitude towards arbitration and started to decrease the scope of the prohibition upon state bodies to conclude arbitration agreement made under the above decree no 85. This not only because the Saudi state agencies have accepted arbitration clauses on its international contracts, but also because Saudi State has adhered important international conventions. In this regard, the first step to reduce such prohibition was in 1976, when the Saudi State made an agreement with the American Overseas Private Investment Corporation (OPIC) including a clause to submit to arbitration any disputes may rise out between the Saudi State or its Agencies and any American investor insured by OPIC. This agreement may be considered as a significant step, dispute its limited

¹³⁶ Saudi Council of Ministers Resolution No 58 dated 17/1/1383 H (1963).

¹³⁷ An example for the first exception can be seen in an agreement concluded in 1969 between the Petromin Company, which is state agencies, with French Company. This agreement included an Arbitral clause to ICC Arbitration at Lausanne in Switzerland. Additionally, an example for the second exception can be found in an agreement between Saudi State and the United States Army Corps of Engineers to submitting technical disputes arising out of the contracts executed in Saudi Arabia to Arbitration. See, El-Ahdab, *Arbitration in Arab Countries* vol 2 pp 192; A El-Ahdab, *Arbitration with the Arab countries* (Kluwer Law and Taxation Publishers, Deventer; The Netherlands 1990) pp 602-3; A Lerrick and QJ Mian, *Saudi business and labor law : its interpretation and application* (Graham & Trotman, London 1982) 178.

scope as it is applied only on disputes between Saudi and American investor. The same agreement was also held between Saudi State and Germany.¹³⁸

In addition, the Saudi State ratified, in 1980, the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States.¹³⁹ Saudi State however made two reservations where the Convention is not applied to: (a) all matters of petroleum (b) all matters of national sovereignty. Consequently, Saudi State and a foreign party may consent in writing to submit their disputes to the International centre for Settlement of Investment Disputes (ICSID).

Indeed, this step appears to be a fundamental development which may limit the prohibition imposed upon Saudi State agencies to resort to international arbitration. Some writer goes further to submit that after the ICSID Convention, the authorization of governmental agencies to arbitration became the rule and whereas prohibition became the exception.¹⁴⁰

It is argued, however, that the Saudi Movement has never approved an ICSID arbitration clause.¹⁴¹ This argument seem to be without merit due to the fact that the Saudi State petroleum Company (Petromin) has entered into contracts with foreign companies including arbitral clause referring to ICSID.¹⁴²

3.9.3.4 Fourth Stage

As suspicions concerning international arbitration remain somehow in effect in SA, the SAL of 1983 came to reconfirm allow Saudi state agencies to inter into arbitration agreement with third parties after having the permission from the President of the Council of Ministers to do so. In this regard, Art. 3 of the SAL states that:

¹³⁸ See, El-Ahdab, *Arbitration in Arab Countries* vol 2 p 194; Lerrick and Mian, *Saudi business and labor law : its interpretation and application* 181.

¹³⁹ See, The World Bank Group, 'List of Contracting States and other Signatories of the Convention ' <<http://www.worldbank.org/icsid/constate/c-states-en.htm>> (accessed 12/07/2003).

¹⁴⁰ See, A El-Ahdab, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part 1'(1986) 3 (5) J Intl Arb 27 at 42.

¹⁴¹ See, Sayen, 'Arbitration' 215; Turck, 'Saudi Arabia '10.

¹⁴² See, El-Ahdab, *Arbitration in Arab Countries* vol 2 p 199.

Government Agencies are not allowed to resort to arbitration for settlement of their disputes with third parties except after having obtained the consent of the President of the Council of Ministers. This ruling may be amended by resolution of the Council of Ministers.¹⁴³

In the same way, the IRSAL affirms the above provision, and establishes some required procedures if State Agencies wish to resort to arbitration. It provides in Art. 8 that:

In disputes where a government authority is a party with others, such a government authority shall prepare a memorandum with respect to arbitration in such a dispute, stating its subject matter, the reasons for arbitration and the names of parties. Such a memorandum shall be submitted to the council of ministers for approval of arbitration. The prime minister may, by a prior resolution, authorize a government authority to settle the disputes arising from a particular contract, through arbitration. In all cases, the council of ministers shall be notified of the arbitration awards adopted.¹⁴⁴

According to the letter of the above Articles, it may be observe that the requirement of obtaining the consent of the President of the Council of Ministers is a general rule including all Government Agencies as well as all kind of disputes whether regarding petroleum or not.

However, this may be not the case as some positive factors can be noted in the way of drafting Art. 3 of the SAL and Art. 8 of the IRSAL: First, these Articles entitle the President of the Council of Ministers, without the need to the approval of the Council of Ministers, to grant State agencies the permission to refer their disputes to arbitration. Likewise, the president himself is also empowered to authorise a State agency in particular contract to conclude an arbitration clause before disputes arise out rather than a submission agreement.¹⁴⁵ Furthermore, the last sentence of Art. 3 of the SAL grants the Council of Ministers to amend the provision of prohibition without the need of a Royal decree, although Saudi regulations, as a general rule, are approved and amended by Royal decree.¹⁴⁶ In addition, it is almost unusual, in Saudi statutes,

¹⁴³ SAL of 1983, Art.3.

¹⁴⁴ IRSAL of 1985, Art.8

¹⁴⁵ *ibid.*

¹⁴⁶ Saudi Basic Law of Governance of 1992, Art. Art. 70 provides as follows:

that an Article to be immediately followed by such provision of possible amendment. Having these factors in mind, it may be concluded that there is a strong possibility that the Saudi legislator intend to repeal the prohibition in the future or at least to confine its field of application.

In addition, It may useful to mention that it has been submitted that the farther the Saudi state agencies get away from administrative rules and from the laws on public servants and the closer they come to the commercial laws, the closer they com to arbitration. Also, it is alleged that a Saudi agency no longer needs authorization for arbitration, if its administrative and financial autonomy is important and the tutelage of the Ministry over it is weak.¹⁴⁷ However, such suggestions do not stand on firm grounds since the requirement of obtaining the authorisation from the President of the Council of Ministers made under The SAI, and IRSAL include all state agencies by using a general terms such as "Government Agencies are not allowed to resort to arbitration"¹⁴⁸ and "a government authority"¹⁴⁹ and makes no distinction between governmental and non- governmental activities. However, it may be more appropriate to try another interpretation here by stating that the prohibition imposed by the SAL upon Saudi State agencies to refer to arbitration is only applicable as far as national contexts is concerned,¹⁵⁰ but not to international commercial contexts. This is because the SA has adopted to various international conventions, such as the Washington Convention of 1965 and The NYC, and such adoptions may imply that the SA intend to eliminate the restriction on state agencies in the context of international commercial agreements.

3.9.3.5 Fifth Stage

International treaties, agreements, regulations and concessions are approved and amended by Royal decree.

¹⁴⁷ See, El-Ahdab, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part 1' p 43.

¹⁴⁸ SAL of 1983, Art. 3.

¹⁴⁹ IRSAL of 1985, Art.8.

¹⁵⁰ See, Rifat, *National and International Commercial Arbitration in the Kingdom of Saudi Arabia* 105; El-Ahdab El-Ahdab, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part 1' 32.

A significant development took place in 1994, when Saudi State acceded to the NYC.¹⁵¹ Indeed, this step is deemed as a central shift in the Saudi attitude relating to international commercial arbitration since the NYC is considered to be the most successful international instrument in the field of arbitration, and the most effective instance of international legislation in the entire history of commercial law.¹⁵²

Yet, the question needs now to be decided as to whether the NYC may contribute to reduce the restriction imposed upon Saudi government agencies? It appears to be difficult to have a straightforward answer. However, a relevant factor may be thought helpful to be considered in this sense. As has been seen above, the NYC is generally considered to be applicable to differences between a state or a state body and a private party since the states or their agencies are included under the category of legal persons according to Art. I (1) of the NYC. Taking this consideration into account as well as the Saudi acceding to the Washington Convention of 1965, it can be then inferred that by ratifying the NYC, SA intended to restrict if not waive the prohibition upon the state and state agencies in the field of international arbitration.

3.9.3.6 Present Position of Saudi State Entities

To sum up, it may thus be concluded that there is no clear-cut answer regarding the present position of the capacity of Saudi state agencies to arbitrate abroad. Yet, the restriction appears to be the rule and arbitration is the exception as to national arbitration, whereas the contrary may be held true in the context of international arbitration. i.e. the restriction imposed upon Saudi State agencies might only be applicable in relation to national commercial, and could have no effectiveness in the context of international arbitration. However, SA must recognise the important of international arbitration and take step forward to clarify the capacity of Saudi state entities to refer to international arbitration, and limit the restriction made under Art. 3 of the Saudi Arbitration Law to state entities that deal with sensitive and vital public issues, such as the state security or the main source of national income (i.e. matters of petroleum or national sovereignty).

¹⁵¹ Saudi Royal Decree No. M/11 dated 16.7.1414 H. (1994) for ratification of the New York Convention of 1958.

¹⁵² See, Mustill, 'Arbitration: History and Background'.

3.7.8.6 Case Law

As far as the international commercial arbitration is concerned, the key question which needs to be highlighted is whether a Saudi state agency can rely on its incapacity according to the national laws or rely on its immunity to avoid enforcement of arbitral agreement an award? In the light of above conclusion, they might not be entitled to do so.

This approach was affirmed by the Saudi enforcing court (the 9th Administrative Panel) in a recent case in 1997 between a *University (Saudi public body)* and Dutch party.¹⁵³ In this case, the Saudi court rejected a defence that the arbitral agreement is invalid since the Saudi University lack the proper capacity to recourse to arbitration according to the Council of Ministers Resolution no 58 (1973) which prohibits government agencies to do so. At the outset, the Court regarded the contract as to involve with administrative or governmental activities and not commercial because the contract is included for a public service. The court went on to assert that although resorting to arbitration by public agencies is forbidden under national law, the validity of the arbitral agreement must be granted, regardless the prohibition since the parties had agreed to submit any dispute to binding arbitration as it mentioned in Art. 9 of the contract. The Court held that it based its decision upon the principles of *Shari'ah* to achieve a just result: first, the *Shari'ah* law emphatically upholds the moral obligation to fulfil one's contracts and undertakings, as expressed in the Qur'an: "O you who believe! Fulfil all obligation".¹⁵⁴ Second, the principle adopted by the majority of Muslim scholars is that the arbitral award is binding. As a consequence, the Court granted the foreign Company's petition to enforce the arbitral award against the Saudi State agency, and denied the latter defences.

This conclusion of the Saudi Court is a landmark case in the pro-enforcement bias. It constructs a very advanced approach regarding the issue of a state capacity to arbitration and a state immunity from suit and enforcement. This because of that, as has been seen above, the doctrine of disregarding national prohibitions upon a state agencies or the waiver of state immunity from execution by submission to arbitration

¹⁵³ the 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997).

¹⁵⁴ *The Qur'an, Al-Ma'idah* [5:1].

is recognized only for the disputes where the state may be regarded as a private person acting for commercial purpose.¹⁵⁵ However, the Saudi court goes beyond this doctrine and granted the enforcement of the arbitral award against the Saudi State agency even though it is regarded as public body acting for governmental activities (*acta jure imperii*). In addition, the court's relying on the Shari'ah principles, which allow enforcement against state agencies, rather than the Saudi laws, which do not allow such enforcement, would constitute a practical example for the principle of more-favorable-provision to enforcement set forth in Art. VII(1) of the NYC.

3.10 Conclusion

Following the examination of this chapter, it may be concluded that although the incapacity of party is the first defence to enforcement of foreign arbitral awards mentioned under Art. V (1) of the NYC it rarely turns up in practice apart from state agencies cases. Also, although the wording of Art. V(1)(a) of the NYC would appear to provide that a party may rely on his own lack of capacity, this, however, was proven to be hardly successful, and particularly if it appears to breach the principle of good faith.

The first part of Art. V(1)(a) refers to "the law applicable to them (parties)" in order to determine their capacity of entering into arbitration agreement. The applicable law to the party is commonly interpreted to mean the personal law which requires to be determined by reference to the conflict of laws rules of the place of arbitration or enforcement. These generally include the law of natural person's nationality or his domicile or usual residence, and the law of place of incorporation or the main place of business, as well as the constitution of the state, state body or the law regulates their activities. Alternatively but not commonly, it is submitted that the phrase "the law applicable to them" can be taken to mean the substantive rules which relies mainly on the customs and principles of the international commerce, regardless any reference to national laws.

¹⁵⁵ See, *supra* para 3.8.5.

According to the common interpretation of first part of Art. V (1) (a) of the NYC, the capacity of a natural person to arbitrate, is generally governed by the personal law of the party which is the law of his nationality (e.g. in civil laws) or the law of his domicile or normal residence (e.g. in the common laws). On the contrary, it is submitted that the capacity of the parties should be resolved by referring to the substantive customs of international trade, independently from any reference to national laws. So, any natural person runs an economic activity on a professional basis should be considered as capable to conclude a valid arbitration agreement.

In SAL, a full legal capacity of a party is required to conclude a valid arbitration agreement. According to *Shari'ah* law, *ahliyyat al-ida* (i.e. puberty and enjoying sound judgment) is the full capacity required to enter into arbitration agreement.

The capacity of a juristic person, in some common countries, is governed mainly by its constitution and the law of the place of incorporation or business. On other legal systems, the question of the capacity of a juristic person is judged by the law of the country where its headquarters is located or may be sometimes where its registered office is situated. The law governing international commercial agreement may be regarded as well. On the other hand, under the substantive rules method, all juridical persons involving with commercial activities should be considered to have the capacity to enter into a binding agreement to arbitrate relating to those activities.

The representative powers for a juridical person, under the traditional method of the conflict of laws rules, are generally governed by the law under which that juridical person operates. But under the substantive rules method, (a) It would be sufficient to have a general authorization to contract for the purpose of entering into a binding international arbitration, (b) Corporate representatives responsible for management are assumed to have power to enter into binding arbitration agreements, (c) in the context of international commerce, no particular requirements of form of the power to conclude an arbitration agreement should be imposed to provide that the parties' consent is certain.

In SA, the capacity of a juristic person is generally governed by its constitution and the law of the place of its headquarters. Companies can, in general, bind themselves to

arbitration agreement and it is also bound by an arbitration agreement concluded by its director.

The capacity of state or state body to refer a dispute to arbitration depends mainly on the constitution of the state body or the law which regulates its activities. Some establish no limitation upon the capacity of state or state entities to enter into arbitration agreements, whereas some other countries impose some restrictions upon their state and public authorities to enter into arbitration agreement. Moreover, the capacity of state or state body to agree to arbitration may also depend upon the law of forum where the State is sued, or sometimes depend upon the relevant international conventions, which have been adopted by that State.

The question of the capacity of Saudi State authorities or agencies to refer their disputes to arbitration have gone through, generally, five different historical stages. (1) Since the beginning of oil exploration until the 1950s, the Saudi State or its public entities used to employ arbitration as the primary means of resolving disputes between them and foreign private parties. (2) In 1963, the Saudi Government forbade any Saudi governmental body to refer its dispute with a private party to arbitration. This restriction was a hostile reaction of the Saudi government against arbitration after the famous *ARAMCO* arbitration case of 1958 because the arbitral tribunal excluded the Saudi law and the *Shari'ah* law, even though they were the applicable law according the arbitration agreement. (3) In 1976, the SA started to decrease the scope of the prohibition on state agencies by concluding agreements with foreign parties which included a clause to submit to arbitration any disputes may rise in future. The prohibition was further reduced in 1980 when the SA ratified the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States. (4) The Saudi Arbitration Regulation of 1983 came to allow Saudi state agencies to resort to arbitration but after having obtained the consent of the President of the Council of Ministers. However, this restriction appears to be applicable to national arbitrations, but not to the international commerce as a result of adhering to some international convention such as the Washington Convention of 1965. (5) In 1984, the SA ratified the NYC, which may imply that the Saudi State intended to be more open for international arbitration.

In the context of the international transaction, the new trend supported by most courts and commentators is that a state or state bodies may be not allowed to rely upon their incapacity under their own national law to repudiate a previous arbitration agreement.

Also, the common approach adopted by courts and scholars regarding the immunity of state or perhaps its bodies from arbitration or enforcement of arbitral award is as the following: In the case of governmental activities, the state has the benefit of absolute immunity from enforcement of arbitral agreements and awards, but in the case of commercial activities, the state has no immunity from enforcement of an arbitral agreement, and should be from enforcement, in which the state is engaged in the same manner as private person. However, the Saudi court in its landmark case goes beyond this doctrine and granted enforcement of the arbitral award against the Saudi State agency even though it is regarded as public body acting for governmental activities, relying on *Shari'ah* principles.

CHAPTER FOUR

Invalid Agreement

4.1 Introduction

The second part of the first ground for refusing enforcement of foreign arbitral awards is that the arbitration agreement is invalid. Of course, it goes without saying that the arbitration agreement is almost the foundation stone of international and domestic commercial arbitration. This is in view of the fact that the arbitration, unlike the litigation, has a contractual nature and composes an alternative voluntary means of disputes settlement, which therefore depends solely upon a valid consent of each party. Thus, if a valid agreement to arbitrate is lacking, there can be, in general, no basis for effective arbitration and there can be also no valid arbitral award. Consequently, most if not all conventions and national laws of arbitration include the invalidity of the arbitration agreement as a ground for refusal of enforcement of arbitral award. In this context, the second part of Art. V(1)(a) of the NYC provides that it will be a ground for refusing enforcement to an award that:

[T]he said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made” (emphasis added).¹

This chapter is concerned with the invalidity of the arbitration agreement as a ground for refusing enforcement of foreign arbitral awards under Art. V(1)(a) of the NYC. The laws to be applied to the question of the validity of the arbitration agreement are firstly considered. This involves examining the law applicable to substantive validity and, then law applicable to formal validity. Secondly, it deals with the grounds of invalidity of the arbitration agreement. These include the formal grounds of invalidity on the one hand, and the substantive grounds of invalidity on the second hand. The Saudi position thereof will be finally focused upon.

¹ NYC of 1958, Art. V(1)(a).

4.2 Law Applicable to the Validity of the Arbitration Agreement

Extensive considerations both in theory and practice have been, generally, given to the question of the law applicable to the validity of arbitration agreement. Yet, this question remains unclear in the context of international arbitration² and thus it has given rise to various approaches. This difficulty is caused via several reasons. The validity of the arbitration agreement is affected by many different factors which may each be governed by different laws, while the question of the validity may occur at different stages of the arbitral procedures. Moreover, the scope of application of the NYC regarding the validity of arbitration agreement is not clear,³ since the wording implied by Art. V (1)(a) is ambiguous. In addition, most commentators discuss the issue of the validity in considerable detail in the context of enforcement of the arbitration agreement, whereas in the context of enforcement of the arbitral award, they give the issue just a brief consideration and refer back to the earlier discussion.⁴ Yet, as mentioned before, these two stages suffer noticeably different treatments under the NYC. Likewise, certain commentators, when discussing the issue of the applicable law under the NYC, make no clear distinction between formal validity and substantive validity.⁵

To avoid the above confusions and to have a better perception, the question of the applicable law to the validity of the arbitration agreement at the stage of enforcement of arbitral award will be discussed first in the context of the law applicable to substantive validity, and secondly in the context of the law applicable to formal validity.

² See, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 6-26; Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* 144; Born, *International Commercial Arbitration* 95; VV Veeder, 'Summary of Discussion in the First Working Group' (ICC Congress Series no 9 Paris 1998)45.

³ See, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* 108.

⁴ See, eg, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 463; Born, *International Commercial Arbitration* 849; Davidson, *Arbitration* 393; Sutton and Gill, *Russell on Arbitration* 371; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 985; M Mustill and S Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd edn, Butterworths, London 1989) 424 fn 14.

⁵ See, eg, Sutton and Gill, *Russell on Arbitration* 371.

4.2.2 Law Applicable to Substantive Validity of the Arbitration Agreement.

4.2.2.1 General

Unlike the case of incapacity, Art. V (1)(a) of NYC provides ⁶ choice of law rules to govern the question of invalidity of arbitration agreement. The second part of Art. V (1)(a) states that it will be a ground for refusing enforcement to an award that:

[t]he said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”(emphasis added). ⁷

At first glance, this provision appears to contemplate only two possible applicable laws. The first is the law chosen by the parties to govern the validity of the arbitration agreement. Thus the parties are free to choose the applicable law, and their choice prevails over any other provisions. Thus, it has been said that this provision reflects “the supremacy of party autonomy over the territorial concept of arbitration”, ⁸ while a noted authority has stated that Art. V(1) “places significant emphasis on party autonomy and the ability to be able to settle their dispute as they choose”. ⁹ However, it may be observed that it is not only unusual, but also not recommended for the parties to subject the arbitration agreement to a law which differs from the law of the main contract ¹⁰ or perhaps the law of the arbitral seat. ¹¹ Lord Mustill and Boyd have noted that “it must be unusual for an arbitration clause in a contract to stipulate for a choice of law which is to apply to the clause and nothing else”. ¹²

⁶ See, Born, *International Commercial Arbitration* 95; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 282.

⁷ NYC of 1958, Art. V(12)(a).

⁸ J Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause' (ICCA Congress Series no 9 Paris 1998)142.

⁹ Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 26-144.

¹⁰ See, *ibid* para 6-24; Sutton and Gill, *Russell on Arbitration* 68; Mustill and Boyd, *Commercial Arbitration in England* 62 fn 12. Davidson, *Arbitration* 368; Born, *International Commercial Arbitration* 109.

¹¹ See, *XI Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500 (UK QBD Com Ct) 507; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 146, 282, 291-92.

¹² Mustill and Boyd, *Commercial Arbitration in England* 62 fn 12.

Secondly, where the parties have failed to give any indication regarding the law applicable to the arbitration agreement, the applicable law will then be the law of the country where the arbitral award was made which is broadly deemed to be the law of the seat of the arbitration.¹³

However, the question of determining the applicable law to the validity of the arbitration agreement under the provision of Art. V(1)(a) is actually more difficult than it first appears. A second look at this provision brings a significant difficulty to light, as will be seen below.

4.2.2.2 Implied Choice

While it is clear that Art. V(1)(a) gives primary effect to an express choice of law by the parties, it is not clear, in the absence of such expressed choice, whether the alternative law will immediately be the law of the seat, or will be any implied choice by the parties i.e. the law of the main contract, leaving the law of the seat as the third alternative. In other words, it is not clear whether the choice of law by parties as mentioned in Art. V(1)(a) includes only the expressed choice, or extends to imply choices, such as the choice of law governing the main contract. This question particularly appears when the parties have indicated a law to govern the main contract. Is the application of this law limited to the merits of the main contract, or it is applicable to the arbitration agreement as well, unless agreed otherwise? There are several views on this matter. However, the two main approaches as well as the French approach will be examined below:

First View: The Law of the Seat of the Arbitration

The first view is that in the absence of the expressed choice by the parties, the arbitration agreement is governed by the law of seat. This approach adopted by

¹³ See, eg, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 226; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* 107 fn 28; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 157.

several authors¹⁴ and courts.¹⁵ The view is based upon the doctrine of autonomy or separability of the arbitration agreement. One important consequence of this doctrine is that the arbitration agreement may be governed by a different law to the main contract, since the law governing the arbitration agreement is determined by considerations which are different from those involved in determining the law applicable to the main contract. This approach considers the arbitration agreement as a wholly separate agreement from the main contract, and therefore not governed by the law of the main contract, in the absence of the expressed choice. So, when the parties have chosen a particular place for the arbitration, unless otherwise agreed, they are deemed to intend to choose the law of that place to govern the arbitration agreement.

Furthermore, it is argued that even though the primary choice of law by the parties, as envisaged by Art. V(1)(a), might be thought to include an implied choice of law governing the arbitration agreement, the strongest connecting factor which indicates the parties' intention must be the place of arbitration. Thus, as Prof van den Berg states "if a contract contains a general choice of law clause and provides in the arbitration clause that the arbitration is to be held in a country with a different law, the latter indication must be deemed to prevail over the former". He goes on to note that in the few reported cases where the possibility of an implied choice of law under Art. V(1)(a) was considered, the applicable law was found to be the law of the country where the award was made. Thus, the possibility of an implied choice of law by the parties existed only in theory.¹⁶ It was further said, in this context, that:

¹⁴ See, eg, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 293; van den Berg, 'Consolidated Commentary' (2003) at 654; Gaja, *International Commercial Arbitration* para I.C.2; C Reymond, 'Where is an Arbitral Award Made' (1992) 180 IQR 1 p 3.

¹⁵ See, eg, *Isaac Glycer v Moses Israel Glycer & Estera Glycer-Nottman* (1996) XXI YBCA 635 (Netherlands Court of First Instance 1994) 524; *X v X* (1998) XXIII YBCA 754 (Switzerland Court of First Instance 26 May 1994) at 756,7; *Insurance Company (Sweden) v Reinsurance Company (Switzerland)* (1997) XXII YBCA 800 (Switzerland Supreme Court 21 Mar 1995) at 805; *Conceria GDe Maio & F snc v EMAG AG* (1996) XXI YBCA 602 (Italy Supreme Court 20 Jan 1995) at 604; *X v X* (1999) XXIV YBCA 645 (Germany Court of Appeal 17 Sep 1998) 646; *Activat International SA v Conservas El Pilar SA* (2002) XXVII YBCA 528 (Spain Supreme Court 1996) 530; *Dalmine SpA v M & M Sheet Metal Forming Machinery AG*; *XI Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500 (QBD Com Ct); *Planaverigne S.A v Kalle Bergander i Stockholm AB* (2002) XXVII YBCA 554 (Sweden Court of Appeal 2001) 555.

¹⁶ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 293-94.

When one says that London, Paris or Geneva is the place of the arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland, or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and with the arbitrators.¹⁷

This view has been also adopted by several courts. For example, In *XL Insurance Ltd v Owens Corning* the parties chose the English Arbitration Act of 1996 to govern the arbitral proceedings, while agreeing that the main contract would be subject to the law of the State of New York. In determining the law applicable to the validity of the arbitration agreement, the English Commercial Court held that “by stipulating arbitration in London under the provisions of the Arbitration Act, 1996 the parties ... by implication chose English law as the proper law of the arbitration clause”.¹⁸ In supporting its judgment, the Court quoted Lord Mustill in *Channel Tunnel Group Ltd. & Others v Balfour Beatty Construction*:

Certainly there may sometimes be an express choice of a curial law which is not the law of the place where the arbitration is to be held: but in the absence of an explicit choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended, the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible.¹⁹

The Court then went further to express its observation that “It is by no means uncommon for the proper law of the substantive contract to be different from the *lex fori*; and it does happen, although much more rarely, that the law governing the arbitration agreement is also different from the *lex fori*”.²⁰

Similarly, a Netherlands court of first instance in *Petrasol BV v Stolt Spur Inc* observed that since New York was chosen as the arbitration place, this implies the

¹⁷ Reymond, ‘Where is an Arbitral Award Made’ at 3.

¹⁸ *XL Insurance Ltd v Owens Corning* 500.

¹⁹ *Channel Tunnel Group Ltd and Others v Balfour Beatty Construction Ltd and Others* [1993] 1 Lloyd’s Rep 291 (UK HL) 304.

²⁰ *XL Insurance Ltd v Owens Corning* 507.

choice of the New York law as the law governing the arbitration, including the question of the validity of the arbitration agreement.²¹ Likewise, a Swiss court of first instance has stated that:

It is the prevailing doctrine, and it also corresponds with Art. V(1)(a) of the New York Convention, that, in the absence of a choice of law provision, the validity of the arbitration clause must be decided according to the law of seat of the arbitral tribunal.²²

Thus, according to the above-mentioned view, if there is no explicit choice of law by the parties to govern the validity of the arbitration agreement, the law of the arbitration seat will be deemed as the applicable law thereof.

Second View: The Law of the Main Contract

The second view is that the law chosen by the parties to govern the main contract is also applicable to the arbitration agreement, unless otherwise agreed by the parties. This view is also adopted by several authors²³ and courts.²⁴

In supporting of this view, it has been argued that it is unusual for the parties to specify the law governing the arbitration agreement when making a choice of law for the main contract, particularly when the arbitration agreement is part of the main contract. So, it would appear peculiar to suggest that the law chosen to cover the main contract will govern all its provisions except the arbitration clause, since the choice of

²¹ *Petrasol BV v Stolt Spur Inc* (1997) XXII YBCA 762 (Netherlands Court of First Instance 1995) 765.

²² *X v X* (Switzerland Court of first Instance 26 May 1994) 756,7.

²³ See, eg, Mustill and Boyd, *Commercial Arbitration in England* 63; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 6-24; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* pp 157-58; Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* 144; Davidson, *Arbitration* 291; Suttten and Gill, *Russell on Arbitration* 68; Dicey, Morris and Collins, *Conflict of Laws* vol 1, 592

²⁴ See, eg, *Italin Company v German F R firm* (1980) V YBCA 262 (Germany Court of First Instance 24 Apr 1979) 264; *Cia Maritima Zorroza SA v Sesostris SAE* [1984] 1 Lloyd's Rep 652 (UK QBD Com Ct) 652; *German assignee of a German Shipping Company v Japanese Shipyard* (1990) XV YBCA 455 (Germany Court of Appeal 17 Feb 1989) 457; *Adda Officine Elettromeccaniche v Alsthom Atlantique SA* (1996) XXI YBCA 580 (Italy Court of First Instance 13 Feb 1991) 582; *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48 (UK QBD Com Ct) 50; *Owerri Commercaï Inc v Dielle Srl* (1994) XIX YBCA 703 (Netherlands Court of Appeal 1993).

law and arbitration clauses are usually adjoining or at least close neighbours.²⁵ In this regard Lord Mustill and Boyd state:

The starting point is to be determine the proper law of the contract in which the arbitration is embodied. As a general rule the arbitration agreement will be governed by the same law, since it is part of the substance of the underlying contract. ... The presumption [that the law governing the validity of the arbitration agreement is the law of the state where the award is to be made] would we submit readily be rebutted in favour of the proper law of the underling contract".²⁶

In addition, parties to international arbitration agreement usually choose a "neutral" seat that has no connection with either themselves or their commercial relationship. Consequently, the law of that place is not necessarily intended to be chosen by the parties to govern their relationship. In fact, they may well choose that place on basis of considerations, such as geographical convenience, that have no connection with the governing law of the arbitration agreement.²⁷ Indeed, the seat may be chosen long after the arbitration agreement has come into existence, and sometimes it is not chosen by the parties.

Furthermore, while under the principle of the autonomy the parties may subject the arbitration agreement to a different law from the law of main contract, if this is not done explicitly, it is generally assumed that the arbitration clause is governed by the law of the main contract in which it is included.²⁸ This because of the fact that it is not meant by the separability of the arbitration agreement that it is totally independent from the main contract "as evidenced by the fact that acceptance of the contract entails acceptance of the clause, without any other formality".²⁹ In the same manner, one leading authority has stated that:

²⁵ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 157. See also, Davidson, *Arbitration* 368.

²⁶ Mustill and Boyd, *Commercial Arbitration in England* 63.

²⁷ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 78; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 433, 1695.

²⁸ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* pp 157-58; Davidson, *Arbitration* 291.

²⁹ Y Derains 'The ICC Arbitral Process: Choice of the Law applicable to the Contract and International Arbitration' (1996) 6 *The ICC International Court of Arbitration Bulletin* pp 16-17, cited in Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause' 143.

There is a very strong presumption in favour of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement. This principle has been followed in many cases. This could even be implied as an agreement of the parties as to the law applicable to the arbitration clause.³⁰

This approach has also been supported by several courts. For example, in the early case of *Italian Company v German Firm* the German Court of Appeal held that "the law applicable to the main contract also governs, in principle, the validity of the arbitral clause contained therein, since it must be assumed that parties wish a uniform legal regime applicable to both".³¹ Similarly, the Dutch Court of Appeal in *Owerri v Dielle* stated that it goes without saying that submitting the validity of the arbitration clause to the same law to which the parties submitted the main contract in which the arbitration agreement is embodied would be, in general, preferable by the parties.³²

Equally in *Union of India v. McDonnell Douglas Corporation*, the English Commercial Court held that:

An arbitration clause in a commercial contract like the present one is an agreement inside an agreement. The parties make their commercial bargain ... The parties may make an express choice of the law to govern their commercial bargain and that choice may also be made of the law to govern their agreement to arbitrate. In the present case it is my view that by art. 11 the parties have chosen the law of India not only to govern the rights and obligations arising out of their commercial bargain but also the rights and obligations arising out of their agreement to arbitrate.³³

In addition, the above-mentioned citation by the English Commercial Court in *XL v Owens Corning* of the views of Lord Mustill in the *Channel Tunnel* case to support its approach of applying the law of the seat of the arbitration is open to counterarguments. First, there is an essential difference between the two cases, as

³⁰ *ibid*143.

³¹ *Italian Company v German F R firm* 264.

³² *Owerri Commercial Inc v Dielle Srl* 706.

³³ *Union of India v McDonnell Douglas Corporation* 50.

common principles of French and English law were chosen to govern the contract in the *Channel Tunnel* case, rather than the law of a specific jurisdiction. By contrast, a particular law (i.e. New York law) was chosen in the *XL* case. Likewise, the law governing the arbitration agreement should not be mistaken for the law governing the arbitral process. Lord Mustill refers to the latter, which was obviously governed by English Arbitration Act 1996 as chosen by the parties. Moreover, Lord Mustill plainly refers to the implied choice of law of the seat of arbitration *only* in the absence of (a) an explicit choice or (b) some very strong pointer in the agreement. The stipulation of common principles of two different laws can hardly be considered as a strong pointer, whereas the precise choice for New York law to govern the main contract sensibly appears to be a very strong pointer for the parties' common intention to have the whole agreement, including the arbitration agreement, governed by this law.³⁴ Finally, Lord Mustill, as just mentioned, expressed his support in favour of the law of the main contract approach.

Yet, it may be observed that the above arguments either make no clear distinction between the two forms of the arbitration agreement (i.e. an arbitral clause and a submission agreement) or concern one of them (particularly, the arbitral clause) while addressing the issue of the law governing the validity of the arbitration agreement. Presumably it makes a big difference whether the arbitration agreement takes the form of an arbitration clause in a contract or a free standing agreement not forming part of another contract (a submission agreement). Therefore, it would appear important to make a distinction between the two forms of the arbitration agreement while determining the law governing the validity of each form of the arbitration agreement, as the following:

First, as regards the arbitral clause in a contract, the approach of applying the law of the main contract appears to be more favorable, since an additional support for this approach can be found in the words "*any indication*" in Art.V (1)(a), which is subject to a broad interpretation. Indeed, as Prof Davidson observes, "the reference to 'indication' of the chosen law suggests that the provision may embrace an implied

³⁴ See, Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 147.

choice of law".³⁵ Therefore, Art.V(1)(a) refers to the law of the place of arbitration only when "failing any indication" of the applicable law by the parties. This indication may include an express choice of law or an implied choice in the form of the law of the main contract. In light of the above broad interpretation, it may be also argued that when the parties expressly indicate the law governing the whole contract, this would be deemed as an express choice of law to govern the arbitral clause. Besides, where the choice of the seat of arbitration has not been made by the parties themselves, but by the arbitral tribunal or an institution, the seat is surely entirely unconnected to the parties' intention regarding the law applicable to the arbitration agreement.

Second, with regard to the separate agreement not forming part of another contract (i.e. submission agreement), applying the law of the arbitration seat appears to be more convincing sine there is a less obvious connection between this form of arbitral agreement with the main contract.

Another observation that should be made is that the foregoing arguments relates to the case where the parties have not expressly chosen the law governing the arbitration clause itself, but have chosen the law governing both the main contract and the seat of arbitration. In other circumstances, the question of the law applicable to the arbitration agreement is less difficult. Thus, it may be suggested that where the arbitration forum has not been chosen by the parties, but they have chosen the law governing the main contract, the latter is highly likely to be the governing law of the arbitration agreement, as it appears to be the law most closely related to that agreement. In contrast, where the law governing the main contract has not been chosen by the parties, but they have chosen the arbitration forum, the law latter of the latter appears to be the law applicable to the arbitration agreement, since it is the most connected factor to the underlying question. Finally, where neither the arbitration forum nor the law governing the main contract have been chosen by the parties, the enforcing court should strive to consider all connecting factors and surrounding circumstances to demonstrate the common intention of the parties regarding the applicable law to the arbitration agreement.

³⁵ Davidson, *Arbitration* 393.

Third View: The French Approach to the Substantive Rule Method

The two foregoing views are just the most common approaches. However, there are other approaches to the question of the law applicable to the validity of the arbitration agreement. It may be worth mentioning the French approach. The French approach is called the substantive rule method, which was developed by the French Supreme Court in *Comite populaire de la municipalite de Khoms El Mergeb v Dalico Contractors* of 1993. The Supreme Court upheld the Court of Appeal decision of rejecting the argument of a Libyan respondent that Libyan law was the law applicable to the contract, and that the arbitration agreement was invalid thereunder, finding that the parties agreed to arbitration without choosing the law governing the arbitration agreement. The Supreme Court justified its decision in the following words:

By virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent from the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.³⁶

This approach has been followed by other French courts and supported by several legal writers. It is argued that applying a choice of law approach to determine the applicable law is not very helpful, since there must be great uncertainty in determining the relative importance of each of the various connecting factors.³⁷ Thus, David states:

Legal writers are divided as to the answer to be given to this problem (applicable law), nor is it possible to deduce principles of much certainty from the cases. The occasional pronouncements of the courts in this respect cannot be interpreted as an adhesion to a given doctrine and are only meant in general to explain in a convenient manner how the court has arrived at a solution in the particular case.³⁸

This uncertainty is without doubt one of the grounds why the traditional choice of law

³⁶ *Comite populaire de la municipalite de Khoms El Mergeb v Dalico Contractors* (France Supreme Court 20 Dec 1993), cited in Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 437.

³⁷ *ibid* para 426,

³⁸ David, *Arbitration in International Trade* 219.

methods has been replaced by the substantive rules method in France.³⁹ In addition, it is argued that the principle of the autonomy of the arbitration agreement should be not limited to autonomy from the main contract, but should be extended to mean autonomy from all national laws.⁴⁰

However, this approach has attracted strong criticism from several commentators. It is said, for example, that the arbitration agreement cannot be entirely independent from national law. It cannot be seriously suggested that an arbitration agreement can never be void or invalid for lack of capacity or consent. Likewise, an arbitration agreement is only valid if it fulfills the relevant formal and substantive conditions under the applicable law. Such conditions may be liberal, but they cannot be absent. It may be added that under this approach the arbitration agreement is still subject to French public policy, which appears to run contrary to the essential premise of the substantive rules method that the validity of the arbitration agreement is independent from any national law. Indeed, as has been noted, "the French courts stopped short of a complete delocalization of the arbitration agreement".⁴¹ Indeed, it is not clear how this approach operates.

4.2.3 The Law Applicable to the Formal Validity of the Arbitration Agreement.

The question of the law applicable to the arbitration agreement seems to be even more difficult in the case of the formal as opposed to substantive validity. While there is no difference about the applicability of Art.V(1)(a) to substantive validity, so that arguments are limited to its interpretation, there is however a diversity as to whether Art. V(1)(a) or Art. II applies to the question of the formal validity of the arbitration agreement at the stage of enforcement of the arbitral award. The problem stems from the fact that although Art.V(1)(a) provides guidance regarding choice of law rules to

³⁹ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 434.

⁴⁰ *Gatoil v National Iranian Oil Co* (Paris Court of Appeal 17 Dec 1991), cited in David, *Arbitration in International Trade* 229 fn 140. see also, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 419.

⁴¹ Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 438. for criticizing the approach of international standard independent from any national laws, see, A Redfern, 'Commercial Arbitration and Transnational Public Policy' (ICCA Congress Series no 18 Montreal 2006); Reisman, 'Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration'.

govern the question of the invalidity of arbitration agreement, and makes no distinction between formal validity and substantive validity, the opening of this provision makes an ambiguous reference to Art.II, which provides a standard of formal requirements for the arbitration agreement at the stage of its enforcement. Art. V(1) (a) states that:

The parties to *the agreement referred to in article II* were. ... 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 (emphasis added).⁴²

This unclear reference leads to the question as to whether the formal validity of the arbitration agreement at the stage of enforcement of the award is governed by Art.V(1)(a) or Art II. Two main views will be considered below:

First View: Art. II is Applicable

The prevailing view is that the formal validity of the arbitration agreement is to be determined under the requirements of Art. II at both stages of enforcement of the arbitral agreement and the arbitral award. This approach has been strongly supported by Prof van den Berg and adopted by several authors⁴³ and almost every court.⁴⁴

⁴² NYC of 1958, Art. V(1)(a).

⁴³ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 284; P Sanders, 'Consolidated Commentary'(1981) VI YBCA 202 at 206, 211; Garnett and others, *International Commercial Arbitration* 104. See also, Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' at 166.

⁴⁴ See, eg, *PAG (Zurich) v V (Vienna)* (1976) I YBCA 183 (Austria Supreme Court 17 Nov 1971) 183; *Czechoslovakian Export Organization v Greek Shipping Co* (1989)XIV YBCA 636 (Greece Court of Appeal 1982) 636; *Isaac Glycer v Moses Israel Glycer & Eстера Glycer-Nottman* 524; *Charterer (Norway) v Shipowner (Russian Federation)* (2002) XXVII YBCA 519 (Norway Court of Appeal 16 Aug 1999) 522; *Manufacturer (Slovenia) v Exclusive Distributor (Germany)* (2004) XXIX YBCA 687 (Germany Court of Appeal 24 Jan 1999) 690; *De Maio Giuseppe e Fratelli snc v Interskins Ltd* pp 497-99; *Austin John Montague v Commonwealth Development Corporation* (2001) XXVI YBCA 744 (Queensland Supreme Court 27 Jun 2000) 748; *Smita Conductors Ltd. v. Euro Alloys Ltd* (2002) XXVII YBCA 482 (Indan Supreme Court 31 Aug 2001) 483; *Forwarding agent v Dealer* (2004)XXIX YBCA 747 (Germany Court of Appeal 13 Jan 2002) 750; *Pulsar: Industrial Research BV v Nils H. Nilsen AS* (2003) XXVIII YBCA 821 (Norway Enforcement Court 10 Jul 2002) 824; *Empresa Colombiana de Vias Ferreas v Drummond Ltd* (2004) XXIX YBCA 643 (Colombia Council of State 2004) 651.

This approach is mainly based on ground that there is a specific reference in the beginning of Art. V(1)(a) to Art. II which sets down a uniform rule regarding the formal requirements of arbitration agreement. Therefore, this reference indicates that issues of the formal validity of the arbitration agreement are excepted from being governed by the provision of Art. V(1)(a), and are in fact only subject to the formal requirements of Art. II(2).⁴⁵ Prof Sanders has argued that Art. II thus provides a uniform rule as to the form of the agreement, and no room is left for the application of different requirements under national laws which may require more, or less than that agreement be "in writing" as defined in Art. II. Hence, the reference in Art.V(1)(a) to the law of the country where the award is made defining the validity of the arbitration agreement, only applies to deficiencies other than those of form. That is to say "when enforcement of the award is sought, no other criteria apply to the form of the agreement than those laid down in Art. II, to which Art. V(1)(a) itself refers".⁴⁶

Furthermore, it was argued that this approach draws further support from the legislative history of Art.V(1)(a). The Dutch delegate at the last session of the NYC conference noted that the proposed text of Art.V(1)(a) would include express agreements as well as tacit agreements. In order to exclude the latter, he put forward the addition of "the agreement referred to in article II" which was finally accepted by the conference. So, despite the fact that the above amendment is awkwardly worded, since it does not clearly indicate its real function, the legislative history however makes it clear that the framers of the NYC intended that the invalidity of the arbitration agreement under Art. II would be also a ground for refusing enforcement of the arbitral award.⁴⁷

In addition, it is submitted that limiting the application of Art. II to the pre-award stage (i.e. the enforcement of the arbitral agreement) and not to the post-award stage (i.e. the enforcement of the arbitral award) is contrary to the internal consistency of

⁴⁵ See, *Forwarding agent v Dealer* (Germany Court of Appeal 13 Jan 2002) 750; P Sanders, 'Consolidated Commentary'(1981) VI YBCA 202211; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 287; van den Berg, 'Consolidated Commentary' (2003) at 586.

⁴⁶ Sanders, 'Consolidated Commentary' (1981) 211. See also, Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' 166.

⁴⁷ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 285; Sanders, 'Consolidated Commentary' (1981) 211.

the NYC. This because limiting the application of Art. II to the pre-award stage would lead to the conclusion that an arbitration agreement could be held valid under the governing law at the stage of the enforcement of the arbitral award, although the same agreement would have to be held invalid at the stage of the enforcement of the arbitral agreement as it does not meet the formal requirements of Art. II, (and the opposite is also true). The NYC must be applied in a manner that leads to as much uniformity as possible in governing international commercial arbitration at all stages of the arbitration process.⁴⁸

Finally, it is argued that, apart from the Italian Supreme court, all courts adopt the view that Art. II is also applicable at the stage of the enforcement of the arbitral award.⁴⁹ Prof van den Berg further submits that Art.V(1)(a) has scarcely ever been invoked on the basis that the arbitration agreement is invalid under the law applicable to it, and never successfully. By contrast, Art. V(1)(a) has been successfully invoked on the basis that the agreement did not comply with formal requirements of Art. II(2).⁵⁰

As regards the judicial support, a German court of appeal has, for instance, held that:

The obligation to recognize foreign arbitral awards further requires that the award be issued on the basis of a valid agreement between the parties according to Art. II Convention. This ensues in particular from the wording of the grounds for refusal in Art. V(1)(a) Convention, which provides that the parties must have concluded an agreement within the meaning of Art. II Convention.⁵¹

Moreover, the Austrian Supreme Court underlined that the formal requirements for the arbitration agreement must be exclusively judged under Art. II of the NYC since Art. V does not deal with such requirements.⁵²

⁴⁸ See, Sanders, 'Consolidated Commentary' (1981) 211; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 286.

⁴⁹ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 287.

⁵⁰ *ibid* 282.

⁵¹ *X (UK) v X (Germany)* (2004) XXIX YBCA 732 (Germany Court of Appeal 22 Nov 2001) 736.

⁵² *PAG (Zurich) v V (Vienna)* 183.

Second View: Only Art. V(1)(a) is Applicable

The other view is that the formal validity at the stage of enforcement is not governed by Art. II, but only by the applicable law as mentioned in Art.V(1)(a). This view has strongly been supported by several authors⁵³ as well as some Italian Courts.⁵⁴ In supporting this view, it is submitted that Art V(1)(a) states clearly that the validity of the arbitration agreement at the post-award stage is to be governed by the law chosen (expressly or implicitly) by the parties or, falling such choice, by the law of the arbitration seat, and by nothing else. Therefore, the reference in the opening of Art.V(1)(a) to Art. II is no more than “a superfluous additional description”.⁵⁵ Alternatively, this reference may have another function, since the aim of Art. II is not only to require that the arbitration agreement be in writing, but more importantly to oblige the courts of contracting states to refer parties to such agreement to arbitration, and to grant to arbitration clauses the same treatment as submission agreements.

Furthermore, the legislative history far from makes clear that it was the intent of the NYC drafters that Art. II also be invoked at the stage of enforcement of the award. The legislative history in fact indicates no more than the Dutch delegate was worried that awards based upon implied agreement might be enforceable if a reference to Art. II was not included. Thus, there is no clear explanation why this reference was included in Art. V(1)(a).⁵⁶

Moreover, the NYC as with other treaties “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”.⁵⁷ Indeed, the main object of the NYC is to advance the effective use of international commercial arbitration in general

⁵³ See, Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* pp 83-87; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 62-77.

⁵⁴ *Lanificio Walter Banci S.a.S v Bobbie Brooks Inc* (1981) VI YBCA 233 (Italy Supreme Court 1980); *X v X* (Germany Court of Appeal 17 Sep 1998) .

⁵⁵ See, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-77

⁵⁶ See, UN Doc E/CONF.26/SR.24 p 2; El-Ahdab, *Arbitration with the Arab countries* p 2; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* pp 84-85; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 285.

⁵⁷ Vienna Convention on The Law of Treaties Between States And International Organizations or Between International Organizations of 1986, Art. 31.

and to facilitate the enforcement of foreign arbitral awards in particular. Thus, interpreting Art. V(1)(a) as allowing reliance on non-compliance with Art. II to deny enforcement to awards would be at odds with the NYC's primary purpose and good faith, since this would give the losing party a further chance of resisting the enforcement of arbitral award. It is almost certain that promoting enforcement of arbitral awards is more important than achieving a uniform standards in various national arbitration laws or than the internal consistency of the NYC. Furthermore, Applying the formal requirements of Art. II (2) in the context of the enforcement of the foreign award would be not consistent with the pro-enforcement policy of the NYC only if its requirements are less demanding than the applicable national law pursuant to Art. V (1)(a). However, this is hard to be the case, as most national arbitration laws today require less strict formal requirements than Art. II(2).

In addition, as mentioned early,⁵⁸ Art. V provides an exhaustive list of grounds for refusal of enforcement of foreign arbitral awards, and should be interpreted and applied narrowly. The key purpose of Art. V is to make the opportunities for resisting enforcement of the foreign awards much more restricted, than the opportunities for resisting enforcement of the arbitration agreement according to national laws. It is further submitted that the losing party may only rely on the ground of invalidity of the arbitration agreement at the post-award stage if he has raised a plea of that ground in the arbitral proceedings. If he has failed to do so with no legitimate excuses, he might be not permitted to invoke that objection at the post-award stage, or at least there is indeed a very little chance of him being permitted to do so.⁵⁹ Therefore, allowing the losing party to rely on Art. II to oppose enforcement of the award would appear to be contrary to the foregoing restricted regime of Art. V.

This approach was earlier adopted by the Italian Supreme Court in 1980 in the *Lanificio Walter v Bobbie Brooks* case. In enforcement proceedings the Italian Court of Appeal rejected a defence that the arbitral clause was not in writing as required by Art. II, holding that the clause was valid under the law of the place where the award

⁵⁸ See, supra Ch 2 para 2.2.

⁵⁹ See, in general, *G A Pap KG Holzgrosshandlung v Ditta Giovanni G Pecoraro* (1981) VI YBCA 228 (Italy Appeal Court 13 Feb 1978) pp 228-29; Davidson, *International Commercial Arbitration: Scotland and the UNCITRAL Model Law* 86; Davidson, *Arbitration* 368; Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* 86; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-79.

was made (i.e. the US), which was the applicable law according to Art. V(1)(a). This decision was then upheld by the Italian Supreme Court, which stated that a preliminary observation should be made as to the relationship between Arts. II and V of the NYC. Art. II regulates the derogation from the jurisdiction of the courts of the Contracting States and recognizes the exclusive jurisdiction of the foreign arbitrator by obligating the courts to refer the dispute to arbitrator, on the basis of an arbitral clause provided in writing as prescribed in Art. II. On the other hand, Art. V(1)(a) operates on a completely different level, since it regulates the enforcement of foreign arbitral awards. Hence, Art. V (1)(a) and not Art. II must be applied in cases concerning enforcement of foreign awards.⁶⁰

Similarly, a Germany court of appeal has had affirmed the validity of an arbitration agreement under the English law because the arbitration was held in England, on which the parties agreed.⁶¹

To sum up, it seems to be very difficult to decide which view is preferable, since both can marshal strong arguments. Therefore, it may be appropriate to put forward a compromise suggestion by proposing that Art. II constitutes only a maximum standard for the formal requirements of the validity, which does not prevent any reliance upon more favourable law that may be applicable under Art. V(1)(a).⁶² To put it another way, formal validity, like substantive validity, is generally governed by the applicable law as provided by Art. V(1)(a) (i.e. the law chosen (expressly or tacitly) by the parties, or otherwise the law of the seat of the arbitration seat), unless the formal requirements of the applicable law are stricter than those of Art. II. In that case, Art. II should apply and supersede the formal requirements of all other laws. This compromise has the advantage of relying on the provisions most favourable to the formal validity of the agreement, whether this is the applicable law under Art. V(1)(a) or the provisions of Art. II. Indeed, this appears to be much more in line with the NYC's pro-enforcement bias and arrives at the same conclusion of Art. VII (1) of more-favourable- provision to enforcement.

⁶⁰ *Lunificio Walter Banci S.a.S v Bobbie Brooks Inc* pp 234-35.

⁶¹ *X v X* (Germany Court of Appeal 17 Sep 1998).

⁶² See in general, Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' 66; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-77.

4.2.4 Art. VII (1) of the NYC

It is worth mentioning here that, whatever the law governing the validity of the arbitration agreement under Art. V(1)(a) might be, Art. VII(1)⁶³ of the NYC allows the party who seeks the enforcement of arbitral award to rely upon any more favourable provision provided by the national laws and treaties available at the enforcing country. This is a very important provision which places significant emphasis on the pro-enforcement bias of the NYC. Accordingly, If an arbitration agreement is held to be invalid under the applicable law as indicated by Art.V(1)(a) or Art. II, but is regarded as valid under the law of the enforcing state, the award would still be enforceable.

4.3 Grounds of Invalidity

Having seen that Art. II of the NYC is, according to the prevailing view, applicable to both stages of enforcement of arbitral agreement and award, it may be thought necessary to examine its requirements that the arbitration agreement has to fulfil to be valid, and vice versa. In other words, lacking one or more of these requirements may constitute a ground for invalidity of the arbitration agreement and subsequently a refusal ground for enforcement of the arbitral award. In this context, the formal grounds of invalidity will be first discussed below. The substantial grounds of invalidity will be secondly examined.

4.3.1 Formal Grounds of Invalidity

4.3.1.1 General

The NYC as well as most conventions and national laws require certain conditions for the formal validity of the arbitration agreement. In particular, the arbitration agreement shall be in writing. The next logic question is why is that? In principle, this is because of the fact that, unlike the jurisdiction of national courts, referring any dispute to arbitration can only be done where there is consent by the parties to do so.

⁶³ NYC of 1958, Art. VII (1).

Therefore, having such agreement in writing is self-evident fact without any need of further evidence or explanation that the parties have agreed to resolve their dispute by arbitration outside the primary right of the jurisdiction of the national courts. Besides, the main aim of the formal requirements is to make sure that both parties are totally aware that they are entering into an agreement of arbitration.⁶⁴

Therefore, Art. II (1) of the NYC requires that an agreement to arbitrate shall be “in writing”. It provides that:

Each Contracting State shall recognize an *agreement in writing* under which the parties undertake to submit to arbitration all or any differences (emphasis added).⁶⁵

In this manner, it can be considerably observed that most common ground regarding the invalidity of the arbitration agreement invoked in practice at the stage of enforcement of the arbitral award is that the agreement does not comply with the formal requirements under Art. II. Thus, the Kay question needs to be concentrated on now is what constitutes agreement in writing? But, in order to fully understand this question, it may be helpful to start first with the question of whether the formal requirements of Art. II(2) are deemed as a uniform rule or a maximum requirement?

4.3.1.2 Is Art. II (2) a Uniform Rule or a Maximum Requirement only?

While it is unanimously accepted⁶⁶ that Art. II(2) places a uniform of a maximum formal requirement which supersedes any more demanding formal requirement under national laws, different views, however, exist as to whether the definition of what constitutes a written arbitration agreement given in Art. II(2) could be considered as a uniform of a minimum formal requirement as well.

⁶⁴ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 141; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 171; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 7-7; Merkin, *Arbitration law* para 3.8; N Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?'(1996) 12 (1) *Arb Intl* 27 at 29.

⁶⁵ NYC of 1958, Art. Art. II (1).

⁶⁶ However, the Italian Courts used to rely on the Italian Civil Code (Arts. 1342 and 1342) which requires more restrict requirement for the formal validity than those laid down in Art. II(2). See, for more details, van den Berg, 'Consolidated Commentary' (2003) 591.

The old prevailing view is that the Art. II(2) establishes both a maximum and a minimum of international uniform rule for the formal validity of the arbitration agreement which prevails over any provision of national laws thereon. Prof Sanders and Prof van den Berg earlier emphasised that:

Article II(2) must in principle be considered to be both a maximum and a minimum requirement: a court may not require more, but may also not accept less than is provided by Article II(2) for the form of the arbitration agreement.⁶⁷

So, no enforcement can be sought under the application of the NYC if the arbitration agreement is not in accordance with the written form as required by Art. II(2) such as the implied or oral agreement.⁶⁸ In supporting this approach, it was argued that since the text of Art. II(2) appears to be comprehensive and does not leave any room for the application of national law, the uniform rule character would apply to its fullest extent. Besides, this approach can find additional support under the legislation history of the NYC. The legislation history would indicate that the drafters had in mind that the definition of “agreement in writing” in Art. II(2) was to be all-inclusive, not only because they declined a suggestion of deleting Art. II(2) altogether, but also because they declined a suggestion to add the non-objection to a confirmation including an arbitral clause(i.e. tacit agreement) to the definition of the arbitration agreement in writing.⁶⁹

This view has also been adopted by several national courts. For example, a Swiss court of appeal stated that:

Art. II sets not only a maximum but also a minimum requirement. Obviously, a contracting State may not set stricter requirements as to form, nor can it accept less far-reaching formal requirements ... That

⁶⁷ van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 178-79; Sanders, 'Consolidated Commentary' (1981) 211.

⁶⁸ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 178, 196; van den Berg, 'Consolidated Commentary' (2003) 589; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 76.

⁶⁹ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 179.

provision does not allow for acceptance of the validity of an arbitration clause which does not meet the said requirements.⁷⁰

Besides, the Austrian Supreme Court earlier held that “the requirement of the written form of the arbitration agreement is exclusively governed by the New York Convention.”⁷¹

However, the current common trend is that Art. II(1) does not constitute a minimum requirement for the formal validity of the arbitration agreement, but rather it establishes only a maximum requirement thereof. This approach is increasingly supported by authors⁷² and courts.⁷³ Even Prof Berg, who has been long supporting the old view, seems to have abandoned recently his previous view and came too close to the contemporary trend.⁷⁴

This view can be justified upon the ground that the formal requirements of Art. II not any longer in line with the needs of international trade practice. Indeed, after more than 48 years of adopting the NYC, Art. II(2) definition of what constitutes “an agreement in writing”, and particularly an exchange in writing, has been found to reflect the means of communication used in 1958, but not the means of contemporary days, where the letters and telegrams used in Art. II(2) are broadly replaced by new means of commercial correspondences, such as fax, emails and digital technologies. Consequently, instead of amending Art. II(2) which seems to be significantly difficult, its requirements of written form need to be interpreted liberally, rather than literally, to meet the current practice and needs of international trade communications. This is

⁷⁰ *DIETZ Ltd v RF AG* (1996) XXI YBCA 685 (Switzerland Court of Appeal 1994) 688.

⁷¹ *PAG (Zurich) v V (Vienna)* 183.

⁷² See, eg, K Mbaye, 'Arbitration Agreements: Conditions Governing Their Efficacy' (ICCA Congress Series no 9 Paris 1998) 94 at 100; Vecder, 'Summary of Discussion' 44; G Alvarez, 'Article II(2) of the New York Convention and the Courts' (ICCA Congress Series no 9 Paris 1998) 71; Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* pp 81-83; Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?'. Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 6-39.

⁷³ See, eg, *Tradax Export SA v Amoco Iran Oil Co* (1986) XI YBCA 532 (Switzerland Supreme Court 1984) pp 534-535; *Compagnie de Navigation et Transports SA v MSC - Mediterranean Shipping Company SA* (1996) XXI YBCA 690 (Switzerland Supreme Court 16 Jan 1995) 696; *Jiangxi Provincial Metal and Minerals Import and Export Corp v Sulanser Co Ltd* (1996) XXI YBCA 546 (Hong Kong High Court 1995) 549.

⁷⁴ See, van den Berg, 'Consolidated Commentary' (2003) pp 584-87; van den Berg, 'The Application of the New York Convention by the Courts' 32.

to say that Art. II(2) still survives and breathes the present-day air since the phrase “an agreement in writing” does not mean at the present what it meant in 1958.⁷⁵

4.3.1.3 How should the Formal Requirement of Art. II(2) be Interpreted?

The critical question needs to be highlighted then is that how exactly or to which extent a liberal interpretation for Art. II(2) could be performed to be consistent with present day practise of international trade. Different approaches have been adopted regarding this question,⁷⁶ which essentially as follows:

First, the modern correspondence by means not mentioned in Art. II(2) can be allowed in the light of an expansive interpretation of Art. II(2) for the justifications mentioned above and particularly since the English text of Art. II(2) uses the word “shall include” which means “shall include, but not be limited to”. Accordingly, an implicit acceptance of a contract including arbitral clause can be deemed to be in conformity with the writing requirement.⁷⁷ Besides, there is no justification to submit arbitration agreement to stricter form requirement than other contractual provision since referring to arbitration has become the natural forum for international commercial disputes rather than a risky waiver of the primary right of litigation at the national court. Indeed, restrict form requirements may appear to be a source of additional disputes, rather than promoting legal certainty. Consequently, the written agreement requirement of Art. II(2) should liberally be interpreted in the light of modern means of communications.⁷⁸

This approach has been followed by the Swiss Supreme Court in *Tradax Export SA v Amoco Iran Oil Co* where the Court held that:

[T]his provision [of Art. II(2) of the NYC] has to be interpreted in accordance with its object, and with a view to the interests it is clearly

⁷⁵ See, Veeder, 'Summary of Discussion' 44.

⁷⁶ See, for more details regarding these approaches, van den Berg, 'Consolidated Commentary' (2003) pp 584-87; T Landau, 'The Requirement of a Written Form for an Arbitration Agreement: When "Written" Means "Oral"' (ICC Congress Series no 11 London 2002) pp 67-80.

⁷⁷ See, Landau, 'The Requirement of a Written Form' 68; van den Berg, 'Consolidated Commentary' (2003) 585.

⁷⁸ See, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* paras 7-9, 7-10.

designed to protect. The purpose of the Convention is to facilitate the resolution of disputes through arbitration, taking particular account of the needs of international commerce.⁷⁹

Second, a liberal interpretation for Art. II(2) can be done in the light of Art. 7(2) of the UNCITRAL Model Law on International Arbitration which contains a wider functional definition of the written agreement requirement, despite the fact that it does not resolve the question of whether an arbitration clause contained in a contract that has tacitly been accepted by the other party can be considered to meet the written form requirement.⁸⁰ Art. 7(2) furnishes the following:

The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or 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 another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract (emphasis added).⁸¹

This approach was taken, for example, by the Swiss Supreme Court in *Compagnie de Navigation v MSC*. The Court has interestingly ruled that according to the prevailing view Art. II(2) of the NYC must be interpreted in the light of Art. 7(2) of the model law established by the United Nations Commission on International Trade Law, whose authors intended to adopt the regime of the New York Convention to present needs without modifying it.⁸² Equally, a Hong Kong high court has noted that if one looks at the definition of "agreement in writing" in Art. II(2), one can observe that definition is not exclusive and is not a bar to the application of Art. 7(2) of the UNCITRAL Model Law.⁸³

⁷⁹ *Tradax Export SA v Amoco Iran Oil Co* pp 534-35.

⁸⁰ See, Landau, 'The Requirement of a Written Form' 72; van den Berg, 'Consolidated Commentary' (2003) 585.

⁸¹ UNCITRAL Model Law of 1985, Art. 7(2).

⁸² *Compagnie de Navigation et Transports SA v MSC - Mediterranean Shipping Company SA* 696.

⁸³ *Jiangxi Provincial Metal and Minerals Import and Export Corp v Sulanser Co Ltd* 549.

Third, a liberal interpretation for Art. II(2) can be made by applying the provision of Art. VII(1) which grants a party to rely upon more liberal provisions available at the enforcing country which demands less restrictive formal standard for the arbitration agreement.⁸⁴ This approach of more-favourable-right-provision of Art. VII(1) was followed by several courts.⁸⁵ For example, the French Court of Appeal in *Bomar Oil NV v Entreprise Tunisienne d'Activites Petrolieres* held that:

As the States of both parties have adhered to the [1958 New York Convention], that Convention would govern the recognition and enforcement of the award in dispute ... It follows [from Art. VII (1) of the New York Convention] that a French court, when faced with an application to set aside an arbitral award, may have to put aside the provision of the Convention if French Domestic law is more favourable than the New York Convention".⁸⁶

Fourth, according to the prevailing view, as has already been addressed,⁸⁷ the enforcement court has a marginal discretion to confirm enforcement in some circumstances even if refusal grounds are proven to exist. This approach is based upon the ground that "the opening lines of paragraph (1) and (2) of Article V say that enforcement "may" be refused. They do not say that it "must" be refused. The language is permissive, not mandatory".⁸⁸ Prof Davidson asserts that the court has such discretion to enforce in any case.⁸⁹

This approach has been followed by many courts.⁹⁰ For example, it was taken by the Supreme Court of Hong Kong which held in a straight line that:

⁸⁴ NYC of 1958, Art. VII (1).

⁸⁵ See, eg, *Seller (Denmark) v Buyer (Germany)* (1996) XXI YBCA 535 (Germany Court of Appeal 16 Dec 1992) 537; *Gas Authority of India Ltd v Nippon Kohan Corporation* (1998) XXIII YBCA 688 (India High Court 1993) pp 698-99; *American Bureau of Shipping (ABS) v Copropriete Maritime Jules Verne* (2004) XXIX YBCA 657 (France Court of Appeal 2002) 660.

⁸⁶ *Bomar Oil NV v Entreprise Tunisienne d'Activites Petrolieres* (1992) XVII YBCA 488 (France Court of Appeal 1991) 490.

⁸⁷ See, supra ch 2 para 2.4.1

⁸⁸ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 460.

⁸⁹ See, Davidson, *Arbitration* 392.

⁹⁰ See, eg, *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* 225; *China Agribusiness Development Corp v Balli Trading* pp 78-80; *Chromalloy Aeroservices Inc v Arab republic of Egypt* 914.

Even if a ground of opposition is proved, there is still a residual discretion left in the enforcing court to enforce nonetheless. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all the circumstances.⁹¹

The court then went further, in support of its view, to hold that this conclusion is in accordance with the NYC pro-enforcement bias and most courts' attitude of pro-enforcement worldwide.⁹² Similarly, the UK Commercial Court affirmed in a recent case that "It is clear from the terms of the statute (Arbitration Act 1975 s. 5(2)(e)) that refusal to enforce a Convention award is a matter for the discretion of the Court".⁹³

Fifth, as already mentioned above, at the stage of enforcement of the arbitral award, the formal validity of the arbitration agreement may be deemed to be totally not governed by the formal requirement of Art. II. Contrary to the prevailing view, this approach is supported by some authors⁹⁴ and the Italian Supreme Court in *Lanificio Walter v Bobbie Brooks*. The Court ruled that Art. II aims chiefly to promote the exclusive jurisdiction of the foreign arbitrator by obligating the courts to refer the dispute to arbitrator, on the basis of an arbitral clause provided in writing as prescribed in Art. II. On the other hand, Art. V(1)(a) operates on a completely different level since it regulates the actions for the enforcement of foreign arbitral awards. Hence, Art. V (1)(a) and not Art. II must be applied in the case concerning enforcement of the foreign arbitral award.⁹⁵

4.3.1.4 What Constitutes an Agreement in Writing?

Having seen the general character of Art. II(2), the critical question need now to be considered is that what constitutes agreement in writing under Art. II? It can be

⁹¹ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* 225.

⁹² *ibid* 226.

⁹³ *China Agribusiness Development Corp v Balli Trading* 79.

⁹⁴ see, Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* pp 83-87; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 62-77.

⁹⁵ *Lanificio Walter Banci S.a.S v Bobbie Brooks Inc*) pp 234-35.

observed that the judicial interpretations differ considerably as to some aspects of the written agreement requirements under Art. II(2) as a result of the difference in national laws about what satisfies the writing requirement and as a reflection of different attitudes of the national courts towards arbitration.⁹⁶

Nevertheless, Art. II (1) generally requires the arbitration agreement to be in writing, and Art. II (2) subsequently comes to provide an identification of the concept of the writing requirement as follows:

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.

Art. II(2) sets out two alternative form requirements. The first alternative form requirement is an arbitration clause in contract or a separate arbitration agreement both signed by the parties. The second alternative form requirement is an arbitration clause in contract or a separate arbitration agreement contained in exchange letters or telegrams potentially without signatures. In this sense, the Swiss Supreme Court in *Compagnie de Navigation v MSC* has pointed out the definition of agreement in writing under Art. II(2) as follows:

According to the formal requirements applicable *in casu*, arbitration clauses are valid which are either contained in a signed contract or in an exchange of letters, telegrams, telexes and other means of communication. In other words, a distinction should be made between agreements resulting from a document, which must in principle be signed, and agreements resulting from an exchange of written declarations, which are not necessarily signed.⁹⁷

Similarly, a US district court in *Czarina LLC v WF Poe Syndicate*⁹⁸ has outlined the definition of "agreement in writing" under Art. II(2) as the following:

A majority of courts persuasively conclude that the Convention's definition of "agreement in writing" requires either (1) a signed contract

⁹⁶ See, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* paras 7-19, 7-20; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 170.

⁹⁷ *Compagnie de Navigation et Transports SA v MSC - Mediterranean Shipping Company SA* 697.

⁹⁸ *Czarina LLC v WF Poe Syndicate* 254 FSupp2d 1229 (US District Court M D Florida 2002).

that includes an arbitral clause, (2) a signed arbitration agreement, or (3) an exchange of letters or telegrams demonstrating consent to arbitrate.⁹⁹

Thus, the key questions that needs to be considered next are firstly, what documents have to be signed and, secondly, what kind of exchanges is satisfied and, finally, whether modern means of communication can be entered under "an exchange of letters or telegrams".

4.3.1.5 Signatures

One may ask where the signatures are necessary? If the same document of the arbitration agreement (whether an arbitration clause or a submission agreement) is signed by both parties, it will plainly satisfy the first alternative form requirement of Art. II(2). Yet, it may be noted that the arbitral clause need not to be specifically signed, signing the contract containing the clause as a whole is deemed to be sufficient.¹⁰⁰

On the other hand, although the parties' signature for an arbitral clause or agreement in a contract would appear to be necessary according to the letter of the first limb of Art. II (2), the US Appeal Court in *Sphere Drake Insurance PLC v Marine Towing Inc* concluded clearly that an arbitral clause in a foreign contract does not have to be signed by the parties to constitute an "agreement in writing" pursuant to Art II(2) of the NYC.¹⁰¹ This approach has been followed by many courts, including a US district court in recent case in *Greg J Lannes III v Operators International et al*,¹⁰² as well as by the Swiss Supreme Court that has noted that "we should not forget that, with the development of modern means of communication, unsigned written documents have

⁹⁹ *ibid* 1236.

¹⁰⁰ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 192; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 71.

¹⁰¹ *Sphere Drake Insurance PLC v Marine Towing Inc* 16 F3d 666 (US Court of Appeals 5th Cir 1994) 669.

¹⁰² *Greg J Lannes III v Operators International et al* 2004 WL 2984327 (US District Court E D La 2004) 5.

an increasing importance and diffusion, that the need for a signature inevitably diminishes, especially in international commerce".¹⁰³

On the contrary, a number of courts adopted the view that both arbitral clauses in contracts and submission agreements *must* be signed by the parties if they are not contained in an exchange of letters or telegrams in accordance with Art. II(2), i.e. "an arbitration clause is enforceable only if it is found in a signed writing or an exchange of letters".¹⁰⁴

With regard to the exchange of letters or telegrams, a question has arisen as to whether the signature is also required where the arbitration agreement has been subject to an exchange of letters in writing between the parties. According to the second alternative form requirement of Art. II(2), it is sufficient that the arbitration agreement contained in exchange of letters or telegrams without being necessary that any of these documents be signed by the parties. In this line, a Swiss court of appeal expressly held that:

The second (part of Article II(2)) broadens the meaning of 'in writing', by adding the agreements which have been concluded by an exchange of letters and telegrams ... The signature of the parties is not necessary in this case ... It is sufficient that the parties express their intent in writing.¹⁰⁵

4.3.1.6 Exchange of Documents

Having seen that the signatures of the parties is not required with regard to exchange of documents, the next question is what kinds of exchange of documents can be considered to be in accordance with Art. II(2). The "Exchange of documents" phrase may seem to suggest in general that there must be a written offer by one party

¹⁰³ *Compagnie de Navigation et Transports SA v MSC - Mediterranean Shipping Company SA* 697.

¹⁰⁴ See, *Sen Mar Inc v Tiger Petroleum Corp NV* 774 FSupp 879 (US District Court S D NY 1991) 882; *Kahn Lucas Lancaster INC v Lark International Ltd* 186 F3d 210 (US Court of Appeals 2nd Cir 1999) pp 216-19. See also, van den Berg, 'Consolidated Commentary' (2003) 586; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 191.

¹⁰⁵ *DIETF Ltd v RF AG* 686. Similarly, *Tracom SA v Sudan Oil Seeds Co Ltd* (1987) XII YBCA 511 (Switzerland Supreme Court 1985) 513.

including an arbitral clause, and a written subsequent acceptance by the other party as well.¹⁰⁶ Yet, this question, indeed, has been a subject of wide debates.

Some are of the view that the document itself should be returned back by the party who received it to the sender.¹⁰⁷ This view has been earlier adhered to, for example, by an Italian court of appeal.¹⁰⁸ However, this view is indeed over restricted interpretation because it imposes extra conditions which are not indicated in Art. II and thus it is contrary to the object of the NYC of promoting enforcement of international awards.

On the other hand, the common view is that it suffices when a reference is made to the document in subsequent correspondence by the party to which the document was sent, such as a letter, facsimile, invoice, etc.¹⁰⁹ This view has been followed, for example, by an Italian court of appeal in *Bobbie Brooks Ins v Lanificio Walter Banci*.¹¹⁰

It may be noted that, whatever the case may be, the acceptance need not to be concern the arbitration clause specifically, but it is sufficient that the contract containing the clause be accepted.¹¹¹ Thus, the written requirement would be deemed to be met where the acceptance is a written notice, or by returning back the offer second copy or the order acknowledgement.¹¹²

4.3.1.7 Reference to Arbitration Clause in Standard Conditions

¹⁰⁶ See, Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 70.

¹⁰⁷ See, van den Berg, 'Consolidated Commentary' (2003)pp 587-88.

¹⁰⁸ *Ditte Frey Milota Seitelberger v Ditte F Cuccaro e figli* (1976) I YBCA 193 (Italy Court of Appeal 1974).

¹⁰⁹ See, van den Berg, 'Consolidated Commentary' (2003)588.

¹¹⁰ *Bobbie Brooks Ins v Lanificio Walter Banci SAS* (1979) IV YBCA 289 (Italy Court of Appeal 1977) pp 290-91.

¹¹¹ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 588; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 71.

¹¹² See, Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 71.

The next complex question need to be demonstrated regarding the exchange of documents is that whether reference to standard terms and conditions containing arbitration clause is sufficient? Arbitration clauses are frequently used in business practises as a clause printed with other conditions on the back of a standard contract or printed in separated document to which the contract refers to.

Following the prevailing trend of interpreting Art. II(2) broadly to meet need of international commercial practices, it may generally consider such reference is sufficient as far as the other party appears to be able to check the existence of an arbitration clause.¹¹³ Yet, this issue may vary from case to another, depending on several connecting factors which can indicate whether the parties had been aware that they were entering into an arbitration agreement. This can, in particular, be inferred from surrounding circumstances, such as, "how conspicuous the arbitration clause is, how experienced the parties are, whether there have been previous relationships between them, the customs in the trade, etc".¹¹⁴ In this sense, the Swiss Supreme Court in *Compagnie de Navigation v*, for example, has put it in expressed words as follows:

We must add that, in particular situations, a certain behaviour can replace compliance with a formal requirement according to the rules of good faith. ... The parties ... have a long standing business relationship, ... the carrier had the right to believed in good faith that the shipper, its business partner since several years, approved of the contractual document which it had filled in itself (although did not sign it), including the general terms and conditions on the back, among which the arbitration clause. ... Thus, the Court of Appeal did not violate federal law by declaring the arbitration clause valid, considering the whole circumstances of the case.¹¹⁵

In addition, the French Court of Appeal in *Bomar Oil NV v Entreprise Tunisienne d'Activites Petrolieres* held that in the light of the NYC' aim to facilitate the resolution of disputes by means of arbitration in the field of international trade, it appears that the said Convention admits the adoption of an arbitration agreement by reference as far as the agreement of the parties does not involve any ambiguity. Thus,

¹¹³ See, *Tradax Export SA v Amoco Iran Oil Co* .

¹¹⁴ See, Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 70.

¹¹⁵ *Compagnie de Navigation et Transports SA v MSC - Mediterranean Shipping Company SA* 698.

the arbitration clause in the present case contained in the ETAP standard contract, to which reference is made in the main contract concluded by an exchange of telexes, is valid and binding on the parties, in that the defendant, being conversant with the operation of the oil trade, cannot assert to have not been of the usual clauses in contracts concluded in this sector of activity. Further, it was the defendant's duty to consult the standard contract to which the telex of the seller referred expressly, before giving his definite consent to the seller's offer.¹¹⁶ Similarly, an arbitration clause with standard conditions included in the back of a contract, a general reference clause in the contract has been held to be sufficient in principle.¹¹⁷

With respect to the question of standard conditions including arbitral clause printed in a separate document, two categories of such standard conditions should be distinguished in this connection: first, if a specific reference is made to the arbitration clause in the standard conditions, this has been held to be sufficient as the other party can be deemed to be able to check it.¹¹⁸ Second, if only a general reference is made to the arbitration clause in the standard conditions, this, however, has been held frequently to be not in accordance with the formal requirement of Art. II(2).¹¹⁹ Yet, a general reference would be usually deemed sufficient if the standard conditions have been communicated to the other party,¹²⁰ or continuingly used in a long commercial relationship between the parties.¹²¹

4.3.1.8 Arbitration Clause in Purchase or Sales Confirmation

The arbitration clause is frequently concluded in sales or purchase confirmations that are often used in international commercial practice. Thus, it is submitted that such

¹¹⁶ *Bomar Oil NV v Entreprise Tunisienne d'Activites Petrolieres* (1988) XIII YBCA 466 (France Court of Appeal 1987) pp 469-70.

¹¹⁷ See, *Bobbie Brooks Ins v Lanificio Walter Banci SAS* 288-289; *Kukje Sangsa Co Ltd v Int'l Trading Ltd* (1992) XVII YBCA 568 (Korea Supreme Court 1990).

¹¹⁸ *S.r.l. Unione Italiana Proteine v EPCHAP* (1985) X YBCA 473 (Italy Supreme Court 1983) 475.

¹¹⁹ *Raina and Nikolay and Junakovic v Seagull Shipping* (1977) II YBCA 249 (Italy Supreme Court 1976) 249. See also, van den Berg, 'Consolidated Commentary' (2003) 590.

¹²⁰ *Swiss and German buyers v German seller* (1985) X YBCA 427 (Germany Supreme Court 1984).

¹²¹ See, eg, *Bomar Oil NV v Entreprise Tunisienne d'Activites Petrolieres* (1990) XV YBCA 447 (France Supreme Court 1989) 448; *Compagnie de Navigation et Transports SA v MSC - Mediterranean Shipping Company SA*.

arbitration clause will comply with the formal requirement of Art. II(2) if the confirmation signed by both parties, or its carbon copy is sent back signed or not, or it is accepted in subsequent means of other written correspondence.¹²²

4.3.1.9 New Means of Communication

Since the NYC was established in 1985, Art. II(2) sets down means of communication (i.e. letters and telegrams) that commonly used in that time. However, as the time went on, the letters and telegrams have been almost replaced by new means of communication, such as telcx, fax, e-mail, e-contract which provide the same basic functions, but with much more advanced features. Thus, the definition of written agreement under Art. II(2) presents a tangible and significant obstacles in the way of including such modern means. Consequently, several Italian courts, before the enactment of the Italian Law no 25 of 5 Jan 1994, regarded arbitration agreements reached by an exchange of faxes as null and void.¹²³

Nevertheless, according to the prevailing trend mentioned above, it is generally accepted that the new means of correspondence, such as telex, fax, e-mail and other means of e-communication would be taken to meet the requirement of writing under Art. II(2).¹²⁴

In this context, it is worth mentioning that UNCITRAL attempted, when drafting Art.7(2) of the Model Law on International Commercial Arbitration, to extend the narrow definition of "agreement in writing" of Art. II(2) of the NYC as far as possible.¹²⁵ Thus, it was suggested, at the UNCITRAL Working Group on Arbitration on the work of its 32nd session in 2000, that a liberal interpretation of the writing requirement of Art II(2) of the NYC in the light of Art. 7(2) of the UNCITRAL Model Law should be encouraged as it has been followed by some

¹²² See, van den Berg, 'Consolidated Commentary' (2003)589.

¹²³ See, Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* 114 fn 48.

¹²⁴ See, E Lee, *Encyclopedia of international commercial arbitration* (Lloyd's of London Press, London 1986) 27; Veeder, 'Summary of Discussion' 44.

¹²⁵ See, P Sanders, *The work of UNCITRAL on Arbitration and Conciliation* (2nd and expanded edn, Kluwer Law International, The Hague 2004) 68.

courts.¹²⁶ One of the leading cases in this field has been seized by the Swiss Supreme Court in *Compagnie de Navigation v MSC*. The Court has put this meaning in expressive words as follows:

According to a majority opinion, the said provision (of Article II(2) of the NYC) must be interpreted in the light of [the UNCITRAL Model law Art. 7(2)], the authors of which wished to adopt the regime of the New York Convention to modern needs without modifying it.¹²⁷

Thus, the new methods of commutation, such as telexes, have been often regarded as satisfying the requirement of the writing under Art. II(2).¹²⁸ By way of example, the Swiss Court of Appeal in *Carbomin SA v Ekton Corporation* has brought the modern means of communications in general, and the telex in particular under the expression of “contained in an exchange of letters of telegrams”. The Court held that:

It is clear that by treating an arbitration clause contained in an exchange of telegrams as an ‘agreement in writing’, Art II New York Convention contemplates in a general way the transmission by telecommunication of messages which are reproduced in a lasting format. In this respect a telex produces messages whose senders and receivers can be identified in a better manner than was the case for the traditional telegrams.¹²⁹

In addition, the US Court of Appeals in *Genesco Inc v T Kakiuchi & Co Ltd* has arrived to the conclusion that Arbitration clause valid under Convention because contained in exchange of telexes, some of which were signed, to which the parties did not object.¹³⁰

4.3.1.10 E-Contract

The question as to whether an arbitration agreement concluded via E-mail or more generally by electronic digital contract meets the written requirement of Art. II(2) is

¹²⁶ UN Doc. A/CN.9/468 para 94.

¹²⁷ *Compagnie de Navigation et Transports SA v MSC - Mediterranean Shipping Company SA* 696.

¹²⁸ See, eg, *Carbomin SA v Ekton Corporation* (1987) XII YBCA 502 (Switzerland Court of Appeal 1983) 504; *Scheepvaartkantoor Holwerda v SpA Esperia di Navigazione* (1982) VII YBCA 337 (Italy Court of Appeal 1979) 338; *PAG (Zurich) v V (Vienna)* 183.

¹²⁹ *Carbomin SA v Ekton Corporation* 504.

¹³⁰ *Genesco Inc v T Kakiuchi & Co Ltd* 815 F2d 840 (US Court of Appeals 2nd Cir 1987).

similar to the question of new means of communication mentioned above. However, the question of e-contract would appear to be vital and more significant than other new means of communication. The reason for this is that the e-contract is considered as the most modern means of communications and its use in the context of international trade significantly keeps increasing day after day. Thus, the issue E-commerce has been subject of noteworthy dissection by the UNCITRAL Working Group on Arbitration on the work of its 32nd session in 2000 which satisfied that the written requirement of Art. II(2) should be reinterpreted dynamically to cover the modern means of electronic communication. The report includes that:

There was general agreement in the Working Group that, in order to promote the use of electronic commerce for international trade and leave the parties free to agree to the use of arbitration in the electronic commerce sphere, article II(2) of the New York Convention should be interpreted to cover the use of electronic means of communication as defined in article 2 of the Model Law on Electronic Commerce and that it required no amendment to do that.¹³¹

Accordingly, it may submit that the arbitration agreement fulfils the written form requirement of Art. II(2) if it is concluded by e-mail or e-contract, giving that Art. 6 of the UNCITRAL Model Law on Electronic Commerce of 1996 provides that:

Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.¹³²

Moreover, Art. 6(1) of the UNCITRAL Model Law on Electronic Signatures of 2001 furnishes that:

Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.¹³³

¹³¹ UN Doc. A/CN.9/468 para 101.

¹³² UNCITRAL Model Law on Electronic Commerce with Guide to Enactment of 1996, Art. 6(1).

¹³³ UNCITRAL Model Law on Electronic Signatures with Guide to Enactment of 2001, Art. 6(1).

In addition, many national laws consider electronic communications to be equal to written documents.¹³⁴

The foregoing approach can draw further support from a technical point of view that an exchange of e-mails, for example, can be deemed as analogous to an exchange of telegrams. This is based upon the fact that the essential features of an exchange of telegrams can be reproduced through appropriate use of e-mail. On the other hand, it is indeed difficult to see much difference between telegrams, telex, facsimile and e-mail, notwithstanding some technical difference between them which, however, would not appear to be significant for the purposes of the NYC. "For each technology, a message is converted to a digital format, transmitted over a telecommunications network, and then converted to a human-readable form".¹³⁵

Furthermore, a US district court has recently construed the definition of the written requirement of Art. II(2) widely to cover an arbitration agreement made by arbitration clause included in an online contract.¹³⁶

In contrast, a Norwegian court of appeal denied an application to enforce a foreign award based on an arbitration agreement concluded by e-mail, providing that e-mail does not satisfy the basic requirements of "agreement in writing" set up by Art. II of the NYC and Art. IV(1)(2) for enforcement.¹³⁷

To sum up, although many courts might have not yet get use to the online and digital technology of communication, the current time is, however, witnessing an extraordinary increasing of using such means in national and international trade practice. Thus, interpreting the written requirement under Art. II(2) widely and dynamically to include the modern means of communication in general and e-contract and e-mail in particular must be followed since Art. II(2) does not set forth an exhaustive list of acceptable recording means. It rather provides an example of what is commonly used in 1958, and does not include any explicit or implicit indication to

¹³⁴ See, Lew, Mistelis and Kreoll, *Comparative International Commercial Arbitration* 132 fn 11.

¹³⁵ R Hill, 'On-line Arbitration: Issues and Solutions'(1999) 15 (2) *Arb Intl* 199 at 200-203.

¹³⁶ *Michael Lieschke v RealNetworks Inc* 2000 WL 198424 ND Ill (US District Court ND Ill 2000).

¹³⁷ *Charterer (Norway) v Shipowner (Russian Federation) (Norway Court of Appeal 16 Aug 1999)* 522.

exclude the new means that provide the same basic function of recording evidences with much more advanced features, and the end justifies the means.

4.3.1.11 Arbitration Agreement not in Writing

Having seen that almost all means of written communication are considered to be, as a rule, consistent with the formal requirement of Art. II(2), the next crucial question, which seems to be much more difficult, is whether an arbitration agreement concluded tacitly or orally can be sufficiently valid in the light of the above liberal and wider interpretation of Art. II(2)? A tacit agreement and an oral agreement will be highlighted in turn:

4.3.1.12 Tacit Agreement

With regard to the question of the tacit agreement, it frequently occurs in international trade that a buyer, for example, receives an offer containing an arbitration clause. He, then, acts according to it without objecting to the arbitration clause, although he does not sign the contract nor exchange documents with the seller in relation to contract. In this issue, the main contract is flatly considered as valid and binding upon the parties. However, this may be not the case regarding the arbitration clause as national courts and commentators are divided in their views regarding such agreements.

The general view is that a tacit acceptance does not suffice to enter into a valid arbitration agreement,¹³⁸ although such acceptance is normally sufficient to enter into a normal contract, since it fails to fulfil the written requirement of Art. II(2) of the NYC. Interestingly, this is the other aspect of the principle of the separability of the arbitration clause from the main contract of which it forms part.¹³⁹ The main reason for this approach is that the requirement of the writing is contained in most

¹³⁸ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 196; van den Berg, 'Consolidated Commentary' (2003) 589, 591; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 76; Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?'

¹³⁹ See, Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' 29; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 76.

international and national arbitration laws to ensure that the parties actually agreed on arbitration. Thus, tacit agreement is not sufficient for the lack of the certainty. Accordingly, Art. II(1) expressly requires that the arbitration agreement to be in writing and Art. II(2) particularly specifies that an agreement in writing should be understood as an arbitration clause or a submission agreement (a) signed by both parties or (b) contained in exchange of documents. Notably, an exchange in writing is required in all cases. Thus, such tacit agreement cannot be validly brought under the provision of Art. II(2) since there is no a signed arbitration agreement nor an exchange of document thereon.¹⁴⁰ Moreover, it is argued that the legislation history of the Art. II(2) shows that the NYC' drafters intended to exclude any tacit or oral acceptance to conclude a valid arbitration agreement under the application of the NYC. In this connection, the Dutch delegate suggestion of adding "Confirmation in writing by one of the parties which is kept without contestation by the other party"¹⁴¹ to Art. II(2) was rejected in the final draft.¹⁴²

This approach has been generally followed by national courts.¹⁴³ By way of example, the French Supreme Court has ruled that Art. II(2) is not satisfied by tacit acceptance of letter asserting that contract was subject to certain standard condition, which incorporated arbitration agreement.¹⁴⁴ Likewise, the Italian Supreme Court in *Robobar Ltd v Finncold sas* in which one party preformed the obligation of an order containing arbitration clause which sent by other party, although he did not sign that contract or send back any document in response to the order. The Court held that the agreement to arbitrate is an independent clause of a contract containing it and its validity must be ascertained independently of the validity of the main contract. The

¹⁴⁰ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 196; van den Berg, 'The Application of the New York Convention by the Courts' 31; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 76.

¹⁴¹ UN Doc. E/CONF.26/L.54.

¹⁴² See, Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' pp 29-30; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 76.

¹⁴³ See, eg, *Activial International SA v Conservas EI Pilar SA* pp 529-30; *Kahn Lucas Lancaster INC v Lark International Ltd* 211; *DIETF Ltd v RF AG* 686; *Gaetano Butera v Pietro & Romano Pagnan* (1979) IV YBCA 296 (Italy Supreme Court 1978) 300; *Robobar Ltd v Finncold sas* (1995) XX YBCA 739 (Italy Supreme Court 1993); *Ditte Frey Milota Seitelberger v Ditte F Cuccaro e figli ; Ste Confex v Ets Dahan* (1987) XII YBCA 484 (France Supreme Court 1986) pp 484-85.

¹⁴⁴ *Ste Confex v Ets Dahan* 485.

petitioner's argument that it would be contrary to good faith to contest the validity of the arbitration clause after having performed the obligations contained in the contract in which the clause was contained must be denied, as it is not possible to derogate from the formal requirement.¹⁴⁵

Similarly, an Italian court of appeal has refused to enforce two arbitral awards in favour of two Austrian sellers against an Italian buyer, providing that these awards were based on contracts which have not been signed and returned by the buyer and therefore did not comply with the formal requirement of Art. II(2), although it deemed the main two contracts have been validly concluded.¹⁴⁶

Moreover, a US court of appeals in *KAHN v LARK* held that:

Arbitration clauses contained in purchase orders which were signed only by buyer did not constitute an "agreement in writing" sufficient to bring parties' dispute within the scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and thus subject matter jurisdiction could not properly be premised on statute implementing the Convention.¹⁴⁷

On the other hand, there is a growing support for the view that where the tacit acceptance is sufficient to enter into a normal international commercial contract, it should be also sufficient to enter into a valid arbitration agreement.¹⁴⁸ In supporting this view, it is argued that there are no adequate justifications why should impose a higher degree of proof on the arbitration clause included in a contract than the basic contractual terms themselves. Besides, it is argued that the requirement of an exchange in writing no longer meets the need of international commercial practice

¹⁴⁵ *Robobar Ltd v Finncold sas* 741.

¹⁴⁶ *Ditte Frey Milota Seitelberger v Ditte F Cuccaro e figli* 193.

¹⁴⁷ *Kahn Lucas Lancaster INC v Lark International Ltd* 211.

¹⁴⁸ See, G Herrmann, 'The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts' (ICCA Congress Series no 6 Bahrain 1993) 45; Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' 29; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 7-8; A Singhvi, 'Article II(3) of the New York Convention and the Courts' (ICCA Congress Series no 9 Paris 1998) pp 210-11; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 142; Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* pp 77-78.

where tacit acceptance are frequently applied to conclude contracts.¹⁴⁹ In this manner, Prof. Kaplan stated that.

Giving all these developments, it is not unreasonable to propose that the time has come for another look at Article II(2). In my view, its emphasis on writing or exchange is outmoded. It would be helpful to see a general reconsideration of Article II(2) in the light of existing commercial practices and also in the light of the many developments which have occurred since 1985 in the field of international commercial arbitration.¹⁵⁰

Consequently, it is argued that it appears reasonable to assume that if an arbitration clause included in one party's correspondences, such as an offer, was not affirmatively accepted in writing by the other party, who however contributes to the contract without raising any objection against the arbitration clause contained in that contact, the latter party may be estopped from denying the arbitration clause the same as he may be not able to deny the rest of main contract conditions and clauses.¹⁵¹

This view has been also adopted by a number of courts.¹⁵² For example, the German Supreme Court has held that trade usages can lead to a tacit conclusion of an arbitration clause in standard conditions even in the absence of an explicitly reference as far as the parties are regularly active in particular trade.¹⁵³ Likewise, a Dutch Court of first instance has held that Art. II(2) would be satisfied where the seller sent the

¹⁴⁹ See, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 7-9; Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' 29; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* pp 77- 78; van den Berg, 'Consolidated Commentary' (2003) 584.

¹⁵⁰ Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' 44.

¹⁵¹ See, Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* pp 77-78; Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' 29.

¹⁵² See, eg, *Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep 225 (UK CA 1986); *Israel Chemicals and Phosphates Ltd v NV Algemeene Oliehandel* (1976) I YBCA 195 (Netherlands Court of First Instance 1970); *Seller (Denmark) v Buyer (Germany)* (Germany Court of Appeal 16 Dec 1992) 539; *Buyer v Seller* (1995) XX YBCA 666 (Germany Supreme Court 1992) 668.

¹⁵³ *Buyer v Seller* (Germany Supreme Court 1992) 668.

buyer a written sales contract, containing an arbitration clause, and the buyer did not object until months after taking delivery of goods.¹⁵⁴

Yet, it may be useful to suggest that it is important in this concern to distinguish between two kinds of the tacit acceptance. First, where a contract containing an arbitral clause is kept without objection by a party who acts according to the contract, that party may be deemed to have accepted the arbitration clause. Second, where the arbitral clause is not mentioned at the time of concluding the contract, but it appears later in the conformation of sales or purchase that is sent to party who also acts under the contract without objection, it may appear difficult here to consider the silent party to have accepted to arbitrate.¹⁵⁵

4.3.1.13 Oral Agreement

With regard to the question of the validity of arbitration agreement concluded orally, it appears to be even more difficult to prove the existence of the arbitration agreement where it is made by a complete oral way. Thus, national courts and commentators differ on whether an oral acceptance can be deemed sufficient to conclude a valid arbitration agreement.

According to the prevailing view Art. II(2) of the NYC does not extend to the oral acceptance¹⁵⁶ for the same reasons of excluding the tacit acceptance as addressed above. In this light, Prof van den Berg stated earlier that:

It is essential for the exchange requirement that both the proposal to arbitrate and the acceptance thereof are communicated between the parties. The text of article II(2) does not leave any doubt on this point either: an exchange of letters or telegrams cannot mean anything else than that they are forwarded and replied to in written form. It means that an

¹⁵⁴ *Israel Chemicals and Phosphates Ltd v NV Algemeene Oliehandel* 195.

¹⁵⁵ cf. van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 198.

¹⁵⁶ *ibid* 196; Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' 32; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 77.

arbitration agreement which is proposed in writing and accepted orally or tacitly does not constitute an exchange of letters or telegrams.¹⁵⁷

This approach has also been adopted generally by courts.¹⁵⁸ For example, a Swiss court of appeal has ruled that:

By requiring the written form, Art. II(2) of the NYC means to exclude arbitration agreements concluded orally or tacitly. ... Art. II(2) sets not only a maximum but also a minimum requirement. Obviously, a contracting State may not set stricter requirements as to form, nor can it accept less far-reaching formal requirements ... that provision does not allow for acceptance of the validity of an arbitration clause which does not meet the said requirements.¹⁵⁹

Another example can be found in *Sen Mar Inc v Tiger Petroleum Corp* where a US district court dealt with an arbitration agreement concluded orally. The Court expressly noted that:

The Convention actually defines what will satisfy its writing requirement. An arbitration clause is enforceable only if it is found in a signed writing or an exchange of letters. Because the Convention controls in case of any conflict between the Convention and the Act, this Court will enforce the arbitration clause only if it satisfies the Convention's more stringent requirement.¹⁶⁰

The court therefore denied the appellant petition to compel arbitration, finding that the arbitration clause was orally concluded and consequently fails to satisfy the Convention's writing requirement.¹⁶¹

In contrast, there is strong support for the view that an oral arbitration agreement should be sufficient. In supporting this view, it is argued that excluding oral arbitral agreement would defeat commercial practice in which parties often rely on oral agreement in certain areas of trade. Besides, in view of the fact that arbitration is no longer regarded as a risky waiver of primary right of litigation but rather the natural

¹⁵⁷ van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 196.

¹⁵⁸ *ibid.*

¹⁵⁹ *DIETF Ltd v RF AG* 688.

¹⁶⁰ *Sen Mar Inc v Tiger Petroleum Corp NV* 882.

¹⁶¹ *ibid* 884.

forum for international commercial disputes, there is no good reason to subject arbitration agreements to stricter form requirements than other contractual agreements. Consequently, it has been criticised that how a multi-million dollar contract concluded orally will be deemed to be valid and party can enforce the substantive conditions of the contract, whereas being able to wash his hands from the arbitration agreement concluded in the same contract.¹⁶²

In addition, it is argued that the strict formal requirements of the NYC has disappeared in the modern laws of arbitration where there has in effect been a triumph of substance over form. Redfern and Hunter argue that in the English Arbitration Act of 1996 an oral arbitration agreement will be considered as evidenced in writing if it is made "by reference to terms which are in writing"¹⁶³ or "recorded by one of the parties, or by a third party, with the authority of the parties to the agreement".¹⁶⁴ Therefore, "as long as there is some written evidence of an agreement to arbitrate, the form in which that agreement is recorded is immaterial".¹⁶⁵

This approach has been upheld, for example, by the English Court of Appeal in *Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd*. The Court held that "if it is established that a document with an arbitration clause in writing forms part of a contract between the parties, the assent by one party orally to the contract is sufficient".¹⁶⁶ The Court further concluded that:

The evidence clearly establishes ... that the oral contract which the parties entered into ... was a contract which was made including the terms which are set out in the endorsement on the two quotations. Those terms include the arbitration clause. The arbitration clause became ... as the result of the oral agreement, part of the terms of the contract between the parties, and it is a statement of that term in writing. In consequence of that sequence of events, the contract was, in my view, a contract partly unwritten and partly in writing, and I think that on the facts of this case the agreement to

¹⁶² See, Herrmann, 'The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts' 46; Landau, 'The Requirement of a Written Form' 44; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* paras 7-8, 7-9.

¹⁶³ English Arbitration Act 1996, s. 5(3).

¹⁶⁴ *ibid* 5(4).

¹⁶⁵ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 142-143; Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?'

¹⁶⁶ *Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd* 299

arbitrate was a term in writing, a written term, of the agreement which the parties entered into.¹⁶⁷

Yet, some observations can be made on the latter approach of supporting the oral agreement. First, the argument that oral arbitration agreement is frequently concluded in international practice seems to be without merit, but in fact oral agreement is rare, or at least not common, in most modern commercial contexts.¹⁶⁸ Moreover, the argument that oral agreement is recognised under English Act is doubtful. In contrast, it is generally observed that although common law still recognises an oral agreement, it however cannot be consider an arbitration agreement under English Arbitration Act of 1996.¹⁶⁹ In addition, this provision does not appear to support the oral agreement in general, but in fact it concerns limited applications of oral agreement, such as written offers accepted orally or oral offers accepted in writing both with conduct. Nevertheless, the vital question that has yet to be settled is that whether a purely oral arbitration agreement (i.e. there is no writing at all) will be also considered, under the second view, formally valid. So, can an arbitration agreement be proven merely by oral evidence such as voice recorder or witnesses? The formal validity of such arbitration agreement is likely to be very doubtful.

4.3.2 Substantial Grounds of Invalidity

¹⁶⁷ *ibid* 236.

¹⁶⁸ See, Sutton and Gill, *Russell on Arbitration* pp 45-46; S Rajoo, *Law, practice and procedure of arbitration* (LexisNexis, Kuala Lumpur 2003) 65; R Bernstein and others, *Handbook of Arbitration Aractice* (3rd edn, Sweet & Maxwell, London 1998) para 2-85; Landau, 'The Requirement of a Written Form' 55.

¹⁶⁹ See, Bernstein and others, *Handbook of Arbitration Aractice* paras 2-85, 2-86; Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 7-6 fn 2; Sutton and Gill, *Russell on Arbitration* 45-46 "[the Arbitration Act 1996] makes it difficult to participate in arbitration proceedings arising out of an arbitration agreement which is alleged to be oral without it being construed as an agreement in writing. ... Where the whole of the contract, including the agreement to arbitrate, is oral, the existence and the validity of the entire contract may also be in doubt". See also, Alvarez, 'Article II(2) of the New York Convention and the Courts' 75 fn 29.

Even under the model law and English Arbitration Act 1996. see *H Smal Ltd v Goldroyce Garment Ltd* [1994] HKLY 70 (Hong Kong HC 1994), where the court dismissed the plaintiff's application, finding that the evidence relating to the signing of the purchase order by the plaintiff was hearsay and did not meet the necessary threshold requirement of Model Law Art. 7.

The substantial grounds of invalidity have not created noticeable problems since most of them are rarely invoked in practices as grounds for non-enforcement of the award. Unlike the formal validity, the substantial validity of the arbitration agreement at the context of enforcement of the arbitral award is not governed under the provision of Art. II, but instead it is solely governed under the law chosen (explicitly or implicitly) by the parties to govern the arbitration agreement or, failing any indication thereon, under the law of the country where the award was made according to the provision of Art. V(1)(a). Interestingly, there is a strong argument in favour of applying the same provision of conflict rules laid down in Art. V(1)(a) at the stage of enforcement of the arbitration agreement as well to govern the substantial grounds of invalidity contained in Art. II(3) (i.e. null and void, inoperative or incapable of being performed).¹⁷⁰

Art. V (1)(a) gives no guidance concerning what makes the arbitration agreement invalid, but rather it only refers to the law governing the arbitration agreement thereof. Thus, it may be generally submitted that since the arbitration agreement has the contractual nature, its substantial grounds of invalidity are equivalent to those that invalidate the contract in general. Yet, such substantial grounds invoked in practice are found to be often taken from Art. II(3). This Art obligates the court of a contracting state, at request of one of the parties, to refer the parties to arbitration, “unless it finds that the said agreement is *null and void, inoperative or incapable of being performed*” (emphasised added).

This text has been interpreted narrowly in the light of the NYC’ spirit. For example, a US court of appeals has held that:

¹⁷⁰ See, eg, *Insurance Company (Sweden) v Reinsurance Company (Switzerland)* (Switzerland Supreme Court 21 Mar 1995) 804 “although substantive validity is not regulated by the New York Convention, the issue should be examined by applying the conflict rules of Art. V (1)(a), in order to avoid conflicting decisions in the referral and enforcement phases.”; *Della Sanara v Fallimento Cap Giovanni Coppola srl* (1992) XVII YBCA 542 (Italy Court of Appeal 1990) 543. See, also, van den Berg, ‘Consolidated Commentary’ (2003) pp “as regards the exception ‘null and void, inoperative or incapable of being performed’ in Art. II(3), most courts apply by analogy the conflict rules contained in Art. V(1)(a)” ; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 6-55.

The parochial interests of the Commonwealth, or of any state, cannot be the measure of how the "null and void" clause is interpreted. ... Rather, the clause must be interpreted to encompass only those situations- such as fraud, mistake, duress, and waiver- that can be applied neutrally on an international scale.¹⁷¹

Besides, the US District Court in *Bautista v Star Cruises* has recently given a similar interpretation by holding that "Under the Convention, an agreement to arbitrate is null and void only when it is subject to internationally recognized defences such as duress, mistake, fraud or waiver, or when it contravenes fundamental policies of the forum nation". The Court went on to express that "The 'null and void' language of the Convention must be read narrowly, because the signatory nations have declared a general policy of enforceability of agreements to arbitrate".¹⁷²

Consequently, the substantial grounds of invalidating the arbitration agreement are hardly to be successful in practice. For example, a Japanese district court has granted enforcement of a foreign arbitral award, dismissing the defendant's argument that the arbitration agreement had been in fact terminated since he failed to discharge the burden of proving thereon.¹⁷³ The Spanish Supreme Court also has affirmed enforcement of a foreign arbitral award since the defendant did not prove his allegation that the arbitration agreement was inoperative.¹⁷⁴

An addition example can be found in a case held by a Swiss court of first instance. Although the Court denied enforcement of a foreign arbitral award for other reasons, it rejected a defence that the arbitration agreement was a sham. The court held that the defendant argued that the arbitration agreement is feigned. By examining this allegation, the court found that the simulation results in the nullity of the feigned agreement which is invalid on the sense of Art. V(1) of the NYC. The court however, concluded that:

This would not do justice to the system of the New York Convention. In proceeding of arbitral awards, the New York Convention intends to limit

¹⁷¹ *Ledee v Ceramiche Ragno* 684 F2d 184 (US Court of Appeals 1st Cir 1982).

¹⁷² *Bautista v Star Cruises* 286 FSupp2d 1352 (US District Court SDFla 2003) 1365.

¹⁷³ *Seller (China) v Buyer (Japan)* (2002) XXVII YBCA 515 (Japan District Court 1999) 517.

¹⁷⁴ *Consmaremma - Consorzio v Hermanos Escot Madrid SA* (2001) XXVI YBCA 858 (Spain Supreme Court 2001)861.

drastically the jurisdiction of the enforcement court to procedural aspects, and to avoid that the proceeding on the merits unfold once again. In so far a prima vista formally valid arbitral clause exists, and decide differently would mean to break open international arbitration as it would lead the enforcement court once again to examine the merits of the contractual relationship on a regular basis.¹⁷⁵

The same result was reached by a US district court in *Overseas Cosmos Inc v NR Vessel Corp* where the Court rejected the respondent's petition to refuse enforcement of a foreign award on two bases. "First, the agreement fails to satisfy the Statute of Frauds. Second, a disposition of property made by an agent without the authority of the principal is not binding on the principal". The court reasoned that the respondent has failed to prove that the agreement is not valid under the law to which the parties have subjected it.¹⁷⁶

On the other hand, an example of successful objection based on null and void can be found in *Societe Arabe des Engrais Phosphates v Gemanco srl* held by an Italian court of appeal.¹⁷⁷ In this case, contract containing arbitral clause at the ICC arbitration in Paris was signed by two Tunisian companies and an Italian company. The Italian party resorted to the ICC when a dispute turned out. The Tunisian parties denied the jurisdiction of the arbitral tribunal, arguing that they are public body which not allowed to refer to arbitration under the applicable law (i.e. Tunisian law). The tribunal dismissed the objection and rendered its arbitral award in favour of the Tunisian parties, holding that such bar is not applicable in the context of international contract.

The Tunisian parties then sought enforcement of the award before the Italian Court of Appeal. The Italian party opposed enforcement, contending that the arbitration clause was null and void on two grounds. First, because of the absence of making an attempt to resolve the difference amicably which the arbitration was subjected to, and thus it was inoperative. Second, the Tunisian Parties are not allowed under Tunisian law to enter into arbitration agreement, as they are public body. Thus, the Italian party

¹⁷⁵ *X v X* (Switzerland Court of first Instance 26 May 1994) pp 757-58.

¹⁷⁶ *Overseas Cosmos Inc v NR Vessel Corp* 1997 WL 757041 (US District Court SDNY 1997) 3.

¹⁷⁷ *Societe Arabe des Engrais Phosphates v Gemanco srl* (1997) XXII YBCA 737 (Italy Court of Appeal 1993).

argued that the enforcement request should be disallowed since the requirements of Art. II(3) and V(1)(a) of the NYC were not met. The Court of Appeal agreed with the Italian objection that the bar in Tunisian law is applicable to the Tunisian parties because the contract signed in Tunis by Tunisian public companies and thus the Court refused to enforce the foreign award.¹⁷⁸ However, the Italian Supreme Court reversed the Court of Appeal's decision and remanded the dispute to another Court of Appeal, finding that the lower court's decision did not show that the Italian party fulfilled the requirement of Art. V of the NYC to prove that the Tunisian Companies as public law body were forbidden under Tunisian law to enter into arbitration agreement in international context, and thus the arbitral clause was null and void under the Tunisian law and the relevant provision applied.¹⁷⁹

In the above case, the Italian Courts should enforce the arbitral award and dismiss the objection that is clearly contrary to good faith, even if the Italian party could prove that the Tunisian does not allow the Tunisian parties to arbitrate. This because the Italian defendant who alleged that the arbitration agreement is null and void at the stage of pro-award, he himself had argued that the arbitration agreement is valid and binding at the stage of post-award.

4.4 The Position in Saudi Arabia

4.4.1 Law Applicable to the Validity of the Arbitration Agreement

The SAL provides no guidance as to the question of the law governing the validity of the arbitration agreement in international context, nor such question has been directly dealt with by the Saudi enforcing courts. Yet, it was said that the Saudi Courts would apply only the Saudi laws and the *Shari'ah* rules to govern the various aspects of arbitration, since SA strictly applies the provision of *Shari'ah* and the Implementation Rules of 1985,¹⁸⁰ in particular, obligates that the award shall made under the

¹⁷⁸ *ibid* pp 738-40.

¹⁷⁹ *Societe Arabe des Engrais Phosphates v Gemanco srl (1996)* pp 740-43.

¹⁸⁰ IRSAL of 1985, Art.39.

provisions of *Shari'ah* rules and the Saudi applicable regulations.¹⁸¹ Yet, this opinion seems to have no sound reasons as it is commonly observed that the application of the SAL is limited to the domestic arbitration in SA.¹⁸² Besides, the Saudi relevant Courts recognise the rules of private international law as long as they are not contrary to the most fundamental principles of the *Shari'ah* (i.e. Saudi public policy).¹⁸³ Consequently, the Saudi enforcing Courts have consistently been confirming the validity of the arbitral agreements and awards in the context of international arbitration where the parties agreed on foreign laws (normally western laws) to be the applicable law, rejecting the Saudi parties' objection that the arbitration agreement is invalid because it is governed by non-Islamic law.¹⁸⁴ This clearly shows that the Saudi Authorities, as a rule, uphold the parties' autonomy in international arbitration by giving their choice of law a priority over national laws.

But, what is the position of the Saudi Authorities if the parties have not explicitly chosen the law governing the validity of the arbitration agreement? Will the law of the main contract be applied or the law of arbitration place? No clear-cut answer can be made since there is no case in which a Saudi court has expressed an opinion on this specific question. Yet, a Saudi court (the 18th Subsidiary Panel) has recently applied the Egyptian civil and commercial procedure law to confirm the validity of the arbitration agreement and consequently it confirmed enforcement of foreign arbitral award made under that agreement.¹⁸⁵ In this case the arbitration took place in Egypt and the arbitral award made there as well. Moreover, the place law of the contract performance is generally applied by the Saudi competent Courts in relation to private

¹⁸¹ See, Lee, *Encyclopedia of international commercial arbitration* para 1106; El-Ahdab, *Arbitration in Arab Countries* vol 2 pp 242-43; W Ballantyne and W Ballantyne, *Commercial law in the Arab Middle East: the Gulf States* (Lloyd's of London, London 1986) 157.

¹⁸² See, Sayen, 'Arbitration' at 220; S Jarvin (Arbitration Symposium Cairo 1986), cited in El-Ahdab, *Arbitration in Arab Countries* vol 2 p 186; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 88.

¹⁸³ See, A Yamani and others, 'Saudi Arabi' in R David and others (eds) *International Encyclopedia of Comparative Law* (JCB Mohr Dordrecht 1987) Vol 1-S, 21; J Lew, 'The Recognition and Enforcement of Arbitration Agreement and Awards in the Middle East' (1985) 1 (2) *Arb Intl* 161 at 175.

¹⁸⁴ the 4th Review Committee, decision No. 187/T/4 dated 1413 H (1992); the 4th Review Committee, decision No. 156/T/4 dated 1413 H (1992); the 4th Review Committee, decision No. 155/T/4 dated 1415 H (1994); 15/I/3 the 3rd Review Committee, decision No. 15/I/3 dated 1423 H (2002).

¹⁸⁵ the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003).

international cases.¹⁸⁶ Thus, it may be assumed that the Saudi Courts will apply the law of the arbitration seat.

Whatever the applicable law will be, it is vital to find out whether the Saudi Courts would apply a more favourable provision than the applicable law as provided by Art. VII(1). An affirmative answer can be seen in a case where a Saudi public body appealed against an arbitral award in favour of a foreign company on the ground that the arbitration agreement is invalid under the applicable law (i.e. the Saudi laws) which prohibits the government agencies to arbitrate without prior consent of the President of the Council Ministers. A Saudi court (The 9th Administrative Panel) at outset agreed that the arbitration agreement is invalid under the Saudi law. Nevertheless, the Court affirmed the validity of the arbitration agreement on the basis of the Shari'ah provision which is more favourable than the Saudi Laws, since the *Shari'ah* law emphatically upholds the moral obligation to fulfil one's contracts and undertakings, as expressed by the Qur'an: "O you who believe! Fulfil (your) obligation"¹⁸⁷ and by the Prophet Mohamed (PBUIH): "The Muslims are bound by their stipulations".¹⁸⁸ Besides, the principle adopted by the majority of Muslim scholars is that the arbitral award is binding. As a consequence, the Court granted the foreign Company's petition to enforce the arbitral award against the Saudi public body.¹⁸⁹ This case illustrates clearly that the Saudi enforcing Court has friendly attitude towards enforcement of awards.

4.4.2 Formal Grounds of Invalidity

It may be thought important to address the Saudi position regarding the formal requirements for the validity of the arbitration agreement not only because the Saudi laws may be chosen by the parties to be the applicable law, but also the Saudi laws

¹⁸⁶ the 4th Review Committee, decision No. 155/T/4 dated 1415 H (1994).

¹⁸⁷ *The Qur'an*, [5:1].

¹⁸⁸ Narrated by M Al-Tirmidhi, *Sunan Al-Tirmidhi* No. 1403; S Abu Daoud, *Sunan Abi Daoud* No. 3596; Maalik ibn Anas, *Al Muwatta* (in Arabic) No. 1447; M Al-Hakem, *Al-Mustadrak ala Al-Sahihayin* (in Arabic) No. 2269; and others.

¹⁸⁹ the 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997).

may be applied as a more favourable provision than the formal provision of Art. II(2) of the NYC.

4.4.2.1 Writing Requirement

The key question need to be addressed is whether the SAL requires the arbitration agreement to be in writing. Unlike like the NYC and most of national and international arbitration laws, the SAL does not expressly require the arbitration agreement to be in writing as a condition for its validity.¹⁹⁰ Yet, Art. 5 of the SAL stats somehow ambiguous provision as follows:

The parties to the dispute file the arbitration instrument with the Authority originally competent to hear the dispute. The instrument shall be signed by the parties or their authorized attorneys, and by the arbitrators, and it must state the details of the dispute, the names of the arbitrators and their acceptance to hear the dispute. Copies of the documents relating to the dispute shall be attached.

This text has led many commentators to reach different conclusions. Some commentators thought that the SAL requires all kinds of arbitration agreements must be in writing and signed by all parties to be valid and binding,¹⁹¹ whereas other commentators are of the view that the above formal requirement is only applicable to the submission agreement (i.e., the agreement referring an already existing dispute to arbitration), but not to the arbitration clause (i.e., the agreement referring future disputes to arbitration).¹⁹²

However, both approaches appear to be not convincing. In contrast, it may conclude that all kinds of arbitration agreements are valid and binding without any need of writing and signatures under SAL for following justifications. First, the wording used in Art. 5 "The parties to the dispute *file* the arbitration instrument with the Authority

¹⁹⁰ See, Lew, 'The Recognition and Enforcement of Arbitration Agreement and Awards in the Middle East' 174.

¹⁹¹ See, eg, S Saleh, *Commercial arbitration in the Arab Middle East : a study in Sharai'a and statute law* (Graham & Trotman, London 1984) pp 304-7; Sayen, 'Arbitration' 218.

¹⁹² See, Turck, 'Arbitration in Saudi Arabia ' pp 287-88; Turck, 'Saudi Arabia ' pp 6-7; El-Ahdab, *Arbitration in Arab Countries* vol 2 pp 200-202.

originally competent to hear the dispute"(emphasis added) is equal to the form of the simple present tense which does not constitute any obligatory order, but it seems to be permissible. Second, even assuming that filing the arbitration instrument with the competent court in writing is obligatory, Art. 5 does not deal with the validity of arbitration agreement and how to be binding, it rather deals with the first step of arbitration proceeding and thus it requires even the arbitrators' signatures and the details of the dispute which without a doubt have nothing to do with the validity of the arbitration agreement. Third, Art. 7 of the SAL goes to the heart of the problem and stats that:

*If the parties have agreed to arbitrate before the occurrence of the dispute, or if the arbitration instrument relating to a specific existing dispute has been approved, then the subject matter of the dispute shall be heard only according to the provisions of this Regulation. (emphasis added)*¹⁹³

This provision puts it clear that the arbitration clause is general valid and binding without being approved by the competent court through the formal requirements of Art. 5. Finally and more important, this approach can be further supported by a decision of the appeal court (the 4th Commercial Review Committee). The Court dealt with the question that when one party refused to agreed to arbitrate, although he previously concluded an arbitration agreement. The Court held that, in such case, it is sufficient that the other party submits the arbitration agreement to competent Court. Then, if the party refusing arbitration also insists not to sign the submission, the Court however will approve the submission to arbitrate.¹⁹⁴ This approach has been also adopted, as a principle, by the Commercial Courts.¹⁹⁵ This decision shows clearly that absence of the formal requirement of Art. 5 does not affect the validity of the arbitration agreement.

In the light of the above observations, it may conclude that there are no formal requirements such as writing for the validity of the arbitration agreement under the

¹⁹³ SAL of 1983, Art. 7.

¹⁹⁴ the 4th Review Committee, decision No. 150/T/4 dated 1413 H (1992).

¹⁹⁵ I Al-Ajlan, *Compilation of judicial principles confirmed by the Commercial Review Committee in the Board of Grievances from 1407 H (1987) to 1419 H (1999)* (the Board of Grievances Riyadh 2004 'in Arabic' unpublished)56.

SAL. This is because all Saudi laws are influenced by the *Shari'ah* rules which does not stipulate the contract, in general, to be in writing although it recommends to do so. In this regard, the *Qur'an* says:

O you who believe! When you deal with each other, in transactions involving future obligations in a fixed period of time, record it in writing. ... You should not become weary to write it (your contract), whether it be small or big, for its fixed term, that is more just with Allah; more solid as evidence, and more convenient to prevent doubts among yourselves, *except when it is a present trade which you carry out on the spot among yourselves, then there is no blame on you in not writing it down.* But make witnesses whenever you make a commercial contract. (emphasis added)¹⁹⁶

This verse indicates that although the *Qur'an* highly recommends, not obligates, the writing method to be used general in transactions (e.g. private or civil transactions), the same verse, however, makes an exception for the commercial cases. This may be for the reason that commercial transactions are generally run by experienced businessmen who are familiar with trade customs and the practical implications of their oral agreements. Thus, requirements of a written contract might sometimes become at odds with the need of speed and flexibility which play a key role in the success of trade activities.

4.4.2.2 Legitimate Ways for Concluding Arbitration Agreement

The next question is that how the arbitration agreement can validly be concluded under the SAL? Since the SAL requires no specific formality to conclude an arbitration agreement, this means that the Saudi legislator intended to leave this question to be solved under the umbrella of the *Shari'ah* rules. In general, the Saudi Courts follow the view that the *Shari'ah* requires no special formality for an expression of offer and acceptance to be valid and binding. So, the arbitration agreement can be, just as other contracts, formed by the linking of an offer and acceptance and is binding once it has been accepted. These can generally be made

¹⁹⁶ *The Qur'an, Al-Baqarah* [2:282].

either in writing or orally or to be implied by conduct and other appropriate means of correspondence.¹⁹⁷

As strongly explained by Ibn Taymiyya¹⁹⁸ and other *Hanbali*¹⁹⁹ scholars, the root principle is that no certain form is required and thus any verbal agreement, conduct, or act that indicates beyond a reasonable doubt the desires of the parties is sufficient to conclude a valid contract. He set forth the reasons that *Allah* (SWT) states in the *Qur'an* that "O you who believe! Eat not up your property among yourselves unjustly, except that it be trading amongst you by your mutual consent", so he makes the parties' mutual consent as the basis of the legitimacy of the sale without requiring a specific word or action to indicate such consent. Thus, any way (writing, oral or implied by conduct) applied in practice and recognised by the applied custom is sufficient to indicate the consent of the parties to enter into binding contract should be also satisfactory under the Shari'ah. Moreover, a strict formality would create inordinate difficulties and hardships, since contracts have been concluded without any word of mouth since the time of the prophet Mohamed (PBUH).²⁰⁰ Thus, it can be concluded that under the Shari'ah law, the intention of the parties rather than the specific formula should be enforced regarding arbitration agreement.

4.4.2.3 Modern Means of Communications

Having seen that written, implied and oral arbitration agreement is sufficient under *Shari'ah* and should be so under Saudi laws, it should be followed by the question that can one presume therefore that the arbitration agreement can also be validly made

¹⁹⁷ See, A Al-Qaradaghi, 'The General Principles of Arbitration in Islamic Fiqh ' (Symposium of Arbitration in Islamic Shariah, Doha 2001 'in Arabic')15; S Rashid, 'Alternative Dispute Resolution in the Context of Islamic Law '(2004) 8 *Vindobona J Intl Comm L & Arb* 95 at 105; N Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah'(2004) 20 *Arbitration International* 97at 109 fn 22; C Childress, 'Saudi-Arabian Contract Law: A Comparative Perspective'(1990) 2 *St Thomas L F* 69 at 80-81.

¹⁹⁸ A well-known Muslim Hanbali scholar (b.1263- d.1328).

¹⁹⁹ Hanbali is one of the four Sunni schools of law, found by Ahmad ibn Hanbal. The other principle Sunni schools are the Hanafi, the Maliki and the Shaffei. They do not differ in fundamentals but disagree in several points of detail.

²⁰⁰ A Ibn Taymiyya, *Majmau Fatawaa Shaykh Alislam Ahmed ibn Taymiyya* (1980 'in Arabic')vol 29 pp 5-21; A Ibn Qudamah, *Al-Mughnai; wa yaliki Alsharh Alkkabir* (Dar Alhadith, Cairo 1996 'in Arabic') vol 5 pp 246-49; A Ibn Qasim, *Haashiyat Alrrawd Almurbi; sharh Zuad Al-mustaqni* (Foad Bauno Bayrut 1996 'in Arabic')vol 4 pp 329-31 and fn 1.

via one of the modern means of communication, such as fax and email and the like, under in Saudi laws. In the light of the above-mentioned principle that no certain formality is required but it depends on the applied costume, the answer would clearly be yes.²⁰¹ This for the explanations pointed out above, and also for the following grounds. The principal that, as explained by Ibn Taymiyya, of all matters of worldly affairs which people have need, the only one that they are prohibited are those the prohibition of which the *Qur'an* and *Hadith* indicate, just as, of all the worships by which people draw near God, the only ones that are lawful for the people are those the lawfulness of which the *Qur'an* and *Hadith* indicate.²⁰² In other words, in matters of worship, God's silence implies prohibition, while in matters of worldly affairs, God's silence implies permission. Thus, since concluding contracts are matters of worldly affairs and since no certain form is imposed by *Qur'an* and *Hadith*, any new method of communication not mentioned in traditional Islamic book can therefore be validly used to enter into contracts.²⁰³

In addition, the main reason of formal requirement is to be self-evidence. Thus, proving the existence of the arbitration agreement via modern means of correspondence should be considered sufficient since the Saudi Courts also adopt a very flexible view regarding the proof principles which has been earlier clarified under the *Shari'ah* provision by Ibn Al-Qayyim.²⁰⁴ He put it in strong words as follows:

The term of evidence is a name for any thing brings the truth or facts to the light. Those who limit the evidence to certain canonical methods of evidence (essentially, testimony of witnesses, confession, and the oath), and forgo other sensible, practical methods of proof, such people do not give the evidence its proper meaning since the evidence is never mentioned in *Qur'an* and *Hadith* to mean only the testimony, but in fact to mean the proof in general which include other kinds of proofs and signs that sometimes are stronger in establishing the genuine facts. ... Thus, the judge should not cling mechanically to technical *fiqh* rules (i.e the

²⁰¹ See, A Al-Ssalmi, 'Theory of the Contract' (Session of the Shari'ah and law Principles of Arbitration, Riyadh 2002 'in Arabic') pp 18-19; Al-Qaradaghi, 'The General Principles of Arbitration in Islamic Fiqh' 15.

²⁰² See, A Ibn Taymiyya, *Alsiyasa Alshariyya fi Islah Alrai wa Alraiyya* (Dar Alma'rifah 'in Arabic')133. see also, M Ibn Al-Qayyim, *Ilam Almuwaqqin an Rab Alalamin* (Dar al-Kutub al-ilmiyah, Beirut 1991 'in Arabic')vol 1 pp 259-62.

²⁰³ See, Ibn Taymiyya, *Majmau Fatawaa Shaykh Alistam Ahmed ibn Taymiyya* vol 29 pp 17-21.

²⁰⁴ A well-known Muslim Hanbali scholar (b.1292- d.1350).

science of Islamic jurisprudence) of evidence, but should seek to know the truth by any means available since the justice sought by the *Shari'ah* cannot be found just in doctrine with no concern for reality and practical implementation. *Shari'ah* demands justice realized in the world, as far as human capacities allow. *Shari'ah* justice, if properly understood, cannot conflict with right reason, obvious fact, or practical justice.²⁰⁵

In addition, the merit of using modern means of communications to conclude agreements in general is particularly legalized by the Islamic Fiqh Academy (IFA) in Jeddah which convenes most of the highest contemporary Muslim scholars in the world,²⁰⁶ and highly recognized by Saudi Courts.²⁰⁷ The Islamic Fiqh Academy has ruled the following:

First, if the agreement is made between parties who are not present in one place, and one cannot directly see and hear another, and the communication means between them is the writing, letter, messenger, telegram, telex, fax, or computers (i.e. e-contract), in such case the agreement would be validly concluded once the offer is accepted by the offeree after it arrives to him.

Second, if the agreement is made in one time between parties who are not present in one place, but can hear each one another in the same time, such as by the telephone and wireless, in such case it is just like concluding the agreement between attending parties, and thus it takes the general rule concluding a normal contract.²⁰⁸

As to judicial practices, the Saudi relevant Courts, for example, adopt the principle that when the fax message containing the sender name and the fax number, it becomes sufficient without need of the sender signature or stamp.²⁰⁹ Furthermore, in a recent case, a Saudi party has opposed enforcement of a foreign award, contending that there is no arbitration agreement between the parties as the formal requirements were not

²⁰⁵ Ibn Taymiyya, *Alsiyasa Alshariyya fi Islah Alrai wa Alraiyya* pp 16-20. see also, FE Vogel, *Islamic law and legal system : studies of Saudi Arabia* (Studies in Islamic law and society ; v 8, Brill, Leiden 2000) pp 144-45.

²⁰⁶ The Islamic Fiqh Academy (IFA) is formed under the auspices of the organization of the Islamic Conference (OIC) that represents all Muslim Countries around the world.

²⁰⁷ See, eg, the 2nd Review Committee, decision No. 235/T/2 dated 1415 H (1994).

²⁰⁸ The Islamic Fiqh Academy, 'Decision No. 52 (3/6) about Concluding Contracts by Modern Means of Communications'(1990) 2 (6) Islamic Fiqh Academy Journal 785.

²⁰⁹ See, Al-Ajlan, *Compilation of judicial principles* 205; the 4th Review Committee, decision No. 187/T/4 dated 1413 H (1992).

satisfied. However, the Saudi enforcing Court (18th Subsidiary Panel) dismissed the Saudi objection, providing that the arbitral tribunal in Cairo has already and rightly decided that there was a valid and binding arbitration agreement between the parties, and thus the arbitral award is also valid and binding on the Saudi Party. Thus, the Court finally granted leave to enforce the foreign arbitral award.²¹⁰ This decision was then upheld by the Appeal Court (the 4th Review Committee).²¹¹

In the light of the foregoing considerations, it may conclude that the formal requirement of Art. II(2) of the NYC should be dynamically interpreted in the light of the *Shari'ah* principles to uphold the validity of the arbitration agreement whether it is included in writing (explicitly or implicitly), orally, implied by conduct or by new means of communication. This extraordinarily liberal approach leads, in practice, to narrow down the effectiveness of the formal invalidity of the arbitration agreement as non-enforcement ground in SA, which comes in line with the main intended purpose of the NYC.

4.4.3 Substantial Grounds of the Invalidity

With regard to the substantial grounds of invalidity of the arbitration agreement, the SAL, like other arbitration laws, gives no details thereon, and thus it to be governed by the general rules of the *Shari'ah*. The arbitration agreement under the *Shari'ah* law will not be considered binding if there are materials affect its validity. Such defects include duress, misrepresentation, mistake, incapacity and undue influence. However, the Saudi courts appear to narrow the effectiveness of such ground in the light of emphatic policy of *Shari'ah* for fulfilling all obligations in general. This can be seen in the above-mentioned case where the enforcing court (the 9th Administrative Panel) granted leave to enforce arbitral award in favour of the foreign party against the Saudi public entity, although the Court agreed with the defendant objection that the arbitration agreement was invalid under the SAL which forbids the Saudi government bodies to enter into arbitration agreement without the previous consent of the President of the Council of Ministers. However, the Court applied the less strict

²¹⁰ the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003).

²¹¹ the 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004).

provision of *Shari'ah* over the applicable law (i.e. SAL) in favour of binding arbitration agreement and award. The Court supported its approach by three grounds: first, the Qur'an obligates that "O you who believe! Fulfil (your) obligation"²¹² similarly, the Prophet Mohamed (peace be upon him) emphasized that "The Muslims are bound by their stipulations".²¹³ Finally, the principle adopted by the majority of Muslim scholars is that the arbitral award is binding.²¹⁴

In this case the Saudi Court exercised its discretion to restrict the application of the substantial invalidity of the arbitration agreement as a ground for refusal of enforcement. This liberal approach is certainly consistent in general with the NYC policy of pro-enforcement bias and particularly with Art. VII(1) provision of more-favourable-laws to enforcement.

4.4 Conclusion

The following conclusions may be drawn from the foregoing discussion:

The applicable law to the substantial validity of the arbitration agreement is to be decided under the provision of conflict rules laid down in Art. V(1)(a) which is as follows:

- (a) The law chosen by the parties to govern the arbitration agreement. In the absence of such choice;
- (b) If the parties themselves have chosen both the law governing the main contract as well as the arbitration place, two main approaches exist as to which law should be applied to the arbitration agreement; first, the law of the arbitration place; second, the law of the main contract. Yet, it may be suggested a distinction between (a) the Arbitral clause (in a contract) where with the law of the main contract has more obvious connection than the law of the arbitration seat, and (b) the submission agreement (not forming part of

²¹² *The Qur'an, Al-Ma'idah* [5:1].

²¹³ Narrated by Al-Tirmidhi, *Sunan Al-Tirmidhi* No. 1403; Abu Daoud, *Sunan* No. 3596; Maalik ibn Anas, *Al Muwatta* No. 1447; Al-Hakem, *Al-Mustadrak* No. 2269; and others.

²¹⁴ the 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997).

- another contract) where the law of the seat of arbitration has more obvious connection.
- (c) If the arbitration forum has not been chosen by the parties, but they have chosen the law governing the main contract, the latter is highly likely to be the governing law of the arbitration agreement.
 - (d) If the law governing the main contract has not been chosen by the parties, but they have chosen the arbitration forum, the latter should be the applicable law to the arbitration agreement.
 - (e) Where both the law governing the main contract and the arbitration seat have not been chosen by the parties, the enforcement court then should strive to demonstrate the common intention of the parties regarding the applicable law to the arbitration agreement by examining the closest connecting factors and surrounding circumstances.

With regard to the law governing the formal validity of the arbitration agreement, there is strong argument to apply the provision of Art. V (1)(a) just like the case of the substantial validity mentioned above, whereas the prevailing view is that the provision of Art. II (2) governs the formal validity. However, the compromising suggestion that appears to be more suitable is to apply the law applicable according to the conflict of laws rules of Art. V (1)(a), unless the applicable law requires stricter formality than Art. II, the latter then should be applied.

Whatever the applicable law will be, Art. VII(1) of the NYC allows parties to rely on the more-favorable-provisions for enforcement of the foreign award. Thus, any more favorable law or treaty available at the enforcing country may be applied over the applicable law according to Art. VII(1) of the NYC.

In SA, the enforcing Courts are found to recognise the law chosen by the parties. In the absence of such choice, the applicable law seems to be the law of the arbitration seat. With regard to the application of Art. VII(1), the Saudi Courts are also found to apply the *Shari'ah* when its provision is less demanding than the applicable law.

As regards the formal grounds of the invalidity of the arbitration agreement, Art. II requires the arbitration agreement to be in written form either signed by the parties or, contained in exchange of letters or telegrams without signatures. Thus, lacking such

formality may constitute a ground of non-enforcement. Yet, the provision of Art. II(2)) is, according to the contemporary trend, deemed as a maximum (not minimum) formal requirement that supersedes more demanding formal requirements by national laws. Thus, Art. II(2) must be interpreted widely in the light of NYC's spirit of pro-enforcement bias to conclude other modern means of contracting in international trade practices.

As regards the signature requirement, there is no need to specifically sign the arbitral clause in contract, but signing the main contract as whole is sufficient. However, there is a strong support for the view that the arbitration agreement (whether arbitral clause or submission agreement), does not have to be signed by the parties to constitute an agreement in writing.

As regards an arbitration agreement in exchange of documents, the common view is that the document itself need not to be returned back by the party who received it to the sender, but it is sufficient when a reference is made to the document in subsequent correspondence, such as a letter, facsimiles, letter of credit, invoice or purchase confirmation, etc, by the party to which the document was sent.

The reference to arbitration clause in standard conditions, according to the prevailing trend, is sufficient as far as the other party appears to be able to check the existence of an arbitration clause.

National enforcing courts generally have held the spirit of the NYC to prevail over its technical and terminological limitations and thus interpreted Art. II (2) broadly to include many different forms of modern communications in satisfaction of the writing requirement, such as telex, fax, e-mail and other means of e-communication.

A non-written agreement such as a tacit and oral agreement, according to the general view, does not satisfy the written requirement of Art. II(2) of the NYC, and has led to refusal of enforcement of the foreign awards in several cases. Yet, there is a growing support for the view that where the tacit or oral agreement is sufficient to enter into a normal international commercial contract, it should be also sufficient to enter into a valid arbitration agreement.

In SA, unlike like the NYC and most of national and international arbitration laws, the SAL does not require the arbitration agreement to be in writing to be validly concluded. In contrast, it is open to rely on the liberal provisions of the *Shari'ah* which allow the arbitration agreement to be made by writing, tacit, oral, fax, e-mail and the like, as far as such means of communication are used in trade practice and recognized by commercial customs.

The substantial grounds of invalidity of the arbitration agreement such as fraud, mistake, duress and inoperative have not created noticeable problems since most of them are rarely invoked in practice as grounds for non-enforcement of the award.

Finally, national Courts have generally been reluctant to refuse enforcement of the arbitral award on the ground that the arbitration agreement is not valid, respecting the general policy of the NYC of pro-enforcement bias. The same can be held true in SA.

CHAPTER FIVE

Violation of Due Process

5.1 Introduction

Art. V(1)(b) of the NYC set out the second ground in which enforcement of foreign awards may be blocked. It provides that enforcement of a foreign award may be refused if:

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.¹

This ground is considered as the most important ground for refusing enforcement under Art. V of the NYC, because its purpose is to ensure that certain basic standards of “due process” or fair trial are observed throughout the arbitration.² Here the principle of due process covers two different aspects: first, the party’s right to be given proper notice of the time and place of the arbitral proceedings, and second, his right to be given a proper chance to present his case. Breach of such due process may lead the enforcement of the arbitral award being refused under Art. V.(1)(b) of the NYC. Thus, this chapter deals first with preliminary issues, including the law governing violation of due process, and the relation between Art. V(1)(b) (violation of due process) and Art. V(2)(b) (i.e. breach of public policy). Secondly, a number of issues regarding lack of proper notice will then be addressed. Thirdly, several questions concerning inability to present one’s case will be discussed, followed by issues of estoppel and waiver as well the position if the violation of due process has no effect on the arbitration outcome. The Saudi position will finally be highlighted.

5.2 The Law Governing Violation of Due Process

¹ NYC of 1958, Art. V(1)(b).

² See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 463.

When violation of due process is raised as a ground for refusing enforcement of a foreign award, will this matter be governed by the law of the arbitration seat, the law of the enforcement court, or only by the provisions of Art. V(1)(b)? Although the NYC provides little or no guidance for the way in which an arbitration should be conducted to meet its requirement of due process, some commentators suggest that Art. V(1)(b) is a genuinely international substantive rule on violation of due process, which supersedes over any domestic laws thereon. Thus, breaching this rule is deemed to be sufficient in itself to open the door to resisting enforcement, since Art. V(1)(b) is expressed not in choice of law terms, but rather in terms of substantive rules.³

Nevertheless, the general view of commentators⁴ and courts⁵ appears to be that Art. V(1)(b) establishes no international rule or standard of due process. Under this view, different approaches emerge as to the law governing the benchmark of due process, including the law chosen by parties to govern the arbitration,⁶ or the law of the arbitration seat,⁷ or the law applied in the enforcing Court.⁸

However, the prevailing judicial trend seems to be that the enforcing court will naturally have its own concept of what constitutes a violation of the requirements of due process, so that Courts will judge violation of due process according to their own national laws.⁹ However, this does not mean that all of the requirements of due

³ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1696. See also, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-81, who consider this approach to be also convincing.

⁴ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 298; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-81; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 46; Dicey, Morris and Collins, *Conflict of Laws* 639.

⁵ See, eg, *Parsons & Whittemore Overseas Co v RAKTA* 975; *Paklito Investment Ltd v Klockner East Asia Ltd* 47.

⁶ See, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-81

⁷ See, *ibid* para 26-81; *Minmetals Germany GmbH v Ferco Steel Ltd*, “were the court held that “By agreeing the place of a foreign arbitration, a party not only agreed to submit all contractual disputes to arbitration but also agreed that the conduct of the arbitration should be subject to the supervisory jurisdiction of the courts of that place.”

⁸ See, Gaja, *International Commercial Arbitration* vol 1 pt 1 para I.C.4 ; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 298.

⁹ See, eg, *Parsons & Whittemore Overseas Co v RAKTA* (US Court of Appeals 2nd Cir 1974) 975; *Firm P (US) v Firm F (Germany)* (1977) 11 YBCA 241 (Germany Court of Appeal 3 Apr 1975); *Carters Ltd v Francesco Ferraro* (1979) IV YBCA 275 (Italy Court of Appeal 1975) 276; *Biotronik*

process under national law will automatically apply to international arbitration. What may constitute a violation of due process under national law is not necessarily so regarded under the NYC, the latter is more limited than the former.¹⁰ For example, a US court of appeals has recently in *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* confirmed the customary approach that the provision of Art. V(1)(b):

[E]ssentially sanctions the application of the forum state's standards of due process. In this case, United States standards of due process ... (Yet) the right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil procedure. (citations omitted)¹¹

In addition, many courts have given weight, beside their own law, to the law governing the arbitration (i.e. *lex arbitri*) in deciding whether there has been violation of due process.¹² For example, the Hong Kong Court of Final Appeal in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* examined the laws chosen by the parties to govern the arbitration (i.e. the CIETAC Arbitration Rules and the PRC Arbitration Law) and found that there was no breach of these provisions with regard to the requirements of due process.¹³

5.3 The Relation between Art. V(1)(b) (i.e. due process) and Art. V(2)(b) (i.e. public policy).

Mess-Und Therapiegeraete GmbH & Co v Medford Medical Instrument Co 415 FSupp 133 (US District Court New Jersey 1976) 140; *Renault Jacquinet v Sicea* (1979) IV YBCA 284 (Italy Court of Appeal 1977) 286; *German Buyer v English Seller* (1979) IV YBCA 266 (Germany Court of Appeal 27 Jul 1978) 267; *Dutch Seller v Swiss Buyer* (1979) IV YBCA 309 (Switzerland Court of Appeal 1971) 310; *Paklito Investment Ltd v Klockner East Asia Ltd* 47; *Generica Ltd v Pharmaceutical Basics Inc* 125 F3d 1123 (US Court of Appeals 7th Cir 1997) 1130; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 299-300.

¹⁰ See, eg, *Firm P (US) v Firm F (Germany)* (Germany Court of Appeal 3 Apr 1975); *Presse Office SA v Centro Editorial Hoy SA* (1979) IV YBCA 301 (Mexico Court of First Instance 1977) 301-302; *Malden Mills Inc v Hilaturus Lourdes SA* (1979) IV YBCA 302 (Mexico Court of Appeal 1977) pp 303-4; *Generica Ltd v Pharmaceutical Basics Inc* 1130; *Consortio Rive SA De CV v Briggs Of Cancun Inc* 134 FSupp2d 789 (US District Court ED Louisiana 2001) 796; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* pp 299-300.

¹¹ *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* pp 299-300.

¹² See, eg, *Ukrvneshprom State Foreign Economic Enterprise v Tradeway Inc* 1996 WL 107285 (US District Court SD NY 1996) 5; *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665 (Hong Kong Court of Final Appeal 1999) 685.

¹³ *Hebei Import & Export Corp v Polytek Engineering Co Ltd* 685.

It may be thought important to address the question of the relationship between Art. V(1)(b) (due process) and Art. V(2)(b) (public policy) since the principles of fairness and observance of due process are often regarded as a part of the public policy of the enforcing state. The significance of this question stems from the fact that the grounds set forth in Art. V(1) can only be raised by the respondent, who bears the burden of proving the existence of such grounds, whereas the grounds under Art. V(2) can be raised by the court of its own motion. Thus, the key question is whether the NYC intends to exclude violation of due process from Art. V(2)(b), which concerns public policy in general, because it specifically treats the violation of due process under Art. V(1)(b), so that the court cannot of its motion refuse enforcement on the basis of violation of due process?

Most of commentators¹⁴ and courts¹⁵ are of the view that the ground of violation of due process mentioned under Art. V(1)(b) may overlap with public policy defence mentioned in Art. V(2)(b), so that the issue may be raised by either the respondent or the court of its own motion without need to be invoked by a respondent. So, the ground of violation of due process may fall either under Art. V(1)(b) or Art. V(2)(b).

In addition, it can be observed that in practice, respondents often base their objection on violation of due process upon both Art. V(1)(b) and Art. V(2)(b), as they probably believe that the invocation of public policy defence of the forum under Art. V(2)(b) is more effective than the invocation of lack of due process under Art. V(1)(b).¹⁶ Besides, in contrast to Art. V(1)(b), invoking Art. V(2)(b) may not require the resisting party to bear its proof.

¹⁴ See, van den Berg, 'Consolidated Commentary' (2003) at 654-55; van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* pp 299-300; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1697; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-82. Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* 149.

¹⁵ See, eg, *Presse Office SA v Centro Editorial Hoy SA* pp 301-2; *Malden Mills Inc v Hilaturas Lourdes SA* pp 303-4; *Saint Gobain v Fertilizer Corp of India Ltd* (1976) I YBCA 184 (Franc Court of Appeal 1971) 185; *Biotronik Mess-Und Therapiegeraete GmbH & Co v Medford Medical Instrument Co*; *X (Syria) v X* (2004) XXIX YBCA 663 (Germany Court of Appeal 1998) 668.

¹⁶ See, eg, *Presse Office SA v Centro Editorial Hoy SA* pp 301-2; *Malden Mills Inc v Hilaturas Lourdes SA* pp 303-4; *Rice Trading Ltd v Nidera Handelscompagnie BV* (1998) XXIII YBCA 731 (Netherlands Court of Appeal 1998) pp 733-34; *Generica Ltd v Pharmaceutical Basics Inc* 1996 WL 535321 (DN District Court ND Ill 1996) 3. See also, van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 300.

Many courts have also relied on both provisions in deciding whether an award has been affected by a violation of due process.¹⁷ For instance, in *Rice Trading Ltd v Nidera Handelscompagnie BV*, a Dutch defendant objected to enforcement of a foreign award on the ground that Art. V(1)(b) and Art. V(2)(b) of the NYC had been violated, as the defendant was not allowed to react to evidence submitted to the tribunal. The Dutch Court of First Instance upheld the objection and refused enforcement of the foreign award under both provisions¹⁸, which decision was then affirmed by the Dutch Court of Appeal.¹⁹ Likewise, a German court of appeal has rejected an allegation of breach of due process as unfounded under both Art. V(1)(b) and Art. V(2)(b).²⁰ Similarly, before a Swiss court of first instance, a respondent argued that enforcement of a foreign award should be refused for denial of due process not only under Art. V(1)(b) but also Art. V(2)(b). The Court held that the denial of due process is in principle a violation of public policy, and thus it examined the objection of violation of due process under both Art. V(1)(b) and Art. V(2)(b).²¹ More specifically, a German court of appeal stated that:

The violation of due process in the arbitral proceedings alleged by the defendant is not only a ground for refusal of enforcement pursuant to Art. V(1)(b) of the Convention; it is also a violation of public policy which, pursuant to Art. V(2)(b) of the Convention, must be examined ex officio.²²

Yet, with respect, the above approach appears to be doubtful, and should be not followed for the following reasons. First, although the fundamental requirements of fair trial or due process are part of national and international public policy, they should not be so in the context of Art. V. Allowing the violation of due process defence to be raised either by the respondent or the court is at variance with the NYC's scheme of limiting the possibility of non-enforcement defences. Nor does it

¹⁷ See, eg, *Prasse Office SA v Centro Editorial Hoy SA* pp 301-2; *Mulden Mills Inc v Hilaturas Lourdes SA* pp 303-4; *Saint Gobain v Fertilizer Corp of India Ltd* 185; *Biotronik Mess-Und Therapiegeraete GmbH & Co v Medford Medical Instrument Co*; *X (Syria) v X (Germany Court of Appeal 1998)* pp 668, 695, 825-29; *Italian Party v Swiss Company* (2004) XXIX YBCA 819 (Switzerland Court of First Instance 2003) pp 825-29; *Manufacturer (Slovenia) v Exclusive Distributor (Germany)* 695.

¹⁸ *Rice Trading Ltd v Nidera Handelscompagnie BV* pp 732-33.

¹⁹ *ibid* 733-34.

²⁰ *Manufacturer (Slovenia) v Exclusive Distributor (Germany)* 695.

²¹ *Italian Party v Swiss Company* pp 825-29.

²² *X (Syria) v X (Germany Court of Appeal 1998)* 668.

accord with the general trend of interpreting Art. V narrowly in line with the NYC's pro-enforcement bias. Furthermore, by listing violation of due process among the grounds which have to be invoked and proven by the party resisting enforcement, it is almost certain that the NYC intended to exclude this ground from the public policy provision of Art. V(2)(b), and therefore to prevent the enforcing court refusing enforcement of its own motion on the ground of violation of due process. This is made clear by the opening words of Art. V(1) which state:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that[emphases added]²³

Finally, to the best of knowledge, no case has been reported where a court has refused to enforce a foreign arbitral award of its own motion upon the basis of violation of due process. Thus, in the cases mentioned above Art. V(2)(b) was not invoked initially by the courts, but by the respondents.

Accordingly, it may be suggested that Art.V(1)(b) should be deemed to exclude the possibility that violation of due process might also fall under the public policy provision of Art. V(2)(b). A court cannot of its own motion refuse enforcement of an award for violation of due process on the basis of Art. V(2)(b). Such a defence can only be raised by the losing party, who then bears its burden of proof.

5.4 Lack of Proper Notice

5.4.1 General

It is vital that all parties to arbitration be given proper notice of the appointment of the arbitrator and of the arbitration proceedings. Thus, enforcement of the award may be resisted for lack of proper notice, or where notice of the proceedings was received after the award had been rendered. One can observe that the party's lack of awareness of the appointment of the arbitrator or of the arbitration proceedings is treated

²³ NYC of 1958, Art.V(1).

separately from issue of inability to present the case in Art. V(2)(b), even though it is one of the situations in which a party is “unable to present his case”. Surely, this separation demonstrates the seriousness of proper notice in arbitration. Also, it is said that there is a historic reason for this separation, because it appears in the Geneva Convention of 1927,²⁴ and the framers of the NYC did not wish to abandon it.²⁵

The legislative history of the NYC indicates that the word “proper” was inserted in the phrase “not given proper notice” in Art. V(1)(b) as result of a proposal by the Norwegian delegate. He has set forth his proposal because the Conference had decided to delete from Art. V(1)(b) the express provision contained in the Geneva Convention of 1927 to the effect that ‘being under a legal incapacity, the respondent was not properly represented’ on the grounds that such cases seldom arose in practice. Thus, the insertion of the word “proper” before “notice” should provide for that remote contingency of improper representation in the arbitration proceedings.²⁶

Given the tendency to interpret the refusal grounds of Art. V narrowly, the courts have generally looked for a grave and prejudicial lack of proper notice, such as no notice at all, or notice being received after the award has been rendered. Thus, although the objection of lack of proper notice is often relied upon to oppose enforcement, the courts rarely accepted this ground in practice.²⁷ Yet, an example of successful objection can be found in a US district court case of *Sesostris SAE v Transportes Navales SA*, where the Court denied the plaintiff’s motion to confirm enforcement of a foreign award, since the respondent presented evidence that it received no notice of the arbitration proceedings, rejecting the plaintiff’s argument that that respondent was not a proper party to the arbitration proceedings and

²⁴ Geneva Convention of 1927, Art.2(b).

²⁵ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1696.

²⁶ See, UN Doc. E/CONF.26/SR.17 pp 9, 14. See also, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 303.

²⁷ See, eg, *Malden Mills Inc v Hilatwas Lourdes SA* pp 301-2; *Presse Office SA v Centro Editorial Hoy SA* pp 301-2; *Dutch Seller v Swiss Buyer* (Switzerland Court of Appeal 1971) 310; *Bobbie Brooks Ins v Lanificio Walter Banci SAS* 290; *Carters Ltd v Francesco Ferraro* 276; *SpA Nosegno e Morando v Bohne Friedrich & Co* (1979) IV YBCA 279 (Italy Supreme Court 1977) 280. *Renault Jacquinet v Sicea* 286.

consequently should not have received notice of the arbitration.²⁸ Likewise, a German court of appeal refused an application to enforce an award rendered in Russia, finding that the respondent had actually received no notice of the arbitration until the award was made. The Court held that although Russian arbitration law applied by tribunal provides that a communication made to the defendant's last known address suffices if no other address can be found after making a reasonable inquiry, there was no evidence here that any attempt had been made to find the correct address of the German defendant, which in any case had not changed since the conclusion of the contracts.²⁹

5.4.2 The Standard of Proper Notice

When can notice of the appointment of the arbitrator and the arbitral proceedings can be considered to be "proper notice"? This matter is mostly a question of fact in the sense that the notice must be adequate. Yet, it is vital to mention that it is generally accepted that the notice need not to be in a particular form as required under domestic arbitration laws or civil procedure,³⁰ since international arbitration is a private method of dispute resolution.³¹ This interpretation has generally been confirmed by national courts³² and commentaries.³³ For example, the US Court of Appeal in *Generica Ltd v Pharmaceutical Basics Inc* has laid emphasis on the doctrine that by

²⁸ *Sesostris SAE v Transportes Navales SA* 727 FSupp 737 (US District Court D Massachusetts 1989) 741.

²⁹ *Seller (Russian) v Buyer (germany)* (2002) XXVII YBCA 445 (Germany Court of Appeal 16 Mar 2000) pp 448- 49.

³⁰ However, in order to avoid the risk of claiming that no notice was received, it may be recommended to send notices by registered mail or return receipt service which provides a mailer with evidence of delivery (to whom the mail was delivered and date of delivery), and after delivery, the return receipt is mailed back to the sender. See, van den Berg, 'Consolidated Commentary' (2003) 655.

³¹ See, *Italian Party v Swiss Company* (2004) XXIX YBCA 819 (Switzerland Court of First Instance 2003) 827.

³² See, eg, *Generica Ltd v Pharmaceutical Basics Inc* 1130; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* pp 299-300; *Consortio Rive SA De CV v Briggs Of Cancun Inc* 796; *Presse Office SA v Centro Editorial Hoy SA* pp 301-2; *Malden Mills Inc v Hilaturas Lourdes SA* 304; *Bobbie Brooks Ins v Lanificio Walter Banci SAS* 292; *Trans Chemical Ltd v China National Machinery Import And Export Corp* 978 F Supp 266 (US District Court SD Texas 1997) 310.

³³ See, eg, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 303; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-84.

choosing to remedy their disputes through arbitration rather than litigation, parties should not expect the same procedures they would find in the judicial arena.³⁴ Likewise, a US district court has held that:

The right to due process (under Art. V(1)(b) of the NYC) does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By agreeing to arbitration (a party) subjected itself to its advantages and disadvantages.³⁵

A similar approach also was taken by a Mexican court of appeals³⁶ and a Mexican Ccourt of first instance,³⁷ where Mexican respondents objected to enforcement of foreign awards on the ground that they had not been properly notified of the arbitration proceedings since all notices including the summons were served by mail, while the first notice of summons should be served personally upon the respondents pursuant to Mexican procedural law. Both courts expressly referred to Art. V(1)(b) of the NYC in dismissing both objections, holding that by submitting their disputes to arbitration, the parties agreed tacitly to waive the formal requirement of summons established by Mexican Civil Procedure.³⁸ In this regard, the Mexican Court of First Instance held that:

The summons, to which the petitioner objects, was actually served in a correct manner, because by inserting the arbitral clause in the contract, the parties tacitly waived the formalities established by Mexican procedural legislation ... in order to subject themselves to the Arbitration Rules of the ICC.³⁹

The abovementioned cases illustrate that notice would be deemed adequate if it, for example, complies with the requirements set by the applicable arbitration rules and not necessarily with national law.

³⁴ *Generica Ltd v Pharmaceutical Basics Inc* 1130.

³⁵ *Trans Chemical Ltd v China National Machinery Import And Export Corp* 310.

³⁶ *Malden Mills Inc v Hilaturas Lourdes SA* pp 301-2.

³⁷ *Presse Office SA v Centro Editorial Hoy SA* pp 301-2.

³⁸ *Malden Mills Inc v Hilaturas Lourdes SA* pp 303-4; *Presse Office SA v Centro Editorial Hoy SA* pp 301-2.

³⁹ *Presse Office SA v Centro Editorial Hoy SA* pp 301-2. The same was adopted by Mexico Court of Appeal in *Malden Mills Inc v Hilaturas Lourdes SA* 303.

5.4.3 Shortness of Time Limits

Another important issue is whether the notice was timely? This issue includes the shortness of time limits for appointing the arbitrators and preparing defences, and the notice period to appear at hearings. It appears that the question whether such time limits or notice periods did in fact obstruct a party from appointing its arbitrator, preparing its defence or appearing for hearing is again a matter of fact to be judged by enforcing courts. However, the courts generally have considered mere shortness not to be by itself a violation of due process under Art. V(1)(b), as short time limits are regarded as a common feature in arbitration proceedings, the speed of arbitration playing a central function in the effectiveness of international arbitration.⁴⁰ Thus, the Swiss⁴¹ and Italian Courts of appeal,⁴² for example, have held that a request to appoint an arbitrator within seven days does not amount to a denial of due process under Art. V(1)(b). The same conclusion was also reached by the Italian Supreme Court in respect of time limit of 12 days.⁴³ Similarly, a time limit of 15 days for an appointment to be made and a time limit of 48 hours allowed to invoke the inferior quality of the goods were held by an Italian Court of Appeal not to be a violation of due process.⁴⁴

5.4.4 Disclosure of the Arbitrator's Name

It to be observed that the concept of proper notice is not limited to the issues of lack of notice and untimely notice, but extends to such matters as disclosure of the names of arbitrators.⁴⁵ Thus, in an exceptional case the German Court of Appeal found lack

⁴⁰ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 304; van den Berg, 'Consolidated Commentary' (2003) 655; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 150; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26- 83; Garnett and others, *International Commercial Arbitration* 105.

⁴¹ *Dutch Seller v Swiss Buyer* (Switzerland Court of Appeal 1971) 310.

⁴² *Carters Ltd v Francesco Ferraro* 276.

⁴³ *SpA Nosegno e Morando v Bohne Friedrich & Co* 280.

⁴⁴ *Renault Jacquinet v Sicea* 286.

⁴⁵ See, P Sanders, 'Consolidated Commentary'(1979) IV YBCA 231 at 248; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 305-6; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* pp 151-52; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-85.

of proper notice in failing to disclose the name of the arbitrators to be serious enough to justify refusal of enforcement of an award under Art. V(1)(b). In this case, the award was made under the Arbitration Rules of the Copenhagen Grain and Food Stuff Trade Association, which allowed no disclosure of the names of actual arbitrators to the parties, instead giving them the right to delete undesirable names from the list of arbitrators presented by the institution in advance. Since the award was signed only by the president of the institution's arbitration committee, the parties were not given a chance to ascertain whether or not undesirable people had been appointed as arbitrators. The rationale of this provision was that the persons on the list of arbitrators were members of a small circle of professionals acting in the same industry, who regularly do business with each other. If name of the arbitrator is known to a party in the same trade, this may tempt the party to seek to influence the arbitrator. Nevertheless, the German Court of Appeal declined to enforce the award, finding that the parties' right to know the arbitrators' names and the right to challenge them are fundamental to a fair trial. The Court therefore considered the above deprivation of such right to be a violation of the principle of due process and refused enforcement of the award.⁴⁶

5.4.5 The Language of Notice

The concept of "proper notice" may also cover the issue of the language of the notice, such as where, for example, the request for arbitration proceedings is drafted in a foreign language. Where a Japanese defendant asserted that the notice sent to it was written in Chinese with no Japanese translation, and CIETAC (i.e. the Chinese Arbitration Commission) had never arranged for Chinese legal attorneys for the defendant. Consequently, the defendant argued that the award should be vacated for violation of Art. V(1)(b), but the Japanese District Court rejected this objection, holding that the parties had agreed to CIETAC arbitration, and Art. 75(10) of the Arbitration Rules stipulated that the language of the arbitration should be Chinese, unless otherwise agreed between the parties. In the absence of evidence that the parties had expressly agreed to a language of arbitration other than Chinese, and relying on the fact that the contract was written in Chinese and English, the Court

⁴⁶ *Danish Buyer v German Seller* (1979) IV YBCA 258 (Germany Court of Appeal 1976) pp 259-60.

concluded that the parties had agreed to conduct the arbitral proceedings in Chinese.⁴⁷ Likewise, the Swiss Court of Appeal has found that drafting a request for arbitration in a foreign language does not constitute a breach of due process.⁴⁸

5.5 Inability to Present One's Case

5.5.1 General

The broad wording "... or was otherwise unable to present his case" laid down in Art. V(1)(b) was adopted by the drafters of the NYC upon a proposal of the Dutch delegate (Prof. P Sanders).⁴⁹ Basically, this provision aims to cover any serious unfairness in the arbitral proceedings other than lack of proper notice, and to establish the principle of an equal right to be heard, taking into consideration the possibility that, although notice had been given in adequate time, the respondent might have been unable to appear before the arbitral tribunal due to a cause beyond reasonable control (e.g., government action, refusal to grant a visa, war, fire, explosion, flood, etc) or, when appearing before the tribunal, he might have not been given an adequate opportunity to present his case.⁵⁰

A clear interpretation of the defence that a party "was unable to present his case" is furnished by the US Court of Appeal in *Generica Limited v Pharmaceutical Basics INC*:

[T]hat defense basically corresponds to the due process defense that a party was not given the opportunity to be heard at a meaningful time and in a meaningful manner. ... Therefore, an arbitral award should be denied or vacated if the party challenging the award proves that he was not given a meaningful opportunity to be heard as our due process jurisprudence defines it. ... It is clear that an arbitrator must provide a fundamentally fair hearing. ... A fundamentally fair hearing is one that meets the

⁴⁷ *Seller (China) v Buyer (Japan)* (Japan District Court 1999) pp 517-18.

⁴⁸ *NZ v I* (1992) XVII YBCA 581 (Switzerland Court of Appeal) 583.

⁴⁹ UN Doc. E/CONF. 26/SR.23 at 15.

⁵⁰ P Sanders 'The New York Convention' in P Sanders (ed) *International Commercial Arbitration* (the Hague 1960) vol II, 293 at 315, cited in van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 306.

minimal requirements of fairness - adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. (citations omitted)⁵¹

However, it may be important to stress again that the standards of fair hearing in international arbitration are not to be judged exactly according to the enforcing court's national standards of what amounts to a fair hearing. Rather, the enforcing court should take into account the private nature of international arbitration and its practices of fairness when considering the required standards of due process. Thus in *Parsons & Whittemore Overseas Co INC v Societe Generale de L'industrie du Papier (Rakta)* the US Court of Appeal states:

By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights - including that to subpoena witnesses - in favor of arbitration 'with all of its well known advantages and drawbacks.'⁵²

More pertinently, the US Supreme Court in *Grand Medical PC v New York State Insurance Department*, observes that:

The procedural safeguards required by due process are flexible and vary with the circumstances and type of proceeding. Arbitration is intended to be a more efficient and less expensive alternative to dispute resolution than a formal court procedure. To achieve this goal, arbitrators are permitted to provide relief without observing all of the rules that the court would be bound to. (citations omitted)⁵³

Equally, the Hong Kong Court of Final Appeal in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* expressly held that it is critical, in approaching the question whether there has been a violation of due process, to take into account the fact that the parties agreed to submit their disputes to arbitration under the CIETAC Arbitration Rules and the PRC Arbitration Law. "The fact that the parties agreed to

⁵¹ *Generica Ltd v Pharmaceutical Basics Inc* pp 1129-30.

⁵² *Parsons & Whittemore Overseas Co v RAKTA* .

⁵³ *Grand Medical PC v New York State Insurance Department* 787 NYS2d 613 (US Supreme Court NY Sup 2004) 615. Similarly, *Hoteles Condado Beach v Union De Tronquistas Local* 763 F2d 34 (US Court of Appeals 1st Cir 1985) 38.

procedures which differ from those which would ordinarily apply in Hong Kong is a circumstance of which the Court must take account".⁵⁴

5.5.2 Default by a Party

It is important to bear in mind that the requirements of due process are generally considered to be satisfied where each party has been given an opportunity to present and explain his case and evidence, regardless whether or how he actually makes use of that opportunity. So if a party refuses to appear before the tribunal, after being given proper notice, or if he refuses to participate or remains inactive in the arbitration procedures after being granted an equal opportunity to present his side, he is generally considered to have deliberately forfeited the opportunity. Indeed, a party cannot simply refuse to participate in proceedings so as to obstruct the arbitration. Thus, the inability to present one's case under Art. V(1)(b) cannot in general result from a party's own conduct. In other words, a party who fails to appear for a hearing or to present his case at any stage of the proceedings, cannot without extraordinary circumstances plead that he was unable to present his case in order to resist enforcement of an award pursuant to Art. V(1)(b). This principle has been generally confirmed by commentators⁵⁵ and courts.⁵⁶ For example, in *Minmetals Germany GmbH v Ferco Steel Ltd*, a defendant opposed enforcement of an award rendered in China on the basis that it had been denied an opportunity to present its case. The English Commercial Court rejected this defence, finding that although the arbitrators had not acted in accordance with Art. 53 of the CIETAC rules (i.e. the *lex arbitri*) on fairness and reasonableness in making the first award, the Beijing court had ordered a resumed hearing and the respondent not taken this opportunity to challenge the

⁵⁴ *Hebei Import & Export Corp v Polytek Engineering Co Ltd* 692.

⁵⁵ See, eg. Dicey, Morris and Collins, *Conflict of Laws* 639; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 16; van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 306; Garnett and others, *International Commercial Arbitration* 105; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-88; G Soo, 'International Enforcement of Arbitral Awards'(2000) 11 *Intl Comp & Comm L Rev* 253 at 255.

⁵⁶ See, eg. *Biotronik Mess-Und Therapiegeraete GmbH & Co v Medford Medical Instrument Co* pp 140-41; *German Ruyer v English Seller* (Germany Court of Appeal 27 Jul 1978) 267; *Geotech Lizenz AG v Evergreen Systems Inc* 697 FSupp 1248 (US District Court ED NY 1988) 1253; *Fitzroy Engineering Ltd v Flame Engineering Inc* 1994 WL 700173 (US District Court ND Illinois 1994) pp 5-6.

evidence relied on by the arbitrators at the first hearing. It had to be concluded that it was clear that the respondent failed to avail itself of the opportunity given to it to present its case. The Court concluded that:

[t]he inability to present a case to arbitrators ... contemplates at least that the enforcer has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcer has, due to matters within his control, not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not ... bring himself within that exception to enforcement under the Convention. In the present case that is what has happened.⁵⁷

The same principle has been also confirmed by a US district court in *Fitzroy Engineering Ltd v Flame Engineering Inc*. In this case, a respondent contended that it was unable to present its case pursuant to Art. V(1)(b) because Bell Gully (its legal representative) had an apparent conflict of interest. The Court rejected this allegation, finding that:

Having received proper notice of the pending arbitration proceedings, (the respondent) failed to appear to present its case. As noted above, (the respondent) has failed to show that it did not appear at Bell Gully's urging or even that Bell Gully's counsel had anything to do with (the respondent)' failure to appear. A party cannot fail to appear at a proceeding, offer no satisfactory explanation for its absence, and then expect to prevent enforcement of the resulting award on the grounds that it was unable to present its case.⁵⁸

These cases show that inability to present the case as ground for resisting enforcement under the NYC is to be narrowly interpreted, so as to embrace only an inability caused by matters outside the party's control, and not to include an inability caused by a party's own failure to take advantage of an opportunity properly given to him.

Having seen how the defence of inability to present a case should be generally construed, it may be appropriate to address some examples of specific issues which are often invoked in practice under the defence of the inability to present one's case.

⁵⁷ *Minmetals Germany GmbH v Ferco Steel Ltd*.

⁵⁸ *Fitzroy Engineering Ltd v Flame Engineering Inc* 6.

5.5.3 Denial of the Right to Introduce Evidence

Under the principle of due process, each party must be given a reasonable opportunity to argue his case by adducing evidence on fact and law. Thus, it might amount to a ground for challenging enforcement of an award on the basis of a denial of due process, if the arbitrator did not give a party the chance to adduce his evidence to the arbitral tribunal. Yet, such defence is proven to be rarely successful in practice.

An example of an unsuccessful attempt to use this defence can be seen in the *Ukrvneshtrom State Foreign Economic Enterprise v Tradeway Inc* case, where the respondent asserted that the arbitrator had refused to hear and consider relevant material and evidence it had presented. The US District Court did not agree with the respondent's assertions, holding that the award had been carefully reviewed and no such determination was reflected in it. The Court went on to state that the defendant also chose not to follow the applicable procedures, and thus had no claim of being denied an opportunity to present its evidence in a meaningful manner.⁵⁹ Another example can be found in the *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd* case, where the respondent sought to resist an award rendered in Geneva being enforced in England, arguing that he had been unable to present his case because the arbitrator had refused to hear oral evidence and only held a short hearing to take closing submissions from both sides. However, the English Commercial Court found that all the witnesses both sides wished to call had been heard on two separate days by the first arbitrator, who took notes of the evidence. After the second arbitrator was appointed, no request for supplementary evidence was made by either party, nor did either advance new contentions of fact regarding the substance of the case. The Court quoted the following findings of the Second arbitrator:

In the case in question the facts of the main issue have already been examined in detail by the first arbitrator, then by the Court of Justice of Geneva and the Swiss Supreme Court. Before the undersigned arbitrator, the Parties waived their right to submit new evidence. The procedure on the main issue is therefore so advanced that from the point of view of procedural economy and the efficiency rule that characterises the

⁵⁹ *Ukrvneshtrom State Foreign Economic Enterprise v Tradeway Inc* 5.

arbitration process, postponement of the decision on the merits to a later stage cannot be justified

And

In a Procedural Order of 28 October 1991, the Arbitrator considered that he had sufficient knowledge of the decisive facts and rejected the Defendant's request for the re-hearing of the whole matter. The Parties having not required the taking of new evidence, it therefore clearly appeared that, because of the nature of the issues to be determined as they resulted from the Parties written pleadings and exhibits and minutes filed in this matter, starting the hearing of the case afresh would have been a pointless measure and contrary to the Arbitrator's duty to proceed with diligence and to settle disputes referred to him.

The Court entirely agreed with the approach of the arbitrator, concluding that there was nothing in the suggestion that respondent was unable to present its case, and hence there was no violation of due process ground on which the enforcement of the award could be refused. Thus it rejected the objection and confirmed the leave to enforce the award.⁶⁰ In the same way, many US Courts have confirmed the principle that "an arbitrator is not bound to hear all of the evidence tendered by the parties ... as long as he give each of the parties an adequate opportunity to present its evidence and arguments".⁶¹

On the other hand, an example of a successful defence to enforcement based on denial an opportunity to introduce evidence can be seen in the *Iran Aircraft Industries v Avco Corp* case held by a US court of appeals. In this case, the court found that a dispute between Iranian and American parties was submitted to the Iran-US Claims Tribunal for binding arbitration. In order to save time and cost, the Tribunal allowed during the pre-hearing conference voluminous and complicated evidence of invoices to be presented through summaries, tabulations, charts, graphs or extracts prepared by independent audit. Later a new arbitrator was appointed who did not accept the ex-arbitrator's method of presenting proof, and when he questioned the respondent's proof produced by the early method, he never informed the respondent that the early

⁶⁰ *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd* [1999] 2 Lloyd's Rep 222 (UK QBD Com Ct) pp 225-26.

⁶¹ See, eg, *Generica Ltd v Pharmaceutical Basics Inc* 1130; *Mary Decker Slaney v The International Amateur Athletic Federation* 244 F3d 580 (US Court of Appeals 7 Cir 2001) 592; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 300.

method of producing proof is no longer accepted. Thus, the respondent was not made aware that the Tribunal now required the actual invoices to substantiate its claim. Having led the respondent to believe it had used a proper method to substantiate its claim, the Tribunal then rejected that claim for lack of proof. The US Court of Appeals concluded that, by misleading the respondent, the tribunal denied it the opportunity to present its case in a meaningful manner, so that it was “unable to present its case” within the meaning of Art. V(1)(b), and enforcement of the award was therefore denied.⁶²

5.5.4 Denial of the Right to Hear the Other Party’s Argument or Evidence

Under the principle of due process, each party must be given a reasonable opportunity to hear the argument and evidence of his opponent. Failure to comply with this requirement may render enforcement of the award subject to challenge under Art. V(1)(b). An unsuccessful example of such defence is provided by the *Hebei Import & Export Corp v Polytek Engineering Co Ltd* case, where an award was rendered in China in favour of a buyer, who was then granted leave to enforce the award in Hong Kong by the enforcing court. The seller appealed to the Court of Appeal to set aside that leave on the ground that it did not have the opportunity of hearing what was presented to the chief arbitrator by the buyer’s employees during the inspection of the goods, since it had not been notified of that inspection, and hence was not able to present its side of the case. The Court of Appeal found it is quite clear as a matter of fact that the seller was not able to present its side of the case, since it did not have the opportunity of hearing what was presented to the chief arbitrator by the plaintiff’s employees during the inspection. Thus, the Court allowed the appeal and set aside the leave to enforce.⁶³ Yet, that decision was in turn set aside by the Court of Final Appeal. This Court insisted that, in approaching the question whether the seller was unable to present its case due to its inability to hear what was said during the inspection, the fact that the parties agreed to arbitration under CIETAC Arbitration Rules and the PRC Arbitration Law must be taken into account. Consequently, the parties had agreed to procedures that differ from those which would ordinarily apply

⁶² *Iran Aircraft Industries v Avco Corp* 980 F2d 141 (US Court of Appeals 2nd Cir 1992) pp 145-46.

⁶³ *Hebei Import & Export Corp v Polytek Engineering Co Ltd* 300.

in Hong Kong. The Court felt that although it was true that the seller did not attend the inspection because it had not been notified of it, in all the circumstances it could not be said that it had been unable to present its case. This is because the Court found the seller was given a copy of the experts' report which followed the inspection, and an opportunity to deal with it, and thus was in a position to explore the significance of what had happened. However, the seller never indicated that it wished to contest any part of the report, or to call its own expert witnesses, or to question the experts, or present a case that goods were capable of appropriate modification. It simply proceeded with the arbitration as if nothing improper had happened.⁶⁴

5.5.5 Denial of the Right to Controvert Other Party's Argument or Evidence

The inability of a party to present his case also covers the fact that he has been denied the right to controvert or comment on the other party's argument or evidence. Again, in practice, such defence are rarely successful. For example, in confirming the enforcement of an ICC award made in Zurich, a German court of appeal has rejected an objection that the defendant had been given no opportunity to react to a claim for compensation for the period subsequent to 29 October 1992, which claim was made for the first time in a late-filed statement by the claimant on 31 October 1995. The Court dismissed the defendant's allegation of violation of due process, finding that it was clear that the issue referred to in the statement was discussed in the course of the arbitral proceedings, and the defendant has undoubtedly been given the opportunity to comment on the late-filed statement and thereby compel the arbitral tribunal to examine the possibility of a new hearing.⁶⁵

With respect to the right of cross-examination, in *Generica Ltd v Pharmaceutical Basics Inc* a respondent alleged that the arbitrator denied it due process when it limited the cross-examination of the plaintiff's witness. The US District Court rejected this objection, finding that the limitation of cross-examination by the arbitrator did not deprive the respondent of a fair hearing, since the right to cross-examine is not absolute and the due process defence to enforcement of arbitral awards

⁶⁴ *ibid* 692.

⁶⁵ *X (Syria) v X* (Germany Court of Appeal 1998) 668.

must be narrowly construed.⁶⁶ The Court of Appeals affirmed the lower Court's conclusion, finding that "The arbitrator's curtailment of cross-examination of (the witness) was not such a fundamental procedural defect that it violated our due process jurisprudence and therefore the New York Convention".⁶⁷

On the other hand, an example of an unusual successful defence to the enforcement of a foreign award based on denial of the right to comment on other party's argument and evidence is provided by the decision of a Dutch court of first instance. In this case, the respondent argued that Art. V(1)(b) had been violated because the arbitral tribunal violated due process by not allowing it to react to evidence submitted in the arbitral proceedings. The Court upheld the objection, finding that the arbitral tribunal allowed the plaintiff to submit new documents without giving the respondent the opportunity to comment thereon either orally or in writing. Consequently, the Court found the tribunal had violated the fundamental right to contradictory proceedings in this case to the respondent's disadvantage. The Court therefore denied enforcement of the award.⁶⁸ The Dutch Court of Appeal confirmed the lower Court' decision.⁶⁹

5.5.6 Adjournment to Introduce Evidence

An allegation that the arbitral tribunal has refused to postpone the arbitration hearing because a witness for the respondent was unable to appear at the given time has generally been held not to be a violation of the principle of due process.⁷⁰ For example, in the famous case of *Parsons & Whittemore Overseas Co INC v Societe Generale de L'industrie du Papier (Rakta)* the losing party argued that there was a violation of due process in the arbitral tribunal denying it an adequate opportunity to present its case, in particular by refusing to delay proceedings so that one of its witnesses, who was temporarily unavailable, could be heard. The US Court of Appeal

⁶⁶ *Generica Ltd v Pharmaceutical Basics Inc* pp 4-6.

⁶⁷ *Generica Ltd v Pharmaceutical Basics Inc* pp 1129-31.

⁶⁸ *Rice Trading Ltd v Nidera Handelscompagnie BV* 732.

⁶⁹ *ibid* 734.

⁷⁰ See, eg, *Parsons & Whittemore Overseas Co v RAKTA* 976; *Glencore Ltd v Agroden SA de CV* 36 FedAppx 28 (US Court of Appeals 2nd Cir 2002). See also, van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 309.

rejected the argument, holding that the inability of a party to produce its witnesses before the arbitral tribunal at the due time is a risk inherent to arbitration. By submitting to arbitration, a party waives his courtroom rights, including that of witness summons. Thus, the alleged obstacle that the losing party's key witness was prevented from attending the hearing before the tribunal due to a prior commitment to lecture at an American university was one could not be taken into account in order to postpone the arbitration proceedings as a matter of fundamental fairness to the losing party. The Court also held that the losing party cannot protest that the tribunal reached its decision without considering its witness that is critical to its defence because the tribunal had already heard before them an affidavit from the witness in question. The Court concluded that:

The arbitration tribunal acted within its discretion in declining to reschedule a hearing for the convenience of an Overseas (respondent) witness. Overseas' due process rights under American law, rights entitled to full force under the Convention as a defense to enforcement, were in no way infringed by the tribunal's decision.⁷¹

Similarly, the Italian Supreme Court has affirmed the Court of Appeal's finding that a failure by the arbitral tribunal to grant a further postponement for hearing a respondent witness was not a violation of due process under Art. V(1)(b).⁷²

5.5.7 Inability to Participate for Reasons outwith a Party's Control

A party may oppose enforcement of an award on the ground that he has been prevented from participating in the arbitration process by reasons out of his control, and he thus was unable to present his case in terms of Art. V(1)(b). Yet, once more this kind of allegation has proved in general to be unsuccessful in practice. For example, in *Consorcio Rive SA De CV v Briggs Of Cancun Inc* an American respondent objected to enforcement of an award made in Mexico on the ground that Mexican criminal proceedings had been initiated against its representative, who was therefore precluded, by fear of arrest, from entering Mexico to participate in the arbitration. Thus, the respondent concluded that it was unable to present its case

⁷¹ *Parsons & Whittemore Overseas Co v RAKTA* 976.

⁷² *Dalmine SpA v M & M Sheet Metal Forming Machinery AG* 713.

pursuant to Art. V(1)(b). The US District Court rejected this objection, holding that the respondent had ample opportunity to participate in the arbitration by alternative means, such as sending other representatives or its attorney, or having the individual in question participate by telephone. The Court concluded that fear of arrest and extradition do not constitute an inability to attend an arbitration hearing.⁷³ This decision was later affirmed by the US Court of Appeals.⁷⁴ Similarly, a US district court in *National Development Com v Adnan M Khashoggi* held that the defendant's decision not to attend arbitration proceedings in England, because he was afraid of being taken into custody for extradition to face criminal charges in the United States, did not constitute inability to attend the proceedings.⁷⁵

In another case, a Russian respondent objected to enforcement of an award rendered in Stockholm on the ground that there was a breach of Art. V(1)(b) because he was unable to appear in the final arbitral hearing in Stockholm, due to of problems with entry visas. The Russian District Court dismissed this allegation as unfounded.⁷⁶

A quite unusual objection can be seen in *Mangistaumunaigaz Oil Production Association v United World Trade Inc*, where the respondent resisted enforcement of an award under Art. V(1)(b), asserting that it had not been permitted to participate fully in the arbitration proceedings due to their excessive cost. The US District Court found the defendant's assertion without merit, "especially giving the extensive litigation expenses that the respondent has clearly expended in attempting to keep this litigation in its home court". The Court further held that "if this Court was to accept the argument, that where litigation is expensive a party has established that it was unable to present his case, it would be difficult to imagine when this defense would not exist". Finally, the Court found that the defendant refused to participate in the arbitration, instead choosing to defend its position through letters and correspondent to arbitral tribunal, so that the respondent could not argue it has received no notice of

⁷³ *Consorcio Rive SA De CV v Briggs Of Cancun Inc* 797; *National Development Com v Adnan M Khashoggi* 781 FSupp 959 (US District Court SD NY 1992) 962.

⁷⁴ *Consorcio Rive SA De CV v Briggs of Cancun Inc* 82 FedAppx 359 (US Court of Appeals 5th Cir 2003) 364.

⁷⁵ *National Development Com v Adnan M Khashoggi* 962.

⁷⁶ *Paul Wurth v V/O Tyazhpromexport* (1998) XXIII YBCA 738 (Russia District Court 1996) p 740-41.

the appointment of the arbitrator or the arbitral proceedings. The Court consequently found the respondent was able to present its case, but chose not to.⁷⁷ It is very important that the high cost of arbitration be held not to render a party to be “unable to present his case” pursuant to Art. V(1)(b), since parties freely refer their disputes to arbitration, and thus they should be aware of its costs in advance.

5.6 Estoppel/Waiver

Raising an objection timeously is an essential duty of the parties. This may imply that objection based on the violation of due process should be made first to the arbitral tribunal during the arbitration itself, if the relevant facts were known to the party objecting. Otherwise, an enforcing court might consider such party as has waived his right of such objection and thus estop him from raising it later at the stage of enforcement of the arbitral award. It is submitted that the justifications behind this approach are to avoid undermining the effectiveness of international arbitration and, in particular, to not breach the central purpose of the NYC of promoting enforcement of foreign awards. To allow a party to raise a complaint for the first time at the stage of enforcement of the award would be as unfair as the permitting deficiencies of due process in the arbitral process.⁷⁸ This approach may be reinforced where parties are allowed to apply to the court during the arbitration to remove an arbitrator for lack of impartiality⁷⁹ or misconduct⁸⁰ and no such application has been made.⁸¹

The above approach of waiver has been confirmed in several court decisions.⁸² For example, a US district court in *La Societe Nationale Pour La Recherche v Shaheen Natural Resources Co Inc* declared:

⁷⁷ *Mangistaumunaigaz Oil Production Association v United World Trade Inc* (1999) XXIV YBCA 806 (US District Court D Colorado 1997) 810.

⁷⁸ See, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-89; Garnett and others, *International Commercial Arbitration* 107; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 158.

⁷⁹ eg, English Arbitration Act 1996, s.24(1)(a); UNCITRAL Model Law of 1985, Art. 12(2).

⁸⁰ eg, English Arbitration Act 1996, s. 24(1)(d).

⁸¹ Garnett and others, *International Commercial Arbitration* 107.

⁸² See, eg, *Imperial Ethiopian Government v Baruch-Foster Corp* 535 F2d 334 (US Court of Appeal 5th Cir 1976); *La Societe Nationale Pour La Recherche v Shaheen Natural Resources Co Inc* 585

[The defendant] had an opportunity to contest the invocation of the arbitration provision clause at the time that the panel held its hearing. Its failure to do so before the ICC panel waives this ground.⁸³

The Court went on to conclude that:

To deny recognition and enforcement to the arbitration award ... at this stage (of enforcement) would be to violate the goal and the purpose of the Convention, that is, the summary procedure to expedite the recognition and enforcement of arbitration awards. [The defendant] had an opportunity to raise its objections to the arbitration proceedings before the panel and did not do so. ... Thus, the defendant's motion to dismiss is denied, and the arbitration award is hereby confirmed.⁸⁴

The above decision was then affirmed by a US Court of Appeals.⁸⁵

However, the principle of waiver was rejected by a Hong Kong high court in the *Paklito Investment Ltd v Klockner East Asia Ltd* case. In this case, the plaintiff argued that the Court should exercise its discretion to permit enforcement, even if it was satisfied that a ground for non-enforcement had been made out, relying on the fact that the defendants had taken no steps to set aside the award before the court of the arbitration seat, and this failure was a factor upon which the Court could rely. Nevertheless, the Hong Kong High Court disagreed, stating:

There is nothing in s. 44 nor in the New York Convention which specifies that a defendant is obliged to apply to set aside an award in the country where it was made as a condition of opposing enforcement elsewhere. ... (thus) the defendants were entitled to take this stance. It is clear ... that a party faced with a Convention award against him has two options. Firstly, he can apply to the courts of the country where the award was made to seek the setting aside of the award. If the award is set aside then this

FSupp 57 (US District Court SD NY 1983) 64; *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* 225; *AAOT Foreign Economic Association (Vo) Technostroyexport v International Development and Trade Services Inc* 139 F3d 980 (US Court of Appeal 2nd Cir 1998) 982.

⁸³ *La Societe Nationale Pour La Recherche v Shaheen Natural Resources Co Inc* 64.

⁸⁴ *ibid* 65.

⁸⁵ *La Societe Nationale Pour La Recherche v Shaheen Natural Resources Co Inc* 733 F2d 260 (US Court of Appeals 2nd Cir 1984)

becomes a ground in itself for opposing enforcement under the Convention.⁸⁵

The High Court therefore affirmed the decision to refuse enforcement of the award on the ground that the defendants were denied a fair and equal opportunity of being heard which constituted a serious breach of due process.⁸⁷

5.7 If Violation of Due Process has no Effect on the Arbitration Result?

It may be thought important to consider the question as to whether the enforcing court might exercise its discretion to enforce an award if the decision of the arbitration tribunal would have been the same in the absence of a serious breach of due process? The permissive word used in the opening paragraph of Art. V(1) of the NYC: "enforcement of the award *may* be refused ..." might indicate that the enforcing court still has marginal discretion in some circumstances to enforce the award even if the non-enforcing grounds are proven to be existing. Thus, it seems to be accepted, at least in theory as Prof van den Berg has earlier stated, that:

Only if it is beyond any doubt that the decision could have been the same, would a court be allowed to override the serious violation (of due process). A court before which enforcement of a Convention award is sought may ... not go further as this would amount to an extensive examination as to how an arbitrator would have decided if the violation had not occurred. The latter would yield to a review of the merits of the arbitral award which is excluded under the Convention.⁸⁸

This principle has been accepted by a Hong Kong Court of first instance in *Apex Tech Investment Ltd v Chuang's Development*. Although the Court found that there had been an irregularity in arbitration procedures which prevented the defendant from presenting its case before the tribunal, it exercised its discretion to order enforcement of the award on the basis that on the materials before it, the result of the arbitration could not have been different even if the opportunity to be heard had been granted. Yet, the Hong Kong Court of Appeal, while agreeing with the principle upon which

⁸⁶ *Paklito Investment Ltd v Klockner East Asia Ltd* 48.

⁸⁷ *ibid* 50.

⁸⁸ van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 302.

the lower Court had acted in exercising its discretion, noted that that the lower court should meticulously avoid any consideration of the merits of the award. The Court of Appeal went on to conclude that it could not be said that, if the defendant had been given the opportunity to make further representations to the arbitral tribunal, it could have not affected the outcome of the case. Therefore, it allowed the appeal and refused to grant enforcement.⁸⁹ Similarly, a Dutch court of appeal rejected the principle that if violation of due process has no effect on the arbitration result, the court should still enforce the award, reasoning that answering such a question would lead to an examination of the merits of the award, which has no place in the proceedings for obtaining enforcement of an arbitral award.⁹⁰

Yet, a distinction between the public policy and other grounds on the underlying question has been made by a Hong Kong court of appeal in *Hebei Import & Export Corp v Polytek Engineering Co Ltd*. In this case, the party opposing enforcement alleged that there had been a breach of natural justice since it had been denied an opportunity to present its case during inspection of goods and there was apparent bias as communications had been reviewed in its absence, whereas the winning party argued that even if the court was satisfied that the due process had been violated, it still had a discretion to enforce the award, and should indeed do so since the result of the arbitration could not have been affected, as the inspection did not affect the tribunal's determination. The Court held that while s.44 of the Hong Kong Arbitration Ordinance (implementing the NYC) uses the word "may",⁹¹ which indicates that the court is granted a discretion to order enforcement even if a Convention ground is proved, this does not mean that such discretion could come into play in relation to all of the grounds. The Court distinguished between the public policy and other grounds, suggesting that a court should not exercise its jurisdiction to order enforcement if it was contrary to public policy to enforce an award. On the other hand, in the case of breach of the other grounds the court could still exercise its discretion and enforce an award, if it took the view that the decision of the arbitration tribunal would have been the same in any event. The Court concluded that, in the present case, it would be

⁸⁹ *Apex Tech Investment Ltd v Chuang's Development* [1996] 2 HKLR 155 (Hong Kong Court of Appeal 1996) pp 158-59.

⁹⁰ *Rice Trading Ltd v Nidera Handelscompagnie BV* 734.

⁹¹ Hong Kong Arbitration Ordinance of 1997, s.44(2).

difficult to say that the result would have been the same if the defendant had been properly enabled to present its case before the tribunal. The burden to satisfy the court that this was so rested on the party seeking enforcement.⁹²

In the light of the foregoing considerations, it may be accepted in theory that the enforcing court may be entitled to order enforcement of an award, regardless of a violation of due process if such violation has no effect on the arbitration decision. But, in practice, the courts appeared to be very cautious and hesitant in deciding that the result would be the same if the violation had not occurred, and consequently in exercising their discretion to confirm enforcement. This hesitant attitude seems to be caused by the conflict between two important interests: the requirement of equal and fair treatment in arbitral procedure on the one hand, and the need to deal with enforcement sensibly and realistically in a practical way rather than theoretical considerations. Yet, it would seem to make no sense to refuse enforcement, if it is beyond a shadow of a doubt that breach of due process would have not affected the outcome of the arbitration. Allowing such discretion in such circumstance should ensure the efficient function of international arbitration and serve, in particular, the general pro-enforcement bias manifested in the NYC.

5.8 The Position in Saudi Arabia

As has been seen above, the violation of due process as a ground for resisting enforcement under Art. V(1)(b) is considered essentially according to the standards of due process of the forum in which enforcement is sought. Thus, it may be thought important to outline at the outset the requirements of due process during the arbitration proceedings under Saudi Laws and *Shari'ah* provision.

5.8.1 The Requirements of Due Process under the Saudi Arbitration Law

Generally speaking, arbitral procedure in SA is quite informal due to the fact that the SAL contains no provision in connection with arbitral procedure. Besides, the final

⁹² *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1998] 1 HKLRD 287 (Hong Kong Court of Appeal 1998) pp 300-1.

text of the SAL has omitted the proposed provision that “arbitrators shall hear the dispute according to the procedures followed by the Authority originally competent to hear the dispute”. Having omitted this provision in the final text, the legislators apparently intended to maintain the generally prevailing informality as practised in arbitration proceedings in SA.⁹³

The IRSAL however gives some guidance as to the requirement of the principle of fair trial throughout the arbitral proceedings. Accordingly, its Art. 36 provides:

The arbitration panel shall observe the principles of litigation, so as to include confrontation in proceedings, and to permit either party to take cognizance of the claim proceedings, to have access to its material papers and documents in reasonable periods of time, and to give him a sufficient opportunity to present his documentation, defences and contents in the hearing, either orally or in writing and to record them in the minutes.⁹⁴

Although the words “shall observe the *principles of litigation*” might lead one to think that arbitrators are required to conduct the arbitral proceedings in compliance with the civil procedure rules, this is however not the case, because the following words of the provision plainly give a further explanation of what is meant by that phrase, in an attempt to include only the most fundamental rights of natural justice to ensure that a reasonable opportunity must be given to each party to enable him to present his case throughout the arbitration proceedings. This can be further supported by the provision of Art. 39 of the IRSAL which lays down that:

The arbitrators shall issue their awards without being bound by legal procedures, except as provided for in the arbitration regulations and its rules of implementation.⁹⁵

The above provision plainly frees in general the arbitral tribunal from any formal procedure required by the civil procedure rules.

5.8.2 The Requirements of Due Process under Shari’ah Law

⁹³ See, Turck, 'Saudi Arabia' 18.

⁹⁴ IRSAL of 1985, Art.36.

⁹⁵ *ibid* Art. 39.

The above requirement of the due process under Art. 36 of the IRSAL is essentially based upon the Shari'ah rules where the requirement of fair trial is of particular significance. Although, under the *Shari'ah* law, there is no formal mandatory requirement concerning the structure of the arbitral hearing, the *Shari'ah* provision requires the tribunal to conduct the arbitral proceedings in compliance with the fundamental rules of natural justice. The Shari'ah lays generally great stress upon twin principles of fair trial to be observed by arbitrators from the very outset of the arbitration. They are as the following:

5.8.2.1 First: Treating Parties in Equal Manner

The first main principle is that of effecting strict equality of treatment for both parties, regardless of their social or economic status or any other state of difference between them. Equality should be maintained from the very beginning of the proceedings to the announcement of the verdict. No priority should be given to anyone (except possibly travellers who may be harmed by undue delay or to women, eg, required to stay at home for nursing baby). The parties should be treated equally in all aspects of the arbitration, including seating and speaking. Their confidence must be maintained. They must have a feeling of equality and fairness whilst presenting their case.⁹⁶ This obligation is basically based upon the fact that the concept of Justice in Islam is extremely important and it is something which the judge and arbitrator must apply in all matters without exception. Justice means to give each the right he deserves: Muslim or non-Muslim, relative or stranger, friend or enemy. This principle is emphasized by many verses of the *Qur'an* and *Hadith*. The *Qur'an* generally enjoins that:

O you who believe! Stand out firmly for Allah as just witnesses, and let not enmity hatred of a people incite you not to act equitably; act justly, that is nearer to piety, and be careful of (your duty to) Allah; surely Allah is Aware of what you do.⁹⁷

⁹⁶ See, Ibn Qudamah, *Al-Mughnai* vol 13 pp 577-82; Ibn Qasim, *Haashiyat Alrrawd* vol 7, 526. See also, N Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah'(2004) 20 (1) Arb Intl 97 at 106.

⁹⁷ *The Qur'an, Al-Maidah* [5: 8].

The *Qur'an* similarly enjoins:

O you who believe! Be persistently standing firm for justice, witnesses for Allah's sake, even though it be against yourselves, or your parents, or your relatives, whether one is rich or poor, Allah is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you avoid justice; and if you distort (your witness) or decline to (give it), verily, Allah is Ever Well-Acquainted with what you do.⁹⁸

The *Qur'an* also confirms the justice condition by stating that "Verily! Allah commands that you should render back the trusts to whom they are due; and that when you judge between people, you judge with justice";⁹⁹ "And if you judge, judge with justice between them. Verily, Allah loves those who act justly".¹⁰⁰

In addition, prophet Mohamed (PBUH) has frequently put significant emphasis on the obligation of fair trial in many occasions. By way of one example, He held that:

The doers of justice will be on pulpits of light at the right side of Merciful, Exalted and Glorious, and both of Allah's Hands are Right Hands. (the doers of justice are) those who were just in their ruling, with their families and in all that over which they were given authority.¹⁰¹

In Particular, Prophet Mohamed (PBUH) expressed further details that form the essence of the *Shari'ah* natural justice in the trial. He states that "Whoever is put to the ordeal of judging between Muslims, let him then be justice between them in his expression, gesture, looking and seating, and not to raise his voice against one of the party more than then the other".¹⁰² In addition, Omar Ibn Al-khattab,¹⁰³ according to his judicial instructions letter sent to one of his judges, enjoins the judge to adopt fair

⁹⁸ *ibid An-Nisa* [4: 135].

⁹⁹ *ibid Al-Nisa* [4: 58].

¹⁰⁰ *ibid Al-Maeda* [5: 42].

¹⁰¹ Reported by Muslim, *Sahih Muslim* (in Arabic) no 1827; A Ibn Hanbal, *Musnad Al-Imam Ahmad bin Hanbal* (in Arabic) no 6632; M Ibn Hibban, *Sahih ibn Hibban* (in Arabic) no 4561; A Al-Bayhaqi, *Al-Sunan Al-Kubra* (in Arabic) no 18515.

¹⁰² Reported by A Al-Bayhaqi, *Al-Sunan Al-Suqra* (in Arabic) no 3284; Al-Bayhaqi, *Al-Sunan Al-Kubra* no 18796; A Al-Ddarqutni, *Sunan Al-Ddarqutni* (in Arabic) no 3909.

¹⁰³ The Second Caliph of Islam (b. 581, d. 644)

attitudes toward the parties. He, in particular, stated that “and treat the parties equally in your court and in your regard, so that the noble shall not aspire to your partiality, nor the humble despair of your justice”.¹⁰⁴

5.8.2.2 Second: Hearing both Parties

The second principle is to allow both parties to be heard. So, the judge or arbitrator is bound under the *Shari'ah* provision to give equal opportunity to both parties to present their case. In this regard, the Prophet Mohamed (PBUH) sent Ali ibn Abi Talib¹⁰⁵ to be a judge in Yemen and said to him that:

Oh Ali, When two litigants sit in front of you, do not decide till you hear what the other has to say as you heard what the first had to say; for it is best that you should have a clear idea of the best decision.¹⁰⁶

Also, it is reported that a man has came to Omar Ibn Al-khattab to complain against somebody who had knocked out his eye, but Omar said to him that: “bring your opponent (first before me) ... as you might have knocked his both eyes”.¹⁰⁷

This means that the judge or arbitrator is obliged under the *Shari'ah* provision to give each party a fair opportunity to put its case as well as to rebut the case made against him. Consequently, the judge or arbitrator is not authorized to make a decision without having given such opportunity to both parties. Yet, if one of the parties has been given a proper chance to present his case but he refuses to participate in arbitration, the hearing may however take place and the tribunal has the power to proceed in arbitration and passed its award according to the majority of Muslim scholars.¹⁰⁸ This is because of the fact that the obligation upon the tribunal to allow to parties to present their respective cases corresponds to the obligation upon the parties

¹⁰⁴ Reported by Al-Ddarqutni, *Sunan* no 3914; Al-Bayhaqi, *Al-Sunan Al-Kubra* no 18872.

¹⁰⁵ The fourth caliph of Islam (b. 598, d. 661).

¹⁰⁶ Reported by Ibn Hanbal, *Musnad* no 868; Abu Daoud, *Sunan* no 3164; A Al-nnasai, *Al-Sunan Al-Kubra* (in Arabic) no 7192; Al-Hakem, *Al-Mustadrak* no 7125.

¹⁰⁷ Reported by A Ibn Hazm, *Al-Muhalla bi Al-Athar* (Dar al-Kutub al-ilmiyah, Beirut 'in Arabic' 'in Arabic') vol 8, 436.

¹⁰⁸ See, eg, Ibn Qudamah, *Al-Mughni* vol 13 pp 633-34; Ibn Hazm, *Al-Muhalla* vol 8, 434; Ibn Qasim, *Haashiyat Alrrawd* vol 7 p 557.

to follow the rules of conduct in proceedings in good faith, and thus indulging in dilatory tactics by the parties is not tolerated.¹⁰⁹ Giving each party a fair opportunity to be heard is an important aspect of natural justice, but, in contrast, allowing one of the parties (typically the respondent) to employ the right to be heard for the purpose of dilatory tactics would defeat the natural justice itself and the efficient functioning of the arbitration process too.

5.8.3 Case Law

The next crucial question to be clarified is what the attitude of Saudi enforcing courts toward the application of the violation of due process as a non-enforcement ground under Art. V (1)(b) of the NYC? Do the Saudi courts, like most other national courts, construe Art. V(1)(b) narrowly so as to accept the objection of violation of due process only in serious cases?

In a case brought before a Saudi enforcing court (the 25th Subsidiary Panel),¹¹⁰ an application was made by a foreign claimant to enforce a ICC award in SA. The Saudi respondent objected to enforcement on the grounds that the award had been made through proceedings that were not in compliance with the procedural rules of the Board of Grievances (the Saudi competent court). He further argued that the award was rendered in default, as no notices for the arbitral hearings have been given to it nor to its lawyer. But, the claimant produced documents to prove the respondent and its lawyer were continually given notices for all arbitral proceedings from the beginning by registered mail. The respondent replied that notices by registered mail were not sufficient since they did not contain his signatures.¹¹¹ The Court however rejected the respondent's objections, holding that registered mails were sufficient to assume that the losing party was properly informed. The Court went on to hold that the respondent's allegation that such document is not sufficient as a proof of proper notice, was considered to be a frivolous allegation and tactic to delay enforcement of the award with no legal justification. Thus, the respondent was duly summoned and

¹⁰⁹ See, Majeed, 'Good Faith' 107-108.

¹¹⁰ the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 14/7 H (1996).

¹¹¹ *ibid* pp 3-4.

given a proper opportunity to defend its case before the tribunal and to adduce evidence in support of its case, but had intentionally or through recklessness missed the opportunity given to it. The Court also dismissed the respondent's objection that the award has been made through proceedings not in compliance with the procedure rules of the Board of Grievances (the Saudi competent court). The Court therefore granted leave for enforcement of the award.¹¹² The Saudi respondent then appealed before the appeal court (the 2nd Review Committee) from the lower Court decision, but the Review Committee dismissed the appeal and affirmed the leave of enforcement of the foreign award.¹¹³

In another case, a foreign plaintiff submitted a request before a Saudi enforcing court (the 18th Subsidiary Panel)¹¹⁴ to obtain enforcement of a foreign award in SA, but the Saudi respondent objected the enforcement on several grounds, one of which was that the award was rendered in default and the plaintiff had failed to prove that the respondent had been properly informed about the award. The Court rejected the respondent's objection, holding that, according to the documents produced by the plaintiff, the award was not rendered in default and the respondent was informed about the award by diplomatic means.¹¹⁵ The lower Court's decision was later affirmed by the Appeal Court (the 4th Review Committee).¹¹⁶

The above cases illustrate the Saudi Courts' refusal to dismiss an arbitral award on the basis of violation of due process, as they interpret this ground narrowly in favour of enforcement of foreign awards. The first case makes it clear that non-compliance with civil procedure rules in arbitral proceedings constitutes no breach of due process. It also demonstrates that, unless a party proves otherwise, serving notice by registered mail is sufficient to assume that he has been duly summoned, without need to have his signature on the receipt returned back to the sender. It further makes it clear that if a party, who is duly notified of the arbitration proceedings, fails to appear at a hearing without valid excuse, such default would form no serious violation of the principle of

¹¹² *ibid* pp 7-8.

¹¹³ the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997).

¹¹⁴ the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003).

¹¹⁵ *ibid* pp 3, 5.

¹¹⁶ the 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004).

the due process and would not lead to refusal of enforcement of an award under Art. V (1)(b) of the NYC.

The unsuccessful attempts to oppose enforcement of foreign awards under the provision of Art. V (1)(b) in SA, as mentioned above, shows that such opposition would appear to have a very limited chance of success, which reflects the Saudi Courts' friendly attitude towards the enforcement of foreign arbitral award. This positive trend adopted by the Saudi Courts is consistent with the common tendency of other national courts of construing the defence of Art. V(1)(b) narrowly in an attempt to accept a violation of due process, as resisting ground of enforcement, in serious cases only, which at the end fulfils the NYC pro-enforcement policy. Therefore, it can be concluded the violation of due process defence of Art. V(1)(b) does not constitute a serious threat to the enforcement of foreign awards in SA or other contracting States, since such defence is found to be rarely successful in practice.

5.9 Conclusion

The violation of due process is, according to the prevailing view, judged under the national law of the enforcing court. Yet, what is considered as a violation of due process under domestic law is not necessarily so in cases falling under the NYC, as the latter is limited to serious irregularities. The courts may also take into account the law governing the arbitration (i.e. *lex arbitri*). The latter is followed by Saudi courts.

It is generally accepted that violation of due process under Art. V(1)(b) may also be raised under the public policy provision of Art. V(2)(b). Nevertheless, by listing the violation of due process under the defences of Art. V(1), the framers of the NYC apparently intended to exclude this violation from the defences to be recognised under Art. V(2) (i.e. public policy).

The lack of proper notice defence is often invoked in practice, but the courts generally insist on only a grave lack of proper notice, such as actual lack of notice or notice being received after the award had been rendered, which rarely occur in arbitration practice. Also, it is generally accepted that the notice need not to be in the particular

form required under the domestic laws, in order to be deemed adequate. The same position is adopted by Saudi courts.

The courts generally have considered the shortness of time limits for arbitral proceedings not to be by themselves a violation of due process under Art. V(1)(b), as speed is a central function in international arbitration.

The wording "or was unable to present his case" covers any serious breach of the principle of due process or fair trial in arbitral proceedings, which is different from the lack of proper notice. This defence is regularly invoked in practice as where the defendant, for example, alleges that he was denied a proper chance to put his case and evidence before the arbitral tribunal, or to hear the argument and evidence submitted by other party, or to hear and rebut an expert report, or was unable to participate in arbitration for reasons outwith his control. Yet, such defences have generally been dismissed by the courts, except in cases of serious irregularity.

It is generally accepted that the inability to present a case cannot in general result from a party's own conduct. So, if a party, who is duly notified of the arbitration proceedings, fails to appear at hearing without valid excuse, such default would form no serious violation of due process under Art. V (1)(b). The same concept is adhered to by Saudi courts.

Some courts take the view that objections based on the violation of due process should be made first during the arbitration itself, if the relevant facts were known to the party objecting. Otherwise, he may be estopped from raising this defence later at the stage of enforcement of the arbitral award.

Some courts also are of the opinion that a court could still exercise its discretion and enforce an award if it is certain that the decision of the arbitral tribunal would have been the same in the absence of serious violation of due process.

The non-enforcement ground of Art. V(1)(b) creates no serious obstacles in the way of enforcement of foreign awards in contracting Countries including SA.

CHAPTER SIX

Excess of Jurisdiction

6.1 Introduction

The third ground for recourse against enforcement of a foreign arbitral award under Art. V of the NYC turns on the issue of jurisdiction scope. As has been seen, an arbitral tribunal, unlike a court, lacks authority to resolve a particular dispute unless the parties have conferred that authority by agreement, since international commercial arbitration is essentially consensual. This fundamental principle is adopted by the NYC and most national and international laws, so that enforcement of a foreign award is subject to denial if the award goes beyond the scope of the parties' submission to the arbitration. Thus, Art. V(1)(c) of the NYC provides that enforcement of an arbitral award may be refused if the resisting party proves that:

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 recognised and enforced.¹

Several issues related to the abovementioned ground are discussed in this chapter: first, the scope of application of Art. V(1)(c); secondly, determining the scope of disputes submitted to arbitration; thirdly, *extra petita* (i.e. the award falls outside the scope of the arbitration agreement); fourthly, *ultra petita* (i.e. some parts of the award fall outside the scope of the arbitration agreement); fifthly, partial enforcement; finally, the position in SA on such issues.

6.2 The Scope of Art. V(1)(c)

¹ NYC of 1958, Art. V(1)(c).

It has been observed that it is becoming increasingly common in practice for the parties resisting enforcement of foreign awards to raise the issue of jurisdiction as a first line of defence, arguing either that there was no valid arbitration agreement or that the tribunal has exceeded its jurisdiction.² However, one should note that Art. V(1)(c) does not address the situation where the whole jurisdiction of the arbitral tribunal is disputed because of the lack of a valid arbitration agreement. The invalidity of the arbitration agreement is, as already seen,³ governed by Art. V(1)(a). By contrast, Art. V(1)(c) assumes that there is a valid arbitration agreement, but the arbitral tribunal has either (i) acted beyond its authority by rendering an award dealing with a dispute or disputes not submitted to it (*extra petita*), or (ii) has exceeded its mandate in some respects but not all (*ultra petita*).⁴ In this context, the English Commercial Court in *Dardana Ltd. v Yukos Oil Co*⁵ suggested that s 103(2)(d) of the Arbitration Act⁶ (which implements Art. V(1)(c)) did not extend to the situation in which there has been no agreement at all, but rather applied only to the situation in which there has been an undoubtedly valid arbitration agreement, and something had gone wrong thereafter.

For the foregoing observations, it may be concluded that Arts. V(1)(a) and V(1)(c) are similar in nature, the latter complementing the former,⁷ because in both Articles the ground of refusal is concerned with the jurisdiction of the arbitrator. Nevertheless, there is still an essential difference between them, in the sense that under Art. V(1)(a) a party is allowed to attack the arbitration itself on the ground that it is based upon invalid or inexistent agreement to arbitrate, whereas Art. V(1)(c) does not allow a party to attack the arbitration itself, as there is a valid agreement to arbitrate, but

² See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 464.

³ See, *supra* Ch 3.

⁴ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 312; van den Berg, 'Consolidated Commentary' (2003) at 656; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-91; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* pp158-59; Merkin, *Arbitration law* para 19.54.

⁵ *Dardana Ltd v Yukos Oil Co* [2002] 1 Lloyd's Rep 225 (UK QBD Com Ct) para 20-22. See also, Merkin, *Arbitration law* para 19.54.

⁶ English Arbitration Act 1996, s.103(2)(d).

⁷ Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1700.

rather to attack the outcome of arbitration, in the shape of a declaration that the award contains decisions in excess of the terms of the submission to arbitration.

Another question which should be addressed is whether Art. V(1)(c) applies to an award in which the arbitral tribunal has not settled all matters submitted to it by the parties (known as an incomplete award or an award *infra petita*). Where a party resisted enforcement on the ground that the arbitral tribunal had not decided all the points submitted to it, the Luxembourg Court of Appeal dismissed the objection, holding that:

This ground, even if established, could not hinder the recognition (and enforcement) of the awards, as an *infra petita* decision is not sanctioned by the New York Convention.⁸

It can be suggested that this decision is correct and that an award *infra petita* should not lead to a refusal of enforcement under the NYC. This approach would be based on the well-settled principle that the available grounds for refusing enforcement of foreign arbitral awards under the NYC are exhaustively listed in Art. V, and grounds from other laws can not be invoked as a basis for resisting enforcement.⁹

A further related issue to be noted is that Art. V(1)(c) is not to be extended to cover procedural violations, such as where the arbitrators are alleged to have relied on evidence not led before them, or where arbitrations are wrongfully consolidated, since such matters are covered by Art. V(1)(b).¹⁰ Likewise, Art. V(1)(c) does not address errors of law, such as where the arbitral tribunal is alleged to have failed to apply the substantive law chosen by the parties,¹¹ since the judicial review of a foreign award on its merits for an error of law or fact is, in principle, not allowed as such grounds are not included in the grounds for refusing enforcement listed exhaustively in Art. V, and we have seen that this provision is strictly interpreted.

⁸ *Kersa Holding Co v Infancourtage* (1996) XXI YBCA 617 (Luxembourg Court of Appeal 1993) 625. See, in general, van den Borg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 320-21.

⁹ See, supra Ch 2 para 2.2.

¹⁰ See, *Minmetals Germany GmbH v Ferco Steel Ltd*; Davidson, *Arbitration* 394; Merkin, *Arbitration law* para 19.54.

¹¹ See, *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [2003] HKEC 511 (Hong Kong Court of First Instance 2003) paras 46-47; Merkin, *Arbitration law* para 19.54.

Finally, it may be thought interesting, at least theoretically, to mention that although the expression “submission to arbitration” is used in Art. V(1)(c), this does not mean that the provision is intended to be limited to submission agreements (i.e. referring existing disputes to arbitration) and does not cover arbitration clauses (i.e. referring future dispute to arbitration). Art. V(1)(c) is applicable to both submission agreements and arbitration clauses. This interpretation is clearly supported by the French text of Art. V(1)(c) which refers to ‘a difference not contemplated by the submission agreement or not falling within the terms of the arbitration clause’.¹² Moreover, as will be seen below, Art. V(1)(c) has been applied in practice to both kinds of arbitration agreement, and no court has suggested otherwise.

6.3 Determining the Scope of Disputes Submitted to Arbitration

It may be worth observing that both the present question (i.e. whether or not a certain matter is covered by the terms of the arbitration agreement) as well as the question of arbitrability are commonly included under the general heading of ‘the scope of arbitration agreement’. Yet, the present question should be distinguished from that of arbitrability, since the latter concerns the position of both the applicable law and Art. II(3) of the NYC as to whether or not they allow the subject matter of the dispute to be resolved by arbitration. By contrast, the present question concerns the position of the parties as to whether or not they agreed that certain disputes will be settled by arbitration. Therefore, it may be suggested that it might be more accurate to limit the use of the phrase ‘the scope of arbitration agreement’ to the question whether or not a certain matter was submitted by the parties to arbitration according to their agreement, while using phrase ‘the scope of arbitration’ without the word ‘agreement’ to cover both the present question and the question whether a certain dispute is arbitrable.

Generally speaking, the arbitral tribunal derives its jurisdiction, competence and authority from the agreement of the parties to submit their disputes to arbitration, since arbitration, unlike litigation, depends upon the contract between the parties. As a consequence, there is an obligation upon the arbitral tribunal to settle only the disputes falling within the scope of its jurisdiction as granted by the parties’

¹² See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 314-15.

agreement.¹³ If it does not, there is a risk that the award may be refused enforcement by the enforcing court according to the provisions of Art. V(1)(c).¹⁴ While, it is increasingly accepted by national legislations that an arbitral tribunal has power to determine the scope of its own jurisdiction,¹⁵ the arbitral tribunal's decision on its jurisdiction is nonetheless subject to review by the enforcing court.¹⁶

Therefore, it is necessary for the enforcing court, when dealing with an objection based on Art. V(1)(c), to examine the precise terms of the arbitration agreement to determine whether or not a particular claim or claims have been submitted by the parties to be resolved by the arbitral tribunal. Yet, the intention of the parties as to the scope of the disputes submitted to arbitration tends to be more obvious in the case of a submission agreement than in the case of an arbitration clause. When the arbitration agreement takes a form of arbitration clause (referring future dispute to arbitration), it is often drafted in general terms and sometimes in a very short form (e.g. 'disputes arising out of this contract shall be resolved by arbitration'), due to the fact that the parties do not yet know the nature and circumstances of their dispute, since it has not arisen yet.¹⁷ Therefore, the mandate of the arbitral tribunal may, in certain cases, be narrowed or extended if the parties explicitly or tacitly agree to submit to arbitration matters that are narrower or wider than the scope of the actual arbitration clause.¹⁸ On the contrary, determining the matters submitted to arbitration is usually much easier where the arbitration agreement takes the form of a submission agreement. In such a case, the arbitration agreement is usually lengthy and tends to detail the claims being

¹³ See, in general, Sutton and Gill, *Russell on Arbitration* 374; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 260; *Minmetals Germany GmbH v Ferco Steel Ltd*, in which the English Commercial Court held that "the question whether the tribunals decision was inside or outside the scope of the submission ... to be defined by reference to the issues to be resolved by the arbitrators".

¹⁴ See, NYC of 1958, Art. V(1)(c).

¹⁵ See, in general, *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d'Investissements* (1997) XXII YBCA 643 (Belgian Court of Appeal 1997); Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 264; Davidson, *Arbitration* 187; Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 14-12.

¹⁶ See, in general, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 264; Davidson, *Arbitration* 187; Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 14-28.

¹⁷ See, Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* paras 6-3; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 136.

¹⁸ See, van den Berg, 'Consolidated Commentary' (2003) pp 656-57.

submitted to arbitration, because the parties know exactly the circumstances of their dispute, since it already exists.¹⁹

Yet, it may be observed on the other hand, that drafting arbitration clauses in broad terms can help both arbitral tribunals and courts to interpret the scope of the arbitration agreement as widely as possible in favour of the jurisdiction of the arbitral tribunal. Tribunals and courts have correspondingly less discretion to assert jurisdiction in favour of the arbitral tribunal, if the parties drafted their agreement in restricted terms, so as to refer only certain kinds of claims to the jurisdiction of the arbitrator (as under a submission agreement).

Enforcing courts have, in general, been unwilling to differ significantly from the rulings of arbitral tribunals as to the scope of their own jurisdiction. Substantially, a party opposing enforcement of a foreign award has to prove beyond doubt that the award exceeded the arbitral tribunal's jurisdiction.²⁰ Most enforcing courts have invoked, wherever possible, a powerful presumption that arbitral tribunals have acted within the authority granted by the parties' agreement to arbitrate,²¹ rather than seeking to narrow the scope of the arbitration agreement in an attempt to maintain the authority of the court. This due to the fact that arbitration is regarded by most national courts at present time as an appropriate way of resolving international commercial disputes.²² So, a US court of appeal, for example, has held that "we construe arbitral authority broadly to comport with the enforcement facilitating thrust of the Convention and the policy favoring arbitration".²³ Another US court of appeal has referred to,

¹⁹ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 136; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 6-4.

²⁰ See, *Ministry of Defense of the Islamic Republic of Iran v Gould Inc* 969 F2d 764 (US Court of Appeals 9th Cir 1992) 770; *CBS Corp v WAK Orient Power & Light Ltd* 168 FSupp2d 403 (US District Court E.D Pa 2001) 415.

²¹ See, *Parsons & Whittemore Overseas Co v RAKTA* 976; *Management & Technical Consultants SA v Parsons-Jurden International Corp* 820 F2d 1531 (US Court of Appeals 9th Cir 1987) 1534. See also, Born, *International Commercial Arbitration* 850; Soo, 'International Enforcement of Arbitral Awards' at 256; Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' p 21.

²² See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 160

²³ *Management & Technical Consultants SA v Parsons-Jurden International Corp* 1534. Similarly, *Parsons & Whittemore Overseas Co v RAKTA* 976.

[The] general rule, recognized in a Convention case, that whenever the scope of an arbitration clause is in question, the court should construe the clause in favour of arbitration.²⁴

A further US court of appeals has held “that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”. (Citation omitted)²⁵

6.4 *Extra Petita*

The first part of Art. V(1)(c) indicates that it is ground for refusing enforcement if “the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration”. This may be described as an ‘*extra petita*’ because it refers to the situation where the complaining party alleges that the arbitral tribunal has exceeded its authority, and given an award that altogether falls outwith the scope of the arbitration agreement between the parties. It has also been said that this issue is one of “private arbitrability”, as the question whether or not the subject matter of the dispute can be settled by arbitration depends on the private regulation²⁶ of the parties in question, as they may agree to exclude certain disputes from arbitration, although they may be arbitrable under the applicable law. Therefore, this defence applies generally to cases where the arbitral award deals with a matter or matters that were not submitted to arbitration.

However, it is important to reveal that this defence has been pleaded unsuccessfully in most cases,²⁷ largely because the courts believe that Art. V(1)(c), like the other grounds of Art. V, should be construed narrowly, while the arbitration agreement

²⁴ *Ernesto Francisco v Stolt Achievement Mt* 293 F3d 270 (US Court of Appeals 5th Cir 2002) 278. see also, *Sedco Inc v Petroleos Mexicanos Mexican Nat Oil Co* 767 F2d 1140 (US Court of Appeals 5th Cir 1985) 1145.

²⁵ *David J. Threlkeld & Co Inc v Metallgesellschaft Ltd* 923 F2d 245 (US Court of Appeals 2nd Cir) 248.

²⁶ See, Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 159.

²⁷ See, eg, *Jiangxi Provincial Metal and Minerals Import and Export Corp v Sulanser Co Ltd* 551; *Management & Technical Consultants SA v Parsons-Jurden International Corp*; *Avraham v Shigur Express Ltd*. 1991 WL 177633 (US District Court SD NY 1991) 4; *American Construction Machinery & Equipment Corp Ltd v Mechanised Construction of Pakistan Ltd* 659 FSupp 426 (US District Court SD NY 1987) 429; *Canadian National Railway Com v Southern Railway of British Columbia Ltd* (2004) XXIX YBCA 590 (Canada Supreme Court of British Columbia 1998) 592-594; *X (Syria) v X (Germany Court of Appeal 1998)* pp 668-69.

should, on the other hand, be interpreted broadly in accordance with the NYC's general policy of pro-enforcement bias.²⁸ Besides, many objections raised under Art. V(1)(c) have turned out to relate to the merits of the award, whereas enforcing courts have no jurisdiction to re-examine.²⁹ An example of unsuccessful objection can be seen in a case where a German court of appeal rejected a defendant's argument against enforcement on the basis that the arbitrators had rendered a decision in excess of the amount claimed. The court reasoned that the parties had already agreed that any dispute arising between the parties concerning the contract were covered by the arbitration agreement, and accordingly the arbitral tribunal could decide the entire subject matter before it in connection with the underlying contract. Thus, the entire activity of the claimant and the payment due to the claimant in respect thereof were the subject matter of the arbitral proceedings, so that the defendant's objection based on Article V(1)(c) was unfounded.³⁰

This defence also tends to be relied upon where a party seeks to argue that the arbitrator has exceeded his authority because he has awarded damages, although the arbitration agreement agreed upon by the parties expressly excluded this sort of damage.³¹ An unsuccessful example of such a defence comes from the well-known case of *Parsons & Whittemore Overseas Co INC v Societe Generale de L'industrie du Papier (Rakta)*. In this case the respondent pleaded that the arbitral tribunal had granted damages for loss of production, which was in excess of its power, since the

²⁸ See, eg, *Parsons & Whittemore Overseas Co v RAKTA* 976; *Management & Technical Consultants SA v Parsons-Jurden International Corp* 1534; *American Construction Machinery & Equipment Corp Ltd v Mechanised Construction of Pakistan Ltd* 429; *Ministry of Defense of the Islamic Republic of Iran v Gould Inc* 770; *The Ministry Of Defense And Support for The Armed Forces of The Islamic Republic of Iran V Cubic Defense Systems Inc* 29 FSupp2d 1168 (US District Court S.D Cal 1998) pp 1171, 1173.

²⁹ See, eg, *American Pacific Corp v Sydsvensk Produktutveckling AB & Jan Andersson* (2002)XXVII YBCA 551 (Sweden Court of Appeal 2001) 553; *Bank A v Bank B* (2000) XXV YBCA 710 (Germany Court of First Instance 1997) 713; *Parsons & Whittemore Overseas Co v RAKTA* 977; *Fertilizer Corp of India v IDI Management Inc* 517 FSupp 948 (US District Court SD Ohio 1981) pp 958-61.

In contrast, an Italian Court of Appeal had earlier stated that "an Italian judge deciding on the enforcement of a foreign award is not allowed to examine the merits of the decision. However, this principle dose not apply to the examination as to whether the foreign arbitrator has exceeded the limits of the merits to be decided by him, and in particular not to the examination of question pertaining to the arbitrator's competence which have to be examined by the Italian judge in an autonomous and independent manner". See, *General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria v S.p.a SIMER* (1983) VIII YBCA 386 (Italy Court of Appeal 1981) 387.

³⁰ *X (Syria) v X* (Germany Court of Appeal 1998) pp 668-69.

³¹ See, eg, *Fertilizer Corp of India v IDI Management Inc* ; *Parsons & Whittemore Overseas Co v RAKTA* .

contract provided that “neither party shall have any liability for loss of production”. The US Court of Appeal at the outset held that Art. V(1)(c), like other grounds of Art. V, should be construed narrowly, which “would comport with the enforcement-facilitating thrust of the Convention”, so that the resisting party, in invoking Art V(1)(c), must overcome a powerful presumption that the arbitral tribunal acted within its authority. The Court further held that:

Although the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement. (Nor would it be proper for the court to) usurp the arbitrators' role.

The Court therefore rejected the respondent's objection, finding that this clause was a matter of construction of the contract for the arbitrator and that it was not apparent that the scope of the submission to arbitration had been exceeded.³² Similarly, in *Fertilizer Corp of India v IDI Management Inc* a respondent opposed a request for enforcement of a foreign award, arguing that the arbitrators exceeded their power by awarding consequential damages, while the contract between the parties expressly excluded such damages. A US district court stated that without engaging in an in-depth review of the law of contract the court could not state with certainty whether a breach of contract would abrogate a clause which excluded consequential damages. However, it pointed out that “the answer, however, is irrelevant. The standard of review of an arbitration award by an American court is extremely narrow”. Accordingly, the Court rejected the respondent's defence and ordered enforcement of the award.³³

So far, there is only one exceptional case in which enforcement of the award was refused on account of excess of jurisdiction. In that case, it was alleged that the arbitral tribunal had rendered an award on the issue of non-payment, which was not submitted to arbitration, and the phrase ‘or other dispute arising under these contract regulations’ used in the clause was not wide enough to cover claims for non-payment. A Hong Kong high court rejected the respondents' objection, reasoning that,

³² *Parsons & Whittemore Overseas Co v RAKTA* pp 976-77.

³³ *Fertilizer Corp of India v IDI Management Inc* pp 958-61.

The arbitration clause ... was wide enough to cover the dispute. Payment was a crucial element in all contracts for the sale of goods and it was inconceivable that it was intended that quality claims should be arbitrated but that claims for non-acceptance and non-payment should be litigated with all the delay that that would entail in certain jurisdictions.³⁴

Nevertheless, the high court's decision was reversed on appeal. The Hong Kong Court of Appeal gave several justifications, including the following:

(1) the court was not entitled to ignore any ... words (of the arbitration clause), nor was it entitled to write a fresh arbitration clause for the parties on the basis that doing so would render it more efficacious from a business point of view, and enable all disputes arising under one or more of the agreements to be dealt with by the same tribunal. Any presumption that the parties so intended was rebutted by the express language which they had adopted; (2) parties were entitled to provide for restrictive reference ... and ... the courts were only concerned with interpreting the words which the parties chose to use in their contract. A court was often entitled to add to a written contract by implying a term if it was satisfied that reasonable men in the position of the parties would have agreed to it if their attention had been directed to the point and that the term should be implied. But that was supplementing the words which the parties had used - not contradicting them; (3) the arbitrators made their purported awards in excess of jurisdiction.³⁵

For the reasons mentioned above, the Appeal Court allowed the appeal and refused enforcement of the foreign award altogether on the ground of excess of the arbitral tribunal's authority as granted by the arbitration clause.

6.5 *Ultra Petita*

The second part of the ground for refusing enforcement under Art. V(1)(c) concerns a situation in which the tribunal's award partly exceeds its jurisdiction. In such a case, only a part or parts of the award are outside the mandate of the arbitral tribunal, whereas other parts of the award are within the scope of that mandate. This defence, like the other available under Art. V, has been unsuccessfully invoked in most cases. Courts have dealt with this defence in favour of the arbitral tribunal wherever

³⁴ *Tiong Huat Rubber Factory Bhd v Wah Chang International co Ltd* [1991] HKLY 50 (Hong Kong High Court 1990).

³⁵ *ibid*.

possible,³⁶ in the light of the powerful presumption that the tribunal has not exceeded its jurisdiction, but rather acted within its authority.³⁷ For example, in a case before the Luxembourg Court of Appeal, a party resisting enforcement contended that the arbitral tribunal decided *ultra petita*. The court however rejected this contention, holding that:

If founded, this allegation would still not lead to denying recognition of the awards, as the decision attacked can be dissociated from what has been referred to arbitration. However, the allegation is not justified.³⁸

In another case, where arbitrators had been asked to determine the division of an estate, a party alleged, in resisting enforcement, that the arbitrators had not complied with their jurisdiction, in that they had done more than was requested from them, because they have awarded part of the estate to his children. A Dutch court of first instance rejected the respondent's allegation, since it was clear that the respondent himself had requested the arbitrators during the arbitral proceedings to award part of his share of the estate to his children.³⁹

Moreover, in *Fiat S.p.A. v Ministry of Finance and Planning of Republic of Suriname*, the losing party (ONYX) contended that the whole award should be vacated since it exceeded the arbitrator's jurisdiction as part of the award included decisions against a third party (FIAT) who was not a party to the arbitration agreement. A US district court refused to vacate the award whole, holding that the part of the award rendered against resulted from issues properly submitted to arbitration, since Onyx was a party to the arbitration agreement and had participated in the arbitral proceedings.

³⁶ See, eg, *Fiat SpA v Ministry of Finance and Planning of Republic of Suriname* 1989 WL 122891 (US District Court SD NY 1989) 5; *Kersa Holding Co v Infancourtage* 624; *Isaac Glecer v Moses Israel Glecer & Estera Glecer-Nottman* 640. See also, Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 26-93.

³⁷ See, eg, *Parsons & Whittemore Overseas Co v RAKTA* 976; *Management & Technical Consultants SA v Parsons-Jurden International Corp* 1534; *American Construction Machinery & Equipment Corp Ltd v Mechanised Construction of Pakistan Ltd* 429; *Ministry of Defense of the Islamic Republic of Iran v Gould Inc* 770; *The Ministry Of Defense And Support for The Armed Forces of The Islamic Republic of Iran V Cubic Defense Systems Inc* pp 1171, 1173. see also, Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 26-93; Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 21.

³⁸ *Kersa Holding Co v Infancourtage* 624.

³⁹ *Isaac Glecer v Moses Israel Glecer & Estera Glecer-Nottman* 640.

Therefore, the court enforced the part of the award against Onyx, as it was separable from that against concerning FIAT.⁴⁰

6.6 Partial Enforcement

The question arising in *Ultra Petita* objections is whether enforcement of the whole award must be denied or only those parts falling outside the scope of the arbitration agreement? In answering this question, the second half of Art. V(i)(c) declares 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 recognised and enforced.⁴¹

Thus, enforcement of the whole award may be refused where those parts which fall outside the scope of the tribunal's jurisdiction cannot be separated from the parts that are within its power. Yet, partial enforcement of an award, to the extent that it deals with matters within the jurisdiction of the arbitral tribunal, is possible if they are separable from the rest of the award. As a result of its pro-enforcement bias, the NYC attempts at least, if enforcement of the whole award is impossible, to safeguard the parts of the award which have not been tainted by the *ultra petita* objection. The view is taken that such parts have been properly rendered within the arbitrators' authority, and to refuse enforcement of such parts would lead to an undesirable waste of time, money and effort.⁴² The legislative history of the NYC provides further justification. The Indian delegate said, in supporting the provision of the partial enforcement, that:

[I]n a commercial arbitration, the extraneous matter introduced by the arbitrator into the award might be of a very incidental nature. If the enforcing court was not authorized to sever that matter from the remainder of the award and was obliged to refuse enforcement altogether merely

⁴⁰ *Fiat SpA v Suriname S.*

⁴¹ NYC of 1958, Art.V(1)(c).

⁴² See, Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 26-93; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 160.

because a small detail fell outside the scope of the arbitral agreement, the applicant might suffer unjustified hardship.⁴³

The Italian delegate also agreed that:

[I]t would be unfair to refuse enforcement solely because some secondary particulars in the award went beyond the scope of the submission to arbitration. If the proviso (of the partial enforcement) was deleted, the award might be invalidated even by a very minor defect, for example, if the arbitrator had made an unauthorized order as to costs.⁴⁴

A rare example in which the court divided an award into enforceable and unenforceable sections can be seen in a case came before an Italian court. The court found that the parties had agreed to refer non- technical disputes arising out of the contract to local arbitration in Syria and to refer technical disputes to an international arbitration according to the ICC Rules. Disputes arose and the plaintiff resorted to a local arbitration in Syria requesting compensation for the damages resulting from the delay in performance and for the ensuing loss of profits. The defendant opposed the jurisdiction of the local arbitral tribunal in Syria and refused to appoint its arbitrators, alleging that the disputes concerned technical matters which had to be referred to international arbitration under the ICC Rules. The Syrian local tribunal nevertheless proceeded with the arbitration, and made an award in favour of the plaintiff. The plaintiff sought enforcement in Italy, but the Italian Court found that the arbitral tribunal had decided on both non- technical and technical matters. The court therefore granted the award only partial enforcement for the rewards that fell into the jurisdiction of the arbitral tribunal, and denied enforcement of the remaining elements, since separation was possible.⁴⁵

Another application of partial enforcement may be found in practice where the award is made partly against a third party. One example already mentioned above is *Fiat S.p.A. v Ministry of Finance and Planning of Republic of Suriname*. A dispute arose between Onyx and Suriname regarding a supply of goods by Suriname, and ONYX

⁴³ UN E/CONF.26/SR.17 p 9.

⁴⁴ *ibid* pp 9-10.

⁴⁵ *General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria v S.p.a SIMER* pp 386-88.

initiated arbitration proceedings according to the arbitration clause in their contract. The arbitral tribunal rendered its award in favour of Suriname against not only Onyx but also FIAT, which was not a party to the arbitration agreement. Suriname asked a US district court to enforce the award, while Onyx and FIAT applied to vacate it. The Court found that the arbitral tribunal exceeded its authority when it purported to bind FIAT, who was not a party covered by the arbitration agreement. The court therefore vacated part of the award against FIAT, while confirming the remainder against Onyx, as separation was possible. The court reasoned that:

[V]acatur may be granted if the arbitrators “have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.” ... It is usually not within the discretion of the arbitration panel to determine whether a non-signatory to an arbitration agreement should be bound by the arbitrators when that issue is not before the panel.⁴⁶

The court went on to make a distinction between the situation before it and situations where a third party may be bound by the award, in order to counter Suriname’s argument based upon the *DiGhello v* case where another US district court confirmed an award in which the arbitrator awarded against four non-signatory corporations. The Court held that there was a difference between *DiGhello v* and the instant case. In the *DiGhello v* case, the Court had found that the four corporations were DiGhello’s alter egos as they were clearly owned, dominated and controlled by DiGhello, and they therefore executed or directly benefited from the parties’ agreements. The court then noted that the arbitrator may be allowed to extend his jurisdiction when the issues are “inextricably tied up with the merits of the underlying dispute”. More significantly, the Court in *DiGhello v* found that the arbitration agreement itself purported to bind any entities owned by DiGhello. Thus, the arbitral tribunal in *DiGhello v* did not act beyond its power in deciding on the corporations, as they were bound in fact by the arbitration agreement. In the case in question, by contrast, although there were some connection between Onyx and FIAT and they clearly benefited from each other’s business deals, they were not intertwined nor was the connection as close as that

⁴⁶ *Fiat SpA v Suriname* 4.

between DiGhella and his four sub-corporations. Besides, there was no evidence that FIAT intended to be bound by the arbitration clause.⁴⁷

It may be also worth mentioning that the issue whether an arbitrator is allowed to extend his jurisdiction to make an award against a third party who did not sign the arbitration agreement has been "regarded as lying in a borderline zone between the ground for refusal of enforcement as regulated by Article V(1)(c) and the grounds provided by Article V(1)(a)".⁴⁸ Perhaps the non-signatory party might invoke Art. V(1)(a) to resist enforcement of the award by arguing that there is no valid arbitration agreement binding him to the arbitrator's decision, since he was not a party to the arbitration agreement.

A further linked question to be addressed is whether the partial enforcement can be granted when the court finds the other part of the award is unenforceable according to a ground of Art. V other than Art. V(1)(c)? On a literal reading, no ground other than Art. V(1)(c) includes provision for partial enforcement. However, a desirable approach toward this question has been adopted by a Hong Kong high court in a case under Art. V(2)(b) (public policy). In this case, a GAFTA arbitral tribunal rendered an award ordering the Indian defendant (Texuna) to pay damages (in US dollars) for non-delivery of Chinese green mung beans and to return the Indian rupee deposit to the Indian Plaintiff (Agro). The plaintiff sought enforcement of the award in Hong Kong, but proceedings were pending before the Hong Kong Court concerning the alleged kidnapping of a witness in India. By separate proceeding, the plaintiff sought enforcing part of the award concerning the returning of the Indian deposit. The question before the court was whether this severable part of the award could be enforced, although there is no specific reference to separability under the public policy provision of Art. V(2)(b) of the NYC. The high court stated that this was possible by analogy with Art. V(1)(c) of the NYC. The court went on to conclude that:

⁴⁷ *ibid* pp 4-5.

⁴⁸ Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 161.

It would ... be contrary to the whole spirit of the Convention and the Ordinance if enforcement were to be refused in respect of a severable part of an award which has never been in issue.⁴⁹

In supporting its approach, the Hong Kong high court held that its view was consistent with the view of at least two courts in the US. A US district court has declared an ICC award enforceable against a US defendant, with the exception of that portion of the award in which the arbitral tribunal in accordance with a French statute imposed an additional 5% interest p.a. after two months had elapsed from the date of the award. The US court considered this as "penal rather than compensatory and bears no reasonable relation to any damage resulting from delay in recovery of the sums awarded" and therefore contrary to the public policy. Consequently, this part of the award was not capable of enforcement under US law and Art. V(2)(b) of the NYC.⁵⁰

A third connected question is whether a partial enforcement of an award can be requested by the winning party himself. The decision of the Hong Kong high court and the US Domestic Court mentioned above would lend support to the admissibility of such a request. In this regard, Prof van den Berg has stated that:

Such a request may be desirable for example in case where the award contains several decisions of which one or more require a rectification by the arbitral tribunal for arithmetical errors. Pending rectification, a party may have an interest in enforcement of the other decisions in the award without awaiting the outcome of the rectification proceedings.⁵¹

It may be suggested that a party should be not forbidden from requesting partial enforcement, as no reason to the contrary can be discerned under the NYC. Allowing such a request would appear to be consistent with the general policy of the NYC of facilitating enforcement whether entirely or partly.

6.7 The Position in Saudi Arabia

⁴⁹ *JJ Agro Industries Ltd v Texuna International Ltd* (1993) VXIII YBCA 396 (Hong Kong High Court 1992) pp 399-402.

⁵⁰ *Laminoirs-Trefleries-Cableries de Lens SA v Southwire Co & Southwire International Corp* 484 FSupp 1063 (US District Court ND Georgia 1980) 1069. See also, for a similar approach, *JJ Agro Industries Ltd v Texuna International Ltd* pp 401-2.

⁵¹ van den Berg, 'Consolidated Commentary' (2003) 658.

The SAL of 1983 and the IRSAL of 1985 do not indicate that the arbitral award may be challenged or refused enforcement on the ground that the arbitrators have exceeded their jurisdiction, since these provisions allow either party to challenge the award before the court without laying down specific grounds of challenge.⁵² However, such a defence is well known under Islamic jurisprudence and the rules of the Saudi courts. As regards Islamic jurisprudence, there is no disagreement between the Muslim scholars of *Shari'ah* that the authority of the arbitrator comes from the voluntary agreement of the parties to settle their dispute by that arbitrator. Accordingly, the arbitration agreement, like the official appointment of the judge, determines the arbitrator's power regarding the subject matter and the parties to arbitration. Therefore, the arbitrator's award would be, as a general rule, not binding if it contained matters falling outside the disputes submitted to arbitration.⁵³ The Saudi court has also adopted the principle that the arbitral tribunal has to make its award within the limitation of its authority according to the arbitration agreement.⁵⁴

Likewise, the scholars of Islamic Jurisprudence unanimously agree that the arbitral award would not bind a third party who did not agree to arbitrate, but if the third party is one of the owners of a business, he could be bound by an award made against his partner who entered into arbitration.⁵⁵ Art. 1842 of the *Majallah al-Ahkam al-'Adliyyah* (the civil code of the Ottoman Empire of 1876, which was the first codification of the Islamic civil law) states:

⁵² See, Y Al-Samaan, 'The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia'(1994) 9 Arab L Q 217 at 234.

⁵³ See, eg, Z Ibn Nujaym, *AlBahr Alra'iq sharh Kanz Aldaqa'iq* (Dar al-Kutub al-ilmiyah, Beirut 1997 'in Arabic') vol 7 p 41; S Al-Sarkasi, *Al-Mabsout* (Dar al-Kutub al-ilmiyah, Beirut 1993 'in Arabic') vol 16 p 111; Ibn Qudamah, *Al-Mughnai* vol 13 p 629; Ibn Qasim, *Haashiyat Alrrawd* vol 7 p 521. See also, for contemporary scholars, M Al-Sartawy, 'The Scope of Arbitration and the Power of the Arbitrator' (Symposium of Arbitration in Islamic Shariah, Dubi 2001 'in Arabic')pp 9-11; M Aag Beeg, 'Arbitration in Islamic Shari'ah and Islamic Fiqh ' (Symposium of Arbitration in Islamic Shariah, Dubi 2001 'in Arabic')pp 23-24; E Gattarah, *Arbitration in the Light of the Islamic Shari'ah* (Jeddah Chamber of Commerce and Industry Jeddah 1994) 84.

⁵⁴ See, the 4th Review Committee, decision No 33/T/4 dated 1414 H (1994); Al-Ajlan, *Compilation of judicial principles* 58.

⁵⁵ See, O Al-Nashmi, 'International Arbitration and Arbitrating in Islamic Shari'ah' (Symposium of Arbitration in Islamic Shariah, Dubi 2001 'in Arabic') 20; Ibn Nujaym, *AlBahr Alra'iq sharh Kanz Aldaqa'iq* vol 7 p 47; Aag Beeg, 'Arbitration in Islamic Shari'ah and Islamic Fiqh ' 25.

The arbitrator's award is applied and enforced for the litigants who appointed him in a specific matter. His award is not valid for other litigants.⁵⁶

In addition, it is generally accepted by Scholars of Islamic Jurisprudence that if the award contains decisions outside the scope of arbitration agreement, and other within its scope, then the latter are binding and enforceable as far as they can be separated from the rest of the award.⁵⁷

As regards the context of international arbitration, the Circular of the Grievance Board regarding Enforcement of Foreign Judgments and Arbitral Awards of 1405 emphasizes that a foreign award has to be made within the arbitrators' authority according to the arbitration agreement and its conditions in order to be enforceable in SA.⁵⁸

As regards the application of Art. V(1)(c) of the NYC by the Saudi courts, only one case can be found where this defense was raised before a Saudi enforcing court (the 9th Administrative Panel).⁵⁹ In this case, a Saudi defendant alleged, in resisting enforcement of an arbitral award, that the arbitral tribunal acted beyond its authority and included in its award some decisions on a matter of supplying laboratory equipment, which the parties had not agreed to submit to arbitration. The defendant argued that the arbitration agreement referred to arbitration disputes arising under a contract for constructing prefabricated buildings in the university, and made no mention of a contract to supply laboratory equipment. That contract could not be covered by the arbitration agreement, since it was utterly independent and separate from the construction contract. The Dutch plaintiffs argued that under the arbitration agreement construed as a whole the parties authorised the arbitral tribunal not only to settle disputes arising out of the main construction contract, but to deal with sub-disputes emerging from subcontracts for supplying laboratory equipment. The

⁵⁶ Majallah al-Ahkam al-Adliyyah of 1876, Art. 1842.

⁵⁷ See, eg, Ibn Nujaym, *AlBahr Alra'iq sharh Kanz Alduqa'iq* vol 7 pp 45-47. See also, for contemporary scholars, Al-Nashmi, 'International Arbitration and Arbitrating in Islamic Shari'ah' 20; Al-Sartawy, 'The Scope of Arbitration and the Power of the Arbitrator' 11; Aug Beog, 'Arbitration in Islamic Shari'ah and Islamic Fiqh' 25; Gattorah, *Arbitration in the Light of the Islamic Shari'ah* 85.

⁵⁸ the Circular of the Grievance Board regarding Enforcement of Foreign Judgments and Arbitral Awards, no 7 dated 15/8/1405 H (1985), Art. 5.

⁵⁹ the 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997).

plaintiffs added that the defendant had participated in the arbitration in relation to disputes arising from both contacts and had not raised this jurisdictional objection during the arbitral proceedings. They argued that this should be deemed as a new agreement or a modification of the scope of the original agreement so as to embrace disputes arising under both contacts. The Saudi Court interpreted the arbitration agreement and the parties' attitudes during the arbitral proceedings broadly and concluded that all disputes in connection with these contracts fall into the scope of arbitration agreement, so that the decision on damages for breach of the contract to supply laboratory equipment did not exceed the authority of the arbitral tribunal. Thus the Court refused the Saudi respondent's objections and granted leave to enforce the award.⁶⁰

The above-mentioned case illustrates that the Saudi Court has construed arbitration agreements broadly, in order to confer the widest possible jurisdiction on arbitrators. This attitude is plainly consistent with the approach adopted by most national courts of the contracting States that the party resisting enforcement has to prove beyond any doubt that the award exceeded the arbitrator's jurisdiction, otherwise there is a powerful presumption the arbitral tribunal has acted within its authority granted by the arbitration agreement. This case might also show implicitly that the Court deemed the defendant has waived his right to rely on a jurisdiction issue as a refusal ground at the stage of enforcement since he failed to raise it previously, in particular, at the stage of the arbitration procedures.

No case has yet arisen in which a Saudi court has granted partial enforcement of a foreign award according to Art. V(1)(c). However, like the Hong Kong and US courts, in several cases the Saudi courts have granted partial enforcement of foreign awards under the public policy defence (i.e. Art. V(2)(b)).⁶¹ For example, a Saudi enforcing court (the 25th Subsidiary Panel) has granted leave to execute an ICC award, except for the decision of bank interest, which the court considered to be contrary to the *Shari'ah* Islamic rules (i.e. Saudi public policy).⁶² In this case,

⁶⁰ *ibid* pp 3, 8, 10, 12-13.

⁶¹ See, the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996); the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997); the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003); the 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004).

⁶² the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996).

although Art. V(2)(b) includes no provision for partial enforcement, the Saudi court granted partial enforcement in respect of those parts of the award which were not contrary to the Saudi public policy, and did not accept the defendant's motion to refuse enforcing the whole of the award.

6.8 Conclusion

From the discussions in this chapter, it has been seen that Art. V(1)(c) is concerned with the situation where the arbitral tribunal has exceeded its authority in all or some decisions of the award. It does not deal with the situation in which the whole jurisdiction of the tribunal is disputed because of the lack of a valid arbitration agreement, as such an issue is covered under Art. V(1)(a). Likewise, Art. V(1)(c) does not concern issues of procedural violations nor error of law. An incomplete award is not bar to enforcement under Art. V(1)(c) nor under any other grounds of Art. V of the NYC. Regardless of the use of the expression "submission to arbitration", Art. V(1)(c) applies to both kinds of arbitration agreements (i.e. submission agreements and arbitration clause).

The question whether a certain dispute was submitted to arbitration is determined essentially according to the terms of the agreement of the parties to arbitrate. It is also generally accepted that the arbitral tribunal has power to determine the scope of its own jurisdiction, which however subject to review by the enforcing court if the arbitral tribunal is alleged to exceed its authority. Yet, courts have generally construed the arbitration agreement broadly to confer, wherever possible, the widest jurisdiction for the arbitrators, as there is a general presumption that the arbitrators have acted within their granted power.

The first part of Art. V(1)(c) covers a situation where the whole award deals with matters not submitted to arbitration, whereas the second part concerns the situation in which a part (but not all) of the award dealt with matters fall out of the submission to arbitration. Both defences have been proven to be rarely successful, as Art. V(1)(c), like the other grounds of Art. V, is to be interpreted narrowly and should not lead courts to re-examine the merits of the awards to comport with the facilitating policy of enforcement under the NYC.

Like most national courts, the Saudi Courts interpret arbitration agreements broadly in favour of the tribunal's jurisdiction, and construe the defence of jurisdiction narrowly. Thus it has repelled an objection that a foreign award contained some issues falling outside the arbitrators' authority.

Art. V(1)(c) provides the enforcing court with discretion to grant partial enforcement as respects those parts falling within the scope of the tribunal's jurisdiction if they can be separated from that outside its jurisdiction. Partial enforcement might be applied to other grounds of Art. V by analogy with Art. V(1)(c). This has been applied by several national courts including the Saudi courts.

CHAPTER SEVEN

Defective Composition or Procedural Irregularity

7.1 Introduction

Under its Art.V(1)(d), the NYC lays down the fourth ground for refusing enforcement of foreign arbitral awards. It provides, like most modern international and national arbitration laws,¹ that enforcement of foreign arbitral awards may be refused if the arbitral procedure including the composition of the arbitral tribunal deviated from the will of the parties or the law of the seat of arbitration. Accordingly, Art.V(1)(d) states that enforcement of a foreign award may be declined if the aggrieved party can prove that:

The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.²

Accordingly, this chapter will start with (1) general observations regarding Art.V(1)(d). It will then discuss (2) the unpopularity of Art.V(1)(d), (3) the difference between Art.V(1)(d) and Art. V(1)(b), (4) the applicable law under Art.V(1)(d), (5) the scope of the autonomy of the parties, (6) criticisms of Art.V(1)(d), (7) irregularities in the composition of the arbitral tribunal, and (8) irregularities in the arbitral procedure. (9) Finally, the position in Saudi Arabia regarding the underlying issues will be examined.

7.2 General Remarks

Although Art.V(1)(d), on the face of it, establishes two separate non-enforcement grounds in the shape of irregularities; (a) the composition of the arbitral tribunal and

¹ See, eg, UNCITRAL Model Law of 1985, Art.36(1)(a)(iv); European Convention on International Commercial Arbitration of 1961, Art.LX(1)(d); English Arbitration Act 1996, s.103(1)(e).

² NYC of 1958, Art.V(1)(d).

(b) the arbitral procedure. These two grounds are relatively close, because the question of the composition of the tribunal is a kind of procedural matters, which emerges at the beginning of the arbitral proceedings. Thus, specifically mentioning the issue of the composition of the tribunal separately from the arbitral procedure under Art. V(1)(d) indicates that the NYC pays particular attention to defective composition of arbitral tribunals.

7.3 The Unpopularity of Art. V(1)(d).

It may be worth mentioning, as a preliminary point, that Art. V(1)(d) is not as frequently resorted to as the other grounds of Art. V.³ A number of reasons may be advanced for this:

(Firstly), in an effort to advance the goals of the convention, courts will often be very sceptical of broad-based assertions of bias, not raised before the arbitral panel itself, but subsequently raised to block enforcement of the award. Courts may even characterize these attempts as made in bad faith.⁴ (Secondly), the agreement on the arbitral procedure is usually embodied in Arbitration Rules of a specific arbitral institution, which generally affords wide discretionary power to arbitrators as to the conduct of the arbitral procedure. It is therefore rare that the arbitral procedure has not been conducted in accordance with the agreement of the parties.⁵

A third reason may be added is that as far as an irregular procedure may be confused or overlapped with a lack of due process, the party contesting enforcement would usually rely on Art.V(1)(b) (violation of due process) or Art.V(2)(b) (breach of public policy) which may appear to be more effective than Art. V (1)(d).⁶

7.4 The Difference between Art. V(1)(d) and Art. V(1)(b)

³ Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 22; Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 26-95; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 163.

⁴ D Richard, 'Enforcement of Foreign Arbitral Awards under the United Nations Convention of 1958: A Survey of Recent Federal Case Law'(1987) 11 *Maryland J Intl L & Trade* 13 at 32 ; Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 22.

⁵ van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 323.

⁶ See, supra Ch 5 para 5.3.

It may also be important to note that an overlap between Arts. V(1)(b) and V(1)(d) may frequently arise, since both articles relate to alleged procedural breaches in arbitral proceedings. Notwithstanding this close relationship, there is an important distinction between them that should be borne in mind. Art. V(1)(b) deals in particular with breach of basic standards of due process (e.g. procedural fairness or fair hearing), as applied in the country of the enforcing court. By contrast, Art. V(1)(d) focuses on non-compliance with aspects of arbitral procedure other than due process, which are agreed upon by the parties or, failing such agreement, laid down by the law of the seat of arbitration, even if such regularities do not constitute a violation of due process. Consequently, an award which may not be challenged under Art. V(1)(d) may yet offend against the fundamental requirements of due process. For example, if the agreement of the parties provides that one of parties has no right to be heard or to put his case, or that the names of the arbitrators will not be disclosed to the parties, this is unquestionably contrary to the essential requirements of due process, and thus Art. V(1)(b) or even V(2)(b) may be invoked against enforcement of an award resulting from such a case.⁷

7.5 The Applicable Law

Under the Geneva Convention of 1927, the composition of the arbitral tribunal and the arbitral procedure were required to be in compliance with both, in the same time, the agreement of the parties and the law of the country where the arbitration took place. Therefore, enforcement might be refused under the Geneva Convention if the arbitral award resulted from an arbitral procedure which offended against the law of the seat of the arbitration, even if that procedure were agreed upon by the parties. This essentially meant that the parties were unable to agree on a procedure which conflicted with the law of the seat of the arbitration.

This is not the case under the NYC. Its Art. V(1)(d) goes along a way towards establishing the domination of the autonomy of the parties over the law of the

⁷ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 298, 301; Born, *International Commercial Arbitration* 833 fn 83; G Kaufmann-Kohler, 'Identifying and Applying the Law Governing the Arbitration procedure - The Role of Law of the Place of Arbitration' (ICCA Congress Series no 9 Paris 1998) 337.

arbitration seat with regard to the composition of the arbitral tribunal and the arbitral procedure. In this regard, the drafters of the NYC intended to reduce the impact of the law of the country where the arbitration was held on the arbitration procedure when enforcement of foreign awards is sought.⁸ Accordingly, after extensive debates at the NYC conference, Art. V(1)(d) came to lay down that:

The composition of the arbitral authority or the arbitral procedure was not in accordance *with the agreement of the parties*, or, *failing such agreement*, was not in accordance *with the law of the country where the arbitration took place*. (emphasis added)⁹

This provision obviously establishes two alternative rules, which embody a compromise between those delegates who wanted the arbitral procedure to be subject to the law of the seat of arbitration, and those who desired to free the parties to arbitration from any national law.¹⁰ It can be seen that priority is given to the agreement of the parties, and therefore issues of tribunal composition and arbitral procedure are governed exclusively by the parties' agreement if they have agreed on these matters. Hence, Art. V(1)(d) does not require that the composition of the tribunal and the arbitral procedure must comply with any particular national law. However, if the parties fail to agree on the composition of the arbitral tribunal or the arbitral procedure, then and only then the law of the country where the arbitration was held will govern such matters.¹¹ Therefore, that law plays a subsidiary role, if the parties have failed to agree on provision for these issues, but a complementary role if the parties fail to agree on certain aspects of the composition of the arbitral tribunal or the arbitral procedure, thus filling the gaps in the agreement of the parties.¹²

7.6 The Scope of Party Autonomy

⁸ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 323.

⁹ NYC of 1958, Art.V(1)(d).

¹⁰ See, Dicey, Morris and Collins, *Conflict of Laws* 639.

¹¹ See, *Osuuskunta METEX Andelslag V.S v Turkiye Elektrik Kurumu Genel Mudurlugu General Directorate* (1997) XXII YBCA 807 (Turkey Court of Appeal 1996) pp 811-12.

¹² See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 324-25. See, for an example of complementary role, *S.A Pando Compania Naviera v SaS Filmo* (1978) III YBCA 277 (Italy Court of Appeal 1976) pp 277- 78.

After discussing the applicable law, it seems logical to ask whether, according to Art. V(1)(d), the parties are free to agree upon the composition of the arbitral tribunal and the arbitral procedure independently from any municipal law? Several commentators are of the view that the parties are not free to do so, their freedom being limited to selecting national laws applicable to the arbitral procedure.¹³ Nevertheless, this approach imposes a limitation on the parties' autonomy that does not reflect the terms of Art. V(1)(d).¹⁴ Besides, attempts to impose limits upon the parties' autonomy in such matters were clearly unsuccessful at the conference of the NYC.¹⁵

However, there is growing tendency to allow parties to create their own rules, free from the restrictions of any national law. This approach is characterised in the theory of international arbitration as "de-localised" or "de-nationalised" or "floating" arbitration.¹⁶ Accordingly, the Dutch Supreme Court has interpreted Art. V(1)(d) as entitling the parties to choose procedural rules which are independent from the law of any country.¹⁷ This approach may appear in some aspects to serve the main goal of Art. V(1)(d) of reducing the influence of the law of the country where the arbitration was held, by making the agreement of the parties the cornerstone for the arbitral procedure.

Yet, the latter approach invites a further question as to whether the autonomy of the parties granted under Art. V (1)(d) is absolute? While under Art. V(1)(d) the agreement of the parties would seem to prevail even over fundamental procedural rules, and consequently would not be subject to restricted requirements of due process,¹⁸ many argue that party autonomy must be constrained by mandatory

¹³ See, in general, Gaja, *International Commercial Arbitration* para I.C.3, and references quoted there in fn 69; van den Berg, 'Consolidated Commentary' (2003) at 659; Garnett and others, *International Commercial Arbitration* 106.

¹⁴ Gaja, *International Commercial Arbitration*.

¹⁵ See, UN E/CONF.26/SR.3; UN Doc. E/CONF. 26/SR.4. See also, Gaja, *International Commercial Arbitration* para I.C.3.

¹⁶ See, in general, Dicey, Morris and Collins, *Conflict of Laws* 604.

¹⁷ *SEEE v Yugoslavia* 198.

¹⁸ See, *Ministry of Public Works of Tunisia v Societe Bce Freres* (1997) XXII YBCA 682 (France Court of Appeal 1994) pp 688, 690. In this case, the French court of appeal has rejected challenge to enforcement of foreign award based on the fact that the arbitration agreement provided for two arbitrators, which violated the mandatory rules of the arbitration seat (i.e. Tunisia law). See also, UN Doc. A/CN.9/WG.II/WP.42 p 92 fn 5; Davidson, *Arbitration* 394; Born, *International Commercial Arbitration* 847.

requirements of the procedural laws of both the seat of the arbitration and the place of enforcement, if enforcement of the award is not to be denied under Art. V(1)(b) (breach of due process) or Art. V(2)(b) (breach of public policy).¹⁹ It is surely legitimate for the Convention to achieve a balance between party autonomy and the adequate protection of due process and public policy. It appears to be proper to subject the will of the parties to the fundamental requirements of procedural law of the country where enforcement is sought (and not the law of the seat of arbitration) under Art. V(1)(b) or Art.(2)(b), because, as has already been mentioned,²⁰ the enforcing court will naturally have its own concept of what constitutes a violation of the requirements of due process, so that such courts will judge violation of due process according to their own national laws, and not the law of the country where the arbitration took place. Secondly, not all mandatory procedural requirements should be considered to be fundamental. Thus, the freedom of the parties should be not restricted by every mandatory requirement of applicable procedural law, but only fundamental aspects of due process necessary to guarantee that the parties have a fair trial.

7.7 Criticisms of Art. V(1)(d)

Although a significant development is made by Art. V(1)(d), as compared with the Geneva Convention of 1927, by reducing the role of the law of the seat of arbitration in favour of party autonomy, it may still be criticised in comparison with contemporary arbitration laws.²¹ For example, while Art. V(1)(d) allows enforcement

¹⁹ See, *Al Haddad Bros Enterprises Inc v M/S AGAP* 635 FSupp 205 (US Court of Appeal 3rd Cir 1986). See also, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 324; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 277; Garnett and others, *International Commercial Arbitration* pp 21-23, 106; A El-Ahdab, 'New York Convention On the Recognition and Enforcement of Foreign Arbitral Awards' (Beirut) (special edition) *The Lebanese Review of Arab and International Arbitration* (in Arabic) 32. Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 21-14; K Sajko, 'The New York Arbitration Convention of 1958 from the Yugoslav Point of View: Selected Issues' in P Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotman, London 1989) 211; Dicey, Morris and Collins, *Conflict of Laws* 639.

²⁰ See supra ch 3 para 5.2.

²¹ See, eg, French New Code of Civil Procedure of 1981, Art.1502; Swiss Private International Law of 1987 Art.190; The Swiss Private International Law of 1987 Art. 190. See also, Yugoslav law of conflict of laws of 1982, Art.99 (which provides only that the existence of the alleged irregularities are to be determined according to the law of the arbitration agreement), cited in Sajko, 'The New York Arbitration Convention of 1958 from the Yugoslav Point of View: Selected Issues' 211.

to be refused if the composition of the 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 seat of arbitration, French law²² for example allows enforcement to be refused on the basis that such matters were not in accordance with the law of the seat of arbitration only if the parties have actually specified that law to govern the arbitral proceedings.²³

Another criticism is that Art. V(1)(d) appears to be drafted deficiently since the authors of the NYC used the words "failing such agreement",²⁴ which might indicate that the agreement must be explicit and therefore an implied agreement might be not sufficient. There might appear to be force in this criticism, since Art. V(1)(a) uses the words "failing any indication thereon". Nevertheless, this shortcoming appears to create no practical difficulty since Art. V(1)(d) has generally been interpreted to cover both expressed and implied agreement.²⁵

A more significant criticism is that the criteria used in Art. V(1)(d) may exceptionally create real dilemmas for arbitrators. In cases where the agreement of parties would violate the mandatory requirements of the procedural law of the seat of arbitration, arbitrators may struggle to render an internationally enforceable award. If they comply with the agreement of the parties and therefore violate the mandatory laws of the seat of the arbitration, the court of that country might set aside the award, and enforcement may be refused in other countries on the basis of Art. V(1)(e). On the other hand, if they apply the mandatory norms of the seat in a manner that is contrary to the agreement of the parties, the enforcement of the award may be refused in other countries under of Art. V(1)(d).²⁶ Prof van den Berg says this side-effect of Art. V(1)(d) is unfortunate but apparently inevitable.²⁷

²² French New Code of Civil Procedure of 1981, Art.1502.

²³ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 989.

²⁴ See, David, *Arbitration in International Trade* 399. Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 990.

²⁵ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 990.

²⁶ See, eg, *Rederi Aktiebolaget Sally v S.r.l Termarea* (1979) IV YBCA 294 (Italy Court of Appeal 1968) pp 295-96. See also, David, *Arbitration in International Trade* 399; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 327-30; Gaillard and

To avoid such dilemmas, it may be suggested that irregularities of composition and procedure resulting from failure to comply with the agreement of the parties should not lead to enforcement being refused as long as they were justified by the (mandatory) law of the seat of arbitration.²⁸ This suggestion has been adopted by some courts²⁹ and rejected by others.³⁰ It may be concluded that although the above approach might, in some way, defeat the key purpose which Art. V(1)(d) was designed to achieve (i.e. that the law of the seat should apply only if there is no agreement by the parties on procedural issues), it can be considered in other way as reasonable (and arguably desirable) in the light of the general pro-enforcement bias of the NYC. Again, the above-mentioned dilemmas stem from the attempt of the NYC to take into account both the wishes of the parties' in Art. V(1)(a) and (d) and the law of the seat in Art. (V)(e). Nonetheless, such dilemmas hardly ever arise in reality, since Art. V(1)(d) is itself rarely invoked in practice. Moreover, the fact that a court in the seat of arbitration sets aside an award does not inevitably mean that enforcement will be refused in other countries, as will be seen in the following Chapter.

7.8 Irregularities in the Composition of the Arbitral Tribunal

The arbitral proceedings cannot begin until the composition of the arbitral tribunal has been established and the arbitrator(s) chosen. Parties are, as a general rule, free to choose their own arbitrators, and therefore the composition of the arbitral tribunal should essentially be based on the agreement of the parties. If there is no such agreement, then the composition of the arbitral tribunal should be organized according to the law of the seat of arbitration. Enforcement of the award may be resisted under

Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1702; Davidson, *Arbitration* 349; Soo, 'International Enforcement of Arbitral Awards' at 256.

²⁷ van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 330.

²⁸ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1702; Davidson, *Arbitration* 394.

²⁹ See, eg. *Al Haddad Bros Enterprises Inc v M/S AGAP* 210; *Ministry of Public Works of Tunisia v Societe Bee Freres* 688.

³⁰ See, eg. *Rederi Aktiebolaget Sally v S.r.l Termarea* pp 295-96. See also for the view that the agreement of the parties should be granted absolute priority whether or not such agreement is in conflict with a mandatory provision of the procedure law of the arbitration seat, UN Doc. A/CN.9/WG.III/WP.42p 92 fn 5; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1702.

Art. V(1)(d) if the composition of the arbitral tribunal deviates from the agreement of the parties or, failing which, the law of the seat.

However, an examination of case-law shows that Art. V(1)(d) is often unsuccessfully pleaded in resisting enforcement.³¹ For instance, in *Imperial Ethiopian Government v Baruch-Foster Corp* brought before a US court of appeal, the respondent sought to contest enforcement alleging that the arbitration agreement had been violated because the third arbitrator was a member of a commission drafting a civil code for the winning party (i.e. the Ethiopian government), whereas the arbitration agreement provided that that the third arbitrator should have no direct or indirect connection with either party. The court of appeal affirmed the enforcement of the award, agreeing with the district court's conclusion that the respondent had waived any objections to the composition of the arbitral tribunal before the enforcing court, since it had failed to raise such objections in due time during the arbitration. The US Court went on to conclude that the respondent had failed to show that the objection was asserted in good faith and for any reason other than delay.³²

Moreover, in a case that came before a Hong Kong high court, arbitrators were, according to the parties' agreement, supposed to be selected from a list of arbitrators operating from Beijing while they were actually selected from a list of arbitrators operating from Shenzhen. The losing party thus pleaded that the composition of the arbitral tribunal did not comply with the agreement of the parties, and thus requested the court to refuse enforcement. The Court stated that a ground for refusing enforcement had been made out, but nonetheless granted enforcement of the award on the ground that the parties had agreed to CIETAC arbitration and the arbitrators were on CIETAC list as well. Moreover, the court held that the losing party was estopped from raising this objection at the stage of enforcement since the losing party had not challenged the jurisdiction of the arbitral tribunal during the arbitration proceedings. For these reasons, the court exercised its residual discretion to enforce the award,

³¹ See, eg, *Imperial Ethiopian Government v Baruch-Foster Corp*; *Al Haddad Bros Enterprises Inc v M/S AGAP*; *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*; *Ministry of Public Works of Tunisia v Societe Bee Freres* pp 688, 690; *X v X* (2004) XXIX YBCA 673 (Germany Court of Appeal 20 Oct 1998) pp 675-76; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* pp 296-98.

³² *Imperial Ethiopian Government v Baruch-Foster Corp*.

notwithstanding the existence of the defence of Art. V(1)(d).³³ In this regard, the Judge said:

If the doctrine of estoppel can apply to arguments over the written form of the arbitration agreement under Article II(2), then I fail to see why it cannot also apply to the grounds of opposition set out in Article V. It strikes me as quite unfair for a party to appreciate that there might be something wrong with the composition of the tribunal yet not make any formal submission whatsoever to the tribunal about its own jurisdiction, or to the arbitration commission which constituted the tribunal and then to proceed to fight the case on the merits and then 2 years after the award attempt to nullify the whole proceedings on the grounds that the arbitrators were chosen from the wrong CIETAC list.

The Judge went on to state:

I think ... that even if a ground of opposition is proved, there is still a residual discretion left in the enforcing court to enforce nonetheless. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all the circumstances ...³⁴

Furthermore, in a case held by a German court of appeal, a German respondent contend that enforcement of a foreign award rendered in Russian against him should be not confirmed on the ground that the arbitrator appointed on his behalf was not able to speak any German as he had requested, and therefore the arbitral tribunal was incorrectly composed. The Court however rejected his objection, finding that, according to the applicable rules, each party had 30 days to appoint its arbitrator. After the respondent failed to do so within the time limit, the arbitral institution sent him a further request to appoint his arbitrator. In reply, he empowered the president of the Russian chamber of commerce to appoint an arbitrator on its behalf, requesting that the arbitrator should speak German. However, according to the court, a mere lack of the requested language did not lead to an irregularity in the composition of the arbitral tribunal, since the applicable arbitration rules provided that the right of appointment was transferred to the chairman of the Russian Chamber of Commerce where the respondent failed to appoint its arbitrator within the prescribed period, so

³³ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* pp 220-27.

³⁴ *ibid* 225.

that the respondent lost any right to state binding requirements in respect of the arbitrator appointed in his behalf. Furthermore, the court considered the German respondent to be estopped from raising an objection regarding the arbitrator, since according to the applicable law such an objection had to be raised within 15 days of appointment, and he did not raise his objection until six months had elapsed.³⁵

The foregoing cases illustrate that the courts have narrowed the effectiveness of the defence of defective composition of the tribunal by applying the principle of good faith and waiver to estop the losing party from contesting the enforcement, because he did not do so during the arbitration proceedings.

Another example of an unsuccessful attempt to invoke this defence is a case in which the losing party contended that the composition of the tribunal was not in accordance with the agreement of the parties, as the award was made by a sole arbitrator, whereas the agreement of the parties provided for three arbitrators. The US Court of Appeal however held that this irregularity was not fatal to the validity of the award since Art. V(1)(d) of the NYC allows enforcement of an award that, although not complying with the parties' agreement, is in accordance with the law of the seat of arbitration, in this case England. Under English law a dispute may be decided by a sole arbitrator appointed by one party, if the other fails to appoint an arbitrator. Thereby, the court affirmed the enforcement of the award.³⁶ The same conclusion was made by a Spanish Supreme Court³⁷ and an Italian court of appeal.³⁸

Yet, the above contention of the US Court that Art. V(1)(d) of NYC "allows recognition of an award which, although not in accord with the parties' agreement, complied with the laws of the country where the arbitration occurred" is not consistent with the letter of Art. V(1)(d) which provides that the procedural law of the arbitration seat will alternatively be taken into account only if the agreement the parties thereon is absent. It would be more accurate, to say that the US court here

³⁵ *X v X* (Germany Court of Appeal 20 Oct 1998) pp 675-76. See also, Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' pp 169-70.

³⁶ *Al Haddad Bros Enterprises Inc v M/S AGAP 210*.

³⁷ *X v Naviera Y.S.A* (1986) XI YBCA 527 (Spain Supreme Court 1982) 528.

³⁸ *Efxinos Shipping Co Ltd v Rawi Shipping Lines Ltd* (1983) VIII YBCA 381 (Italy Court of Appeal 1980) 382.

seemed to have followed the approach taken by some courts that enforcement should be granted even though the arbitral procedure was not in accordance with the agreement of the parties, as long as it was in accordance with law of the country in which the arbitration was held. The aim of this approach appears to give priority to the more-favourable-provision to enforcement whether the rules agreed upon by the parties or the rules of the arbitration seat. Thus, the approach may find its support in the intended purpose of the NYC to facilitate the enforcement of foreign awards wherever possible according to its Art. VII(1).

Furthermore, in a case before a French court of appeal, the respondent challenged the enforcement of a foreign award on basis that the composition of arbitral tribunal was not in accordance with the agreement of the parties since the arbitral tribunal was composed of three arbitrators, where as the arbitration agreement provided for two arbitrators. The court however rejected the objection and granted enforcement, since the tribunal could not operate with two arbitrators under the mandatory law of the seat. It explained,

The will of the parties expressed in the arbitration clause to submit their future disputes to arbitrators designated by them cannot frustrate the provision of Art. 263 of the CCCP (i.e. the Tunisian Code of Civil and Commercial Procedure) which prescribes an uneven number of the arbitrators. The two arbitrators did nothing more than make themselves subject to the above-mentioned mandatory law. Therefore this ground is rejected.³⁹

In this case, although the constitution of the arbitral tribunal clearly deviated from the agreement of the parties, the French court did not see this deviation as sufficient grounds for refusing enforcement, as the composition of the tribunal was justified by the mandatory law of the arbitration seat. This approach may appear to be odd for a French court to take, as French law tends to regard the will of the parties as superior to any national law. Yet once again the French court here was probably applying those rules which most favoured enforcement under the more favourable right

³⁹ *Ministry of Public Works of Tunisia v Societe Bee Freres* 688.

provision of Art. VII of the NYC,⁴⁰ which is in line with the pro-enforcement bias of the NYC.

In contrast, it is exceptional that the irregularity of the composition of the arbitral tribunal has actually led to a refusal of enforcement under Art. V(1)(d). Yet, an Italian court of appeal refused enforcement of a foreign award on the ground that, contrary to the agreement of the parties which required three arbitrators to make the award, the award was however made by two arbitrators in London. Although making an award by two arbitrators was in accordance with the English Arbitration Act 1950, the Italian Court held that, according to Art. V(1)(d), English law would only apply if there were no agreement by the parties, but the parties had agreed on a tribunal of three arbitrators.⁴¹ In this decision, the Italian Court put much emphasis on the priority of party autonomy over the laws of the arbitration seat. This is in line with the emphasis of the provision, but of course the result may be contrasted with the cases mentioned above where enforcement has been granted, despite the procedure adopted being contrary to the agreement of the parties, since it conformed to the law of the seat.

Again in *Encyclopaedia Universalis S.A v Encyclopaedia Britannica* a US district court denied the plaintiff's petition to enforce a foreign award for several reasons, one of which was that the failure of the two arbitrators to attempt to agree on a third arbitrator was not in accordance with the agreement of the parties, and thereby Art. V(1)(d) was properly invoked.⁴² This conclusion was then affirmed by a US court of appeals.⁴³

7.9 Irregularities in Arbitral Procedure

As has already been seen, the agreement of the parties regarding the arbitral procedure is subject to the most fundamental requirements of due process, the first principle to

⁴⁰ *ibid* 685.

⁴¹ *Rederi Aktiebolaget Sally v S.r.l Termarea* pp 295-96.

⁴² *Encyclopaedia Universalis S.A v Encyclopaedia Britannica* 2003 WL 22881820 (US District Court of SD NY 2003) pp 9-11.

⁴³ *Encyclopaedia Universalis S.A v Encyclopaedia Britannica* 403 F3d 85 (US Court of Appeals 2nd Cir 2005).

be followed by the arbitrators in conducting the arbitration. If the parties do not reach agreement on procedural rules, the procedure then will be governed by the law of the seat of arbitration. Accordingly, if the arbitrators fail to comply with the parties' agreement, or failing such agreement, the law of the seat in relation to the arbitral procedure, enforcement of their award may be refused in conformity with Art.V(1)(d).

In practice, however, this defence is rarely successfully invoked before the courts.⁴⁴ For example, an unsuccessful attempt was made by a losing party to persuade a German court of appeal to refuse enforcement of a foreign award made in London, on the basis that the arbitrators did not list the reasons for the decision in the award. The court however dismissed this argument, holding that such absence of reasons did not constitute a procedural irregularity under Art. V(1)(d) since the applicable law (i.e. English law) did not require it.⁴⁵ The same approach was taken more recently by that court, the court holding that failing to provide reasons in the award is not a procedural irregularity.⁴⁶ The same court further held that lack of an oral hearing did not violate Art. V(1)(d) since the agreed procedural rules in that case allowed an award to be rendered without an oral hearing.⁴⁷

Similarly, in a case where the losing party contended that the arbitral procedure was not in accordance with the International Arbitration Rules of the American Arbitration Association agreed upon by the parties, because the arbitrators did not give reasons in their award, the Canadian Supreme Court held that the failure to give reasons was not part of the arbitral procedure and therefore not a ground for refusing enforcement. More importantly, the Court further stated that even if the failure was a procedural mishap, it was not sufficiently serious to justify refusing enforcement.⁴⁸

⁴⁴ See, eg, *Hainan Machinery Import and Export Corp v Donald & McCarthy Pte Ltd* (1997) XXII YBCA771 (Singapore High Court 1994) pp 774-77; *Food Services of Aamerica Inc v Pan pacific Specialties Ltd* (2004) XXIX YBCA 581 (Canada Supreme Court 1997) pp 586-89; *Industrial Risk Insurers v M.A.N. Gutehoffnungshutte GmbH* 141 F3d 1434 (US Court of Appeals 11th Cir 1998) pp 1442-43; *Transocean Shipping Agency P Ltd v Black Sea Shipping* (1998) XXIII YBCA 713 (India Court of Appeal 1998) pp 716-18; *Manufacturer (Slovenia) v Exclusive Distributor (Germany)* pp 693-95; *Minmetals Germany GmbH v Ferco Steel Ltd* pp 745-46.

⁴⁵ *German Buyer v English Seller* (Germany Court of Appeal 27 Jul 1978) 267.

⁴⁶ *Shipowner v Time Charterer* (2000) XXV YBCA 714 (Germany Court of Appeal 30 Jul 1998) 716.

⁴⁷ *ibid* .

⁴⁸ *Food Services of Aamerica Inc v Pan pacific Specialties Ltd* pp 586-89.

In the above cases, the courts adopted the view that the failure of international arbitrators to give reasons is not sufficiently serious in and of itself to constitute a ground upon which the enforcing court may refuse enforcement of the foreign award.

The Canadian Supreme Court also held that the losing party had waived the right to raise this procedural objection at the stage of enforcement, because it had proceeded with arbitration without promptly stating an objection in writing thereto as provided for in the agreed Arbitration Rules.⁴⁹ This is just one of a number of cases where courts have rejected procedural objections at the stage of enforcement because the party seeking to resist enforcement had, for no sufficient reason, failed to raise such objections before the arbitral tribunal.⁵⁰

Additionally, In *Compagnie des Bauxites de Guinee v Hammermills Inc*⁵¹ a party argued that enforcement of the award should be refused under Art. V(1)(d) because the applicable procedural rules (the ICC Rules) had been violated by the arbitrator by inserting into the award the amount of the legal costs to be assessed against it after the draft award had been approved by the ICC Court. It was argued that the parties having agreed that all under the contract would be settled through arbitration according to the ICC Rules, consequently any violation of ICC Rules would necessarily constitute a violation of the agreement of the parties under Art. V(1)(d). A US district court rejected this argument, holding that:

The Court does not believe that section 1(d) of Article V was intended, as ... (the respondent) argues, to permit reviewing courts to police every procedural ruling made by the Arbitrator and to set aside the award if any violation of ICC procedures is found. Such an interpretation would directly conflict with the "pro-enforcement" bias of the Convention and its intention to remove obstacles to confirmation of arbitral awards. A major purpose of the Federal Arbitration Act is to avoid delay and unnecessary expense to the parties ..., and the delay that would result from reviewing

⁴⁹ *ibid.*

⁵⁰ See, eg, *Mondial Grain Distributors Com Inc v Atlantica Canarias SA* (1991) XVI YBCA 599 (Spain Supreme Court 1984) 601; *China Agribusiness Development Corp v Balli Trading* 80; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* pp 1281-82; *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* pp 220-27; *X v X* (Germany Court of Appeal 20 Oct 1998) pp 675-76.

⁵¹ *Compagnie des Bauxites de Guinee v Hammermills Inc* 1992 WL 122712 (US District Court D.C 1992).

procedural rulings of the arbitrators would be substantial) (citation omitted).⁵²

The court went on to conclude that:

The Court believes that a more appropriate standard of review would be to set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party. Whatever the scope of section 1(d), however, the Court concludes that it is not applicable here because ...(the respondent) has not met its burden of establishing that a violation of ICC procedure occurred.⁵³

Nevertheless, there is a number of cases in which a procedural irregularity has led to enforcement of a foreign award being refused under Art.V (1)(d). Thus a Swiss court of appeal refused to grant enforcement of foreign award on the basis that the arbitral procedure followed by the tribunal violated the procedure agreed upon by the parties. This involved a contract of sale containing an arbitration clause providing for arbitration according to the arbitration rules of the Hamburg Commodity Association. The buyer initiated proceedings in a two-stage arbitration (the first regarding the quality of the goods, the second regarding damages). The seller refused to participate, as he wished to have the dispute settled in a one-phase arbitration. An award was made in favour of the buyer who then sought enforcement in Switzerland. However, a Swiss court of appeal affirmed the decision of a court of first instance in refusing to enforce the award on the ground that the procedure followed by the tribunal was not in accordance with the agreement of the parties, because the arbitration rules of the Hamburg Commodity Association did not provide for a two-phase arbitration.⁵⁴ The Swiss Court appeared to lay great emphasis on the supremacy of party' autonomy.

Another example was a Dutch court of first instance court that refused to order enforcement of a Russian award on the basis that, in an arbitration held under the Rules of the International Commercial Arbitration Court (ICAC) in Moscow, the arbitral tribunal had erred in holding that a challenge request had been filed after the expiry of the time limit provided for in those Rules. The court therefore concluded

⁵² *ibid* 5.

⁵³ *ibid* .

⁵⁴ *Firm in Hamburg (buer) v Corporation A. G in Basel (seller)* (1976) I YBCA 200 (Switzerland Court of Appeal 1968).

that the arbitral proceedings were not in accordance with those Rules and thus the agreement of the parties.⁵⁵ Yet, it has to be mentioned that the court also considered this irregularity to constitute a violation of due process as recognised in the Netherlands as the arbitral tribunal had denied the respondent a valid right to challenge.

Furthermore, a Turkish court of Appeal refused enforcement of a foreign award under Art. V(1)(d), finding that the arbitral tribunal had violated the arbitration agreement in deciding that the parties, by stating in the arbitration agreement that Turkish law would apply, had agreed only on the substantive law to be applied in the dispute, leaving the arbitral tribunal free to apply Swiss law to the arbitral procedure. The Turkish court interpreted the agreement as applying Turkish law to both substance and procedure.⁵⁶

It may be concluded that the cases law mentioned above, despite the few cases in which the award was refused enforcement, show that national courts have generally been reluctant to refuse enforcement under Art. V(1)(d), a line which is consistent with the general principle of interpreting Art. V narrowly whenever possible, in favour of enforcement. This has been achieved in different ways. Some courts, for example, declined to refuse enforcement because the procedural irregularities were not sufficiently serious. What constitutes a serious irregularity is a matter for the discretion of the enforcing court. Some courts rejected the objections because no adequate proof was supplied. Other courts exercised their residual discretion to grant enforcement regardless of the existence of irregularities, especially when the losing party did not raise his objections previously during the arbitral proceedings (i.e., the principle of waiver). If there is a conflict between the agreement of the parties and the (mandatory) law of the arbitration seat, some courts relied upon the rules which are more favourable to enforcement. More importantly, the above attitude of the courts reflects their wish to achieve a proper balance between party autonomy, and the wide power that should be given to arbitrators to achieve efficiency in conducting the arbitral proceedings.

⁵⁵ *Goldron Limited v Media Most B.V* (2003) XXVIII YBCA 814 (Netherlands Court of First Instance 2002) pp 818-19.

⁵⁶ *Osuuskunta METEX Andelslag V.S v Türkiye Elektrik Kurumu Genel Mudurlugu General Directorate* pp 811-12.

7.10 The Position in Saudi Arabia

7.10.1 General

It may be thought important at the outset to make some points regarding the requirements for the composition of arbitral tribunals under Saudi law and their scope of application. This is of particular importance as several commentators (including Saudi commentators) have raised the question whether the Saudi enforcing courts would regard the restrictions imposed by Saudi arbitration laws on the choice of arbitrators as also applicable in the context of a foreign arbitral award sought to be enforced in SA under the NYC. In particular, some commentators doubted whether a foreign award made by a non-Muslim or by a woman would be deemed enforceable by the Saudi Courts.⁵⁷

With regard to the requirement of Islam, the IRSAL of 1985 Art. 3 stipulates, among several requirements, that “ The arbitrator shall be a Saudi national or Muslim expatriate”.⁵⁸ This provision clearly lays down that an arbitrator must be Muslim. Yet there is no explicit provision under the SAL of 1983 nor its Implementation of 1985 preventing women from acting as arbitrators, although, according to the majority of *Shari'ah* schools, including the *Hanbali* School followed in SA, a female may not act as an arbitrator.⁵⁹

The above requirements are plainly applicable to domestic arbitration held in SA. But this is not the question here. Rather, the question should be addressed is whether these requirements are also applicable to international arbitration or, in other words, to a foreign award sought to be enforced in SA under the NYC? The above requirements can simply be deemed to be limited to domestic arbitration held in SA for several reasons. First, the last part of Art. 3 of the IRSAL of 1985 lays down that “In the case

⁵⁷ M Alhoshan 'The Symposium of European-Arabian Arbitration' cited in El-Ahdab, *Arbitration in Arab Countries* v 2 p 242; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' p 91.

⁵⁸ IRSAL of 1985, Art.3.

⁵⁹ Sec, S Al-Hasen, *The Shari'ah Rules of Arbitration* (Al-Narjes, Riyadh 1996 'in Arabic') 49; Gattorah, *Arbitration in the Light of the Islamic Shari'ah* pp 123-25; M Al-Kalidy, 'The Capacity of Arbitrator in Islamic Jurisdiction ' (Symposium of Arbitration in Islamic Shariah Dubi 2001 'in Arabic') pp 7, 28; S Jameel, 'Arbitration In Islamic Shari'ah and its Important of Settling Disputes ' (Symposium of Arbitration in Islamic Shariah Dubi 2001 'in Arabic') pp 17- 18; Aag Boeg, 'Arbitration in Islamic Shari'ah and Islamic Fiqh ' pp 14-15.

of more than one arbitrator, the umpire shall have a knowledge of Shari'ah rules, commercial regulations, customs and traditions applicable in Saudi Arabia".⁶⁰ This part indicates that this provision is concerned with domestic arbitration in SA, as arbitrations held outside SA are usually covered by non-Saudi laws. So, in this case, the arbitrator usually need not be knowledgeable about Shari'ah rules, commercial regulations, customs and traditions applicable in Saudi Arabia and, so need not be Muslim either. Second, the Saudi courts adopt the principle that if there is an agreement between a Saudi party and a foreign party to resort to arbitration rules outside SA under foreign laws, the Saudi party is bound by that arbitration and its rules as well as its outcome.⁶¹ It goes without saying that such arbitrations may be run by arbitrators some of whom are non-Muslim or women. Third, the Saudi enforcing courts have granted enforcement of several foreign awards rendered entirely or partly by non-Muslim arbitrators.⁶²

7.10.2 Irregularities in the Composition of the Arbitral Tribunal

In relation to the defence that the arbitral tribunal is irregularly composed, in one case a Saudi party having requested a Saudi court to refuse enforcement of the award on the ground that the arbitral tribunal was not properly constituted since one of the three arbitrators was not a Muslim, the court decided to enforce the award,⁶³ applying a foreign law which did not demand that all arbitrators should be Muslim. This indicates that the Saudi courts would distinguish between national and international arbitration in dealing with the enforcement of arbitral awards, and that the lack of Muslim arbitrators would certainly not prevent enforcement of a foreign award.

7.10.3 Irregularities in the Arbitral Procedure

⁶⁰ IRSAL of 1985, Art.3.

⁶¹ See, Al-Ajlan, *Compilation of judicial principles* pp 61-62; the 4th Review Committee, decision No. 155/T/4 dated 1415 H (1994); the 4th Review Committee, decision No. 43/T/4 dated 1416 H (1995); the 4th Review Committee, decision No. 187/T/4 dated 1413 H (1992); the 4th Review Committee, decision No. 156/T/4 dated 1413 H (1992).

⁶² See, eg, the 2nd Review Committee, decision No. 10/T/2 dated 1419 H (1998); the 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997).

⁶³ See, the 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997).

As regards the defence that the arbitral procedure has been of irregularly conducted, in one case⁶⁴ a Saudi company alleged that a foreign award had been rendered under an arbitral procedure that contravened Saudi procedural law and that the arbitration had been held in Jordan, although the arbitral agreement provided for arbitration in Paris. The Court held that the agreement between the parties indicated clearly that any disputes would be settled by ICC Arbitration in Paris, which meant that the arbitral procedure was not subject to Saudi procedural law of the competent courts. Moreover, as the ICC had itself decided to refer the dispute to its arbitrator in Jordan confirming his award thereafter, the award could be considered to be an ICC award made under its rules. The court therefore enforced the award,⁶⁵ which decision was confirmed by the Saudi Court of Appeal.⁶⁶

These two cases illustrate that the Saudi courts will not regard every violation of the applicable procedure as sufficient ground to decline enforcement, an approach entirely in conformity with intention of the NYC.

7.10.4 The Applicable Law

As regards the question of the applicable law, the above considerations show undoubtedly that the Saudi courts would initially give weight to the parties' agreement with regard to the composition of the arbitral tribunal and the arbitral procedure. In the absence of such agreement, there appears to be no clear-cut answer. Nonetheless, in one case where it was not clear whether or not there was an agreement regarding the arbitral procedure, the Saudi court⁶⁷ applied Egyptian procedural law, as Egypt was the seat of the arbitration,⁶⁸ a conclusion which was affirmed by the Saudi court of appeal.⁶⁹ This may give some indication that the Saudi courts are willing to respect the law of the arbitration seat, if the parties fail to agree upon the law governing the arbitral procedure. Additionally, one may suggest that from a

⁶⁴ the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 II (1996).

⁶⁵ *ibid* pp 3-4, 6, 8.

⁶⁶ the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997).

⁶⁷ the 18th Subsidiary Panel, decision No. 8/D/T/18 dated 1424 H (2003).

⁶⁸ *ibid*.

⁶⁹ the 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004).

purely theoretically legal point of view the Saudi courts should apply the law of the arbitration seat in line with the provisions of Art. V(1)(d), since the Saudi Arabia has adhered to the NYC.

7.11 Conclusions

Art. V(1)(d) provides that a foreign arbitral award is liable to be refused enforcement if the composition of the arbitral tribunal or the arbitral procedure did not conform with parties agreement, or, failing such agreement, with the law of the arbitration place. Art. V(1)(d) has rarely been invoked in comparison with the other grounds of Art. V. This may be because both Art. V(1)(b) and Art. V(1)(d) are related to alleged procedural breaches. Yet, Art. V(1)(b) deals particularly with violation of basic standards of due process (e.g. fair hearing), whereas, Art. V(1)(d) focuses on non-compliance with the other aspects of arbitral procedure (not regarded as due process).

The provisions of Art. V(1)(d) support the principle of party autonomy in reducing the influence of the law of the seat of arbitration by giving priority to the agreement of the parties in governing the composition of the arbitral tribunal and the arbitral procedure. Only if there is no agreement thereon will these issues be governed by the law of the seat of arbitration. Yet, the parties' agreement has generally been held to be not absolute in these matters, but rather subject to those fundamental rules of the procedural law which reflect the essential requirements of due process of the state where enforcement is sought in terms of resisting enforcement under Art. V(1)(b) and Art. V(2)(b).

The priority given to the agreement of the parties under Art. V(1)(d) might lead to dilemma where the agreement of the parties is contrary to the mandatory law of the seat of arbitration. In this case, if the arbitrator complies with the agreement of the parties, regardless of the mandatory rules of the seat, the award might be set aside by a court of the country where the arbitration was held, and therefore may lead to enforcement being refused under Art. V(1)(e). But, the arbitrator takes the opposite, enforcement may be refused under Art. V(1)(d).

Art. V (1)(d) has in practice proved to constitute no significant threat to enforcement of foreign arbitral awards in SA and other countries. Like the other grounds for refusing enforcement of an award, Art. V(1)(d) has led to very few refusals of enforcement, mainly because the courts have generally construed this defense narrowly. This narrow interpretation can be seen clearly when courts hold that a violation of the parties agreement or the law of the seat of arbitration does not necessarily constitute a ground for refusing enforcement unless the violation is serious. It has also frequently been held that a party is estopped from raising an objection to enforcement if did not raise this objection earlier during the arbitration.

In SA, the specific conditions imposed by the Saudi arbitration laws upon arbitrators (e.g. to be Muslim) have proven to be not applicable to international arbitration and would not prevent enforcement of a foreign arbitral award. The Saudi courts, like most courts of contracting States, construe irregularity in arbitral procedure or composition of the tribunal narrowly in favour of enforcement. So far all attempts in which the Saudi Courts have been called upon to refuse enforcement of foreign award on these grounds have proved unsuccessful.

CHAPTER EIGHT

Award not Binding or Set Aside or Suspended

8.1 Introduction

Art. V(1)(e) of the NYC provides the fifth ground for refusal of enforcement of foreign awards. This ground contains three sub-grounds. First, the award has not yet become binding. Second, the award has been annulled in its country of origin. Third, the award has been suspended in its country of origin. In this regard, Art. V(1)(e) establishes that the foreign award may be refused enforcement if the party against whom the award is invoked proves that:

The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.¹

This chapter thus will discuss the following related issues: first, the natural binding force of the award and its effects on enforcement. Secondly, whether the setting aside of the award in the seat of arbitration should always block enforcement in other countries under the NYC. Thirdly, the effect of suspension of the award in the seat of arbitration on its enforcement under the NYC. Finally, the position in Saudi Arabia thereon will be examined.

8.2 Not binding

8.2.1 Eliminating Double-Exequatur

Art. V(1)(e) lays down that enforcement of a foreign award can be declined if the party resisting enforcement asserts and proves that the award has not become binding. Under the Geneva Convention of 1927, the party seeking enforcement of the foreign award bears the burden of proving that the award has become “final” in the country

¹ NYC of 1958, Art.V(1)(e).

where the award was made, in order that it might be enforceable in other countries.² This requirement has been taken to mean that the party seeking enforcement would have first to seek some sort of leave for execution of the award from the court of the country in which the award was rendered so as to show that the award was final. This requirement therefore had led in practice to the problem of so-called “double-exequatur” because of the fact that the party seeking enforcement would also have to seek leave to execute the award from the court of the country where enforcement is sought. However, according to the legislative history of the NYC, a suggestion of introducing a requirement that an award under the NYC should be final was rejected mainly on two grounds:

First of all, it would be normally impossible for the party seeking enforcement to submit a negative proof that the enforcement of the award has not been suspended or that no appeal has been lodged against the award, and it seemed therefore illogical to impose the burden of the such a proof on the person seeking enforcement. ... (Secondly), the enforcement authorities might interpret it as requiring a prior exequatur or other form of ratification of the award by the competent judicial authorities of the country where arbitration took place, and thus make it necessary to duplicate enforcement action both in the country where the award was made and in the country where the award is to be relied upon.³

In attempting to eliminate the problem of “double exequatur”, which has generally been perceived as cumbersome and ineffective, the drafters of the NYC employed the term “binding” rather than the term “final”.⁴ Consequently, it has been almost unanimously accepted by the courts⁵ and the commentators⁶ that the award does not

² Geneva Convention of 1927, Art.4(2).

³ UN E/CONF.26/2 para 15.

⁴ See, UN Doc. E/CONF.26/SR.17p 3

⁵ See, eg, *Animalfeeds Intl Corp v SAA Becker & Cie* (1977) II YBCA 244 (France Court 1970); *Bobbie Brooks Ins v Lanificio Walter Banci SAS* 291; *Lanificio Walter Banci S.a.S v Bobbie Brooks Inc* pp 235-36; the English High Court in *Rosseel N.V v Oriental Commercial & Shipping Co Ltd* [1991] 2 Lloyd's Rep 625 (UK QBD Com Ct 1990) 628; *Gaetano Butera v Pietro & Romano Pagnan* 299; *Italian Party v Swiss Company* pp 827-28; *A SA v B Co Ltd & C SA* (2004) XXIX YBCA 834 (Switzerland Supreme Court 2003) pp 838-39.

⁶ See, in general, Gaja, *International Commercial Arbitration* para I.C.4; van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* pp 337-38; van den Berg, 'Consolidated Commentary' (2003) at 660; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* pp 454, 461; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1677; Born, *International Commercial Arbitration* 737; Dicey, Morris and Collins, *Conflict of Laws* para 16-117; Merkin, *Arbitration law* para 19.56; Bishop

have to be declared enforceable by the court of the seat of arbitration in order to be enforceable under the NYC in other country. Indeed, abolishing the requirement of "double exequatur" contained in the Geneva Convention of 1927 is one of the main achievements made by the NYC.

8.2.2 When the Award Become Binding

Unlike the Geneva Convention of 1927, which determines when an award becomes "final",⁷ the NYC does not define the word "binding". This silence leaves the meaning of that term in a position of ambiguity. Thus, two main views have emerged in relation to the question when does an award become "binding" under Art. V(1)(e);

First View: Reference to the Law of the Country of Origin

The first view, which is adopted by many courts⁸ and a number of authors,⁹ is that the binding character of an award should be determined by the law of the country of its origin. So, an award should only be regarded as being binding if it had become so under the law of the seat of arbitration. In this regard, an Italian court of appeal held that the question when an award made in England became binding should be determined under English law rather than Italian law, so that court leave to enforce the award was not required in order to make the award binding.¹⁰ In support of this view, it was argued that since Art. V(1)(c) also provides that the award must not have "been set aside or suspended by a competent authority of the country in which, or

and Martin, 'Enforcement of Foreign Arbitral Awards' 25; Dicey, Morris and Collins, *Conflict of Laws* para 16-117.

⁷ See, Geneva Convention of 1927, Art.1(d).

⁸ See, eg, *Carters Ltd v Francesco Ferraro* 277; *Animalfeeds Intl Corp v SAA Becker & Cie* (France Court 1970); *Seller (Denmark) v Buyer (Germany)* (Germany Court of Appeal 16 Dec 1992) 541; *Oil & National Gas Commission v the Western Comp of North America* (1988) XIII YBCA 473 (India Supreme Court 1987) pp 485-87.

⁹ In favour of this view, see, Gaja, *International Commercial Arbitration* para I.C.4 and citations in fn 74; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* paras 1681-1682, 1684 and citations in fn 59. See also in general, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 341; R Nazzini, 'The Law Applicable to the Arbitral Award'(2002) 5 (6) Intl Arb L R 179 at 185; Merkin, *Arbitration law* para 19-56.

¹⁰ See, *Carters Ltd v Francesco Ferraro* 277.

under the law of which, that award was made" (emphasis added), it would be paradoxical if the same law was not to be also applicable to determine the issue of whether an award becomes binding given its relationship to the issue of setting aside or suspending the award. In other words, the arbitral tribunal will have in mind that the award must be valid and binding under the law of the seat, so as to avoid either party taking proceedings to set it aside. Additionally, it was thought unreasonable to refuse enforcement of an award because it was not considered to be binding under the law of the country where enforcement is sought (and enforcement might of course be sought in more than one country), although the same award had previously been considered binding and therefore enforceable under the law of the arbitration seat.¹¹ Furthermore, no legal instrument can be regarded as binding outwith a particular legal system. The NYC itself does not explain when an award becomes binding. Thus the meaning of 'binding' must derive from the legal system of the seat of arbitration.¹²

Second View: Autonomous Determination under the NYC

The second view, which appears to have recently gained increasing approval of many courts¹³ and the majority of commentators,¹⁴ is that the term of "binding award" should be given an autonomous meaning for the purpose of the Art. V(1)(e), independent of the applicable law in the country of origin of that award. It is reasonably clear that the text of Art. V(1)(e) does not require that the binding force of

¹¹ See, Gaja, *International Commercial Arbitration* para I.C.4.

¹² See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1682.

¹³ See, eg, *Carters Ltd v Francesco Ferraro* (Italy Court of Appeal) 277; *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d'Investissements* (1999) XXIV YBCA 603 (Belgium Supreme Court 1998) pp 610-11; *AB Gotaverken v General National Maritime Transport Co* (1981) VI YBCA 237 (Sweden Supreme Court 1979) 240; *Film Distributor v Film Producer* (2004) XXIX YBCA 754 (Germany High Court of Appeal 2002) 758; *SNOC v Keen Lloyd Resources Ltd* (2004) XXIX YBCA 776 (Hong Kong High Court 2001) pp 777- 83; *Rosseeel N.V v Oriental Commercial & Shipping Co Ltd* (UK QBD Com Ct 1990) 628.

¹⁴ See, eg, P Sanders, 'A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1979) 13 Intl Lawy 269 at 275; van den Berg, 'Consolidated Commentary' (2003) 660; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 341-45; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1679; David, *Arbitration in International Trade* 400; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-101; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 166; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 468; Davidson, *Arbitration* 395; Nazzini, 'The Law Applicable to the Arbitral Award' 186.

the award be determined by the law of the country of origin. In particular, the first part of Art. V(1)(e) does not use the expression "the country in which, or under the law of which, that award was made" in relation to the issue of a binding award, whereas the second part of that provision uses that expression in relation to the issue of the setting aside or suspension of the award.¹⁵ This could indicate, as a logical consequence, that whether or not the award has become binding is a question to be decided independently from the law of the seat of the arbitration. Otherwise, it would amount to bringing back a form of double exequatur, a problem which the drafters of the NYC clearly intended to avoid by using the term "binding" instead of "final".¹⁶ In addition, arguments have been advanced against the view that the question of whether the award has become binding is to be determined by the law of the seat of the arbitration. Accordingly, it is submitted that:

The problem with this interpretation is (firstly) that it leads to uneven application of the New York Convention. If every State is free to adopt its own criteria for recognising the binding nature of the award between the parties, the result will be that the New York Convention no longer binds Contracting States. Indeed, each State, by specifying its own criteria for a binding award, could surreptitiously evade the conditions of maximum rigour laid down by the New York Convention for the recognition of the award. In this way, each State, while respecting the letter of the Convention, would be at liberty to violate its spirit, by imposing unreasonably strict criteria for valid awards. (Secondly) This theory only considers the first step of the analysis, in that it recognises that the arbitral award can be made binding by all the domestic legal systems. However, it fails to take the further step to identify the conflict rule which is applicable to the award at the enforcement stage under the New York Convention. (Thirdly) The correct methodological approach is to derive a conflict rule from within the Convention itself to determine whether or not the award should be considered binding. The Convention does not literally state that the binding force of the award is a matter for the law of the country of origin to decide. An effort should be made to avoid implicit referral to domestic law, if it is not absolutely necessary. In practice, the arbitral award is often seen as the fruit of party autonomy and, therefore,

¹⁵ P Sanders, 'A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1979) 13 *International Lawyer* 269-275; 342; Nazzini, 'The Law Applicable to the Arbitral Award' fn 50.

¹⁶ See, Sanders, 'A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' pp275-76; Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* 166.

immediately binding between the parties, whatever national law might apply (footnotes omitted).¹⁷

For these reasons the better view seems to be that the “binding” character of the word should be have an autonomous meaning under the NYC. Yet, this is not the end of the story since there are divergent views as to what an autonomous determination of the term “binding” entails.

8.2.3 Approaches to the Autonomous Determination of Binding Award

Proponents of the autonomous determination theory have advanced a variety of views as regards the question of the moment at which the award can be deemed binding under the NYC. The main approaches are outlined below.

First, an odd interpretation is that the term “binding award” is simply identical in meaning to the word “final”, so that the NYC reiterates the requirements of the Geneva Convention of 1927 in a more condensed and abstract form.¹⁸ In this regard, it was said that “an award cannot become binding until all means of recourse, both ordinary and extraordinary, have been exhausted and all formalities completed”.¹⁹ Yet, since the intended purpose of the drafters of the NYC was undoubtedly to avoid the problem of “double exequatur” by using the word “binding” rather than “final”, this interpretation was soon rejected.²⁰

Secondly, it was submitted that a foreign award would always be considered as binding once it is rendered, even though the award is still open to means of recourse in the place in which the arbitration took place.²¹ Additionally, it has even held that

¹⁷ Nazzini, 'The Law Applicable to the Arbitral Award' pp 186-87.

¹⁸ In favour of this approach, See, Kestler Farnes, the Guatemalan delegate, UN Doc. E/CONF.26/SR.17 pp 12, 14; Koral, the Turkish delegate, UN Doc. E/CONF.26/SR.17 pp 4-5,13; Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' at 171; Berthold Goldman *Arbitrage* in *Encyclopedie Dalloz-Droit International* (1968) 288, cited in Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1679.

¹⁹ Kestler Farnes, the Guatemalan delegate, UN Doc. E/CONF.26/SR.17p 14

²⁰ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1679.

²¹ See, *Fertilizer Corp of India v IDI Management Inc* 957-958; *Rosseel N.V v Oriental Commercial & Shipping Co Ltd* 628; *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d'Investissements* pp 610-11; WM Tupman, 'Staying Enforcement of Arbitral Awards under the New

an award is, in principle, binding once it is rendered, even if it is then set aside or suspended.²²

Thirdly, it has been suggested by a few courts and several authors that a foreign award can be regarded as binding as far as it is not subject to a review by a second arbitral tribunal.²³ This means that the award becomes binding once it is no longer open to an appeal to a second arbitral body, even if the possibility of appeal to a competent court still exists.

Fourthly, the view most favoured by courts²⁴ and the majority of authors²⁵ is that a foreign award is binding for the purposes of Art. V(1)(c) as soon as there is no further possibility of an appeal on the merits (ordinary recourse) to a second arbitration tribunal or a court. This approach is based upon the distinction between ordinary and extraordinary recourses. Ordinary means of recourse connotes any genuine appeal on the merits to a second arbitral tribunal or a court. The continuing availability of such

York Convention '(1987) 3 (3) Arb Intl 209 at 211-212. See, in general, Born, *International Commercial Arbitration* pp 740-41.

²² See, *Hiscox v Outhwaite* [1991] 2 WLR 1321 (UK CA); *Chromalloy Aeroservices Inc v Arab republic of Egypt*; *Pabalk Ticaret Ltd Sirkeli v Norsolor SA* (1986) XI YBCA 484 (France Supreme Court 1984) pp 489-90; *Polish Ocean Line v Jolasry* (1994) XIX YBCA 662 (France Supreme Court 1993) 663; *Hilmarton Ltd v Omnium de Traitement et de Valorisation OTV* pp 656-57; *Egypt v Chromalloy Aeroservices Inc* (1997) XXII YBCA 691 (France Court of Appeal 1997) pp 692-93; *Kajo-Erzeugnisse Essenzen GmbH v DO Zdravilisce Radenska* (1995) XX YBCA 1051 (Austria Supreme Court 1993) pp 1055-56; *Kajo-Erzeugnisse Essenzen GmbH v DO Zdravilisce Radenska* (1999) XXIV YBCA 919 (Austria Supreme Court 1998) pp 924-25. See, also in general, Born, *International Commercial Arbitration* 741.

²³ See, *Fertilizer Corp of India v IDI Management Inc* (US District Court) pp 957-58; David, *Arbitration in International Trade* 40; Dicey, Morris and Collins, *Conflict of Laws* para 16-117. Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 25; Soo, 'International Enforcement of Arbitral Awards' at 256. See, also in general, Gaja, *International Commercial Arbitration* fu 74; Born, *International Commercial Arbitration* 741; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1676.

²⁴ See, eg, *French Seller v German (F.R) Buyer* (1977) II YBCA 234 (Germany Court 8 Jun 1967); *AB Gotaverken v General National Maritime Transport Co* (1981) VI YBCA 237 (Sweden Supreme Court 1979)²⁴⁰; *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d'Investissements* (Belgian Supreme Court) 611; *SPP Ltd v Egypt* pp 489-90; *Film Distributor v Film Producer* (the German High Court of Appeal) 758; *SNOC v Keen Lloyd Resources Ltd* (the Hong Kong High Court) pp 777-83; *A SA v B Co Ltd & C SA* (the Swiss Supreme Court) pp 838-39.

²⁵ In favour of this approach, see, eg, Matteuci, the Italian delegate, UN Doc. E/CONF.26/SR.17pp 13; Cohn, The Israeli delegate, UN Doc. E/CONF.26/SR.17 p 14; Sanders, 'A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' 275; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 354; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-102; Davidson, *Arbitration* 395; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 166; A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn, Sweet & Maxwell, London 1999) 468.

means of recourse would prevent the award from becoming binding. Extraordinary means of recourse cover any irregularities that do not involve the merits of the award, particularly procedural irregularities, including those which may lead to actions being brought to set the award aside. The bringing of such actions would not preclude an award from becoming binding.²⁶ In support of this approach, it has been submitted that “a different interpretation of ‘binding’ would render meaningless the limitation contained in ground that the award has been set aside”.²⁷ (This refers to the fact that it is a ground for resisting enforcement that the award has been set aside or suspended *by a court of the country in which or under the law of which* it was made.) In addition, it was argued that the above-mentioned distinction between ordinary and extraordinary means of recourse was in the minds of the drafters of the NYC, and its insertion into Art. V(1)(c) was only finally rejected because it was not known in certain legal systems, or carried a different meaning in different systems.²⁸

It can be seen that the term “binding” has generated a diversity of interpretations. This diversity is not unexpected since it first appeared among the drafters of the NYC, leading some of them to suggest strongly that the term must be replaced by a more suitable term.²⁹ Some authors consider the debates between the drafters regarding the meaning of ‘binding’ as extremely confusing.³⁰ The possibility of negative consequences of its inclusion was predicted at that time of the NYC Conference by the Dutch delegate, Prof Sanders, who stated:

What does this word “binding” mean? The term is the result of a compromise and will, I fear, cause a diversity of interpretations in countries where enforcement is sought and the defendant tries to prevent

²⁶ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 342; Sanders, 'A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards'275.

²⁷ Sanders, 'A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards'275.

²⁸ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 342.

²⁹ See, UN Doc. E/CONF.26/SR.17 pp 12-14.

³⁰ See, David, *Arbitration in International Trade* 400; Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* 60.

execution in proving to the competent authority that "the award has not yet become binding on the parties."³¹

However, after consideration of the arguments, the term "binding" was finally adopted as a compromise, despite its expected ambiguity, as it was thought to have fewer shortcomings than the term "final", which had created the problem of the "double exequatur".

It may be worth mentioning that, unlike the outcome of mediation and conciliation, all arbitral awards are generally considered as binding once they had been made³² just like the judgment of a court. But, since Art. V(1)(e) allows enforcement to be refused if the award has not yet become binding on the parties, this suggests that the NYC intended to give the losing party some sort of recourse. As has been seen above, the majority of authors and many courts have taken this to mean that the availability of ordinary means of recourse (i.e. a genuine appeal on the merits) to a second arbitral tribunal or a court would prevent an award from being binding for the purpose of Art. V(1)(e), while the availability of extraordinary means of recourse would not. This approach might be said to be without merit because the proposal to insert the expression "has not become binding in the sense that award is still open to ordinary means of recourse" was finally rejected by the drafters of the NYC. Moreover, if the availability of an appeal to a court is to be regarded as preventing an award from

³¹ Pieter Sanders 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 6 *Netherlands International Law Review* 43at 55, cited in D Freyer and H Gharavi, 'Finality and Enforceability of Foreign Arbitral Awards: From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity'(1998) 13 (1) *ICSID Review - Foreign Investment Law Journal* 101 at 104

³² See, eg, UNCITRAL Arbitration Rules of 1976, Art.32(2) which states that:

The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

And ICC Arbitration Rules of 1998, Art.28(6) which states that:

Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

And English Arbitration Act 1996, s.58(1) which establishes that:

Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.

See also, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* pp 361, 468.

being binding, this should surely be in relation to extraordinary means of recourse that do not involve the merits of the award, as courts generally do not allow the re-examination of the merits of arbitral awards. In addition, by replacing the term “final” with the term “binding” to avoid the problem of “double executur”, the drafters of the NYC apparently intended to make an award enforceable as soon as it is made, even if it is still open to appeal before a court. Therefore, it may be suggested that all means of recourse whether ordinary or extraordinary should not prevent an award from becoming binding, unless the parties expressly agree otherwise. This conclusion would be supported by Art. VI of the NYC which provides that:

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 award³³

This Article indicates that an appeal to the competent court in the place of arbitration is merely a ground for adjourning enforcement proceedings, and then only if the enforcing court considers it as a proper appeal. Consequently, this would clearly mean that an appeal to a court in the place of the arbitration should not consider as a ground for refusing enforcement under Art. V(1)(e), and therefore would not bar an award from being binding. The same argument might apply by analogy in regard to an appeal to a second arbitral tribunal. Accordingly, it may be suggested that, for the purposes of Art. V(1)(e), the award should be deemed to be binding once it is rendered, regardless of the possibility of appeal, unless the parties had agreed otherwise. This suggestion has the advantage of interpreting the term “binding” in a manner that minimises the possibility of enforcement being refused, which after all serves the general goal of the NYC to promote and facilitate enforcement of foreign arbitral awards, limiting the chances of enforcement being refused whenever possible. Moreover, this approach has also the merit of promoting parties’ autonomy.

8.2.4 Case Law

³³ NYC of 1958, Art. VI.

Although the absence of a definition of the term "binding" has created an obstacle to a uniform interpretation of the term, which one might have expected to generate costly litigation and lengthy delays in enforcement,³⁴ in practice this ambiguity has not blocked enforcement of awards in most cases.³⁵ The Belgian Supreme Court, for example, has confirmed a decision granting enforcement of an award made in Jordan, rejecting the objection that the award was not binding under the law of the Jordan where the award was rendered. The court reasoned that it does not follow from Art. V(1)(e) that the binding nature of the award can only be determined pursuant to the law of the country of origin. The court went on to hold that:

The question whether the award is open to such recourse is to be solved by referring, successively and one in the absence of the other, to the arbitration agreement, the law that it designates for such purpose, last, the law of the country in which the award was rendered.

Therefore, the court concluded that Jordanian law was not applicable to the question of whether the award was binding, since priority was given to the arbitration agreement, which provided that the award would be final, binding and enforceable from the day it was rendered.³⁶ In addition, a Hong Kong high court rejected an objection against enforcement of a foreign award on the basis that the award was not yet binding because an appeal had been launched in France where the award was made. The court held that the award is considered to be binding when it no longer open to appeal on the merits, even if an action to set aside has been initiated before a court of the country of origin.³⁷

In another case, a defendant opposed enforcement of an award made in New York on the ground that the award had not yet become binding because the parties had agreed "that any proceedings to confirm or vacate the arbitration award will be brought in the

³⁴ See, Freyer and Gharavi, 'Finality and Enforceability of Foreign Arbitral Awards: From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity' 106; Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* 63.

³⁵ See, eg, *Rosseel N.V v Oriental Commercial & Shipping Co Ltd* 628; *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d'Investissements* pp 610-11; *Film Distributor v Film Producer* 758; *SNOC v Keen Lloyd Resources Ltd* pp 777- 83; *Italian Party v Swiss Company* pp 827- 28; *A SA v B Co Ltd & C SA* pp 838-39. see, also in general, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 332.

³⁶ *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d'Investissements* pp 610-11.

³⁷ *SNOC v Keen Lloyd Resources Ltd* p 780.

US District Court of New York". The English Commercial Court rejected this argument and granted leave to enforce the foreign award, holding that an agreement that proceedings to confirm a foreign award in the country where it was made did not prevent enforcement in England, because that agreement did not deprive the award of its binding character, and did not make enforcement abroad subject to such confirmation. In particular, the Court held that:

The Joint Stipulations do provide that proceedings to confirm the award must be brought in the District Court of New York. There is, however, a difference in United States law between proceedings for confirmation of an award, and proceedings for enforcement of an award. One can take proceedings in the country in which an award is made (although it is not required under the New York Convention) to confirm the award, being declaratory relief, without seeking enforcement of the award. The Joint Stipulations relate to confirmation proceedings. They do not expressly touch the subject of enforcement of the award. ... In any event, it is impossible to imply into a provision dealing with proceedings to confirm an award, a provision restricting enforcement abroad.³⁸

The English Court went on to uphold "the ordinary rule that an arbitration award is 'binding' immediately upon publication and continues to bind the parties unless it is set aside or suspended by a competent judicial authority", or the party opposing enforcement can prove that the parties have agreed that the award cannot be enforced without the authorisation of the court of the place where the award was rendered.³⁹ This approach is of particular importance, since it considers an award to be binding once it is made, regardless the possibility of any further appeals, unless agreed otherwise by the parties.

8.3 Award Set Aside

8.3.1 General

The second part of Art. V(1)(e) provides that the enforcing court may refuse enforcement if the party opposing enforcement can prove that the award has been set aside or suspended by a competent court of the country in which, or under the law of

³⁸ *Rosseel N.V v Oriental Commercial & Shipping Co Ltd* 628.

³⁹ *ibid* 627.

which, that award was made. The competent authority as mentioned in the second leg of Art. V(1)(e) and Art. VI is always the court of the country where the award was made.⁴⁰ These two Articles establish the principle that the jurisdiction to set aside or suspend the award is exclusively granted to the court of the place in which the award was made. Accordingly, a decision to set aside by a court elsewhere must be given no weight at all by enforcing courts.⁴¹

Yet, It is important to note that this ground can be invoked to refuse enforcement only if the award has been successfully set aside or suspended in the place of origin, but not where the party resisting enforcement has merely initiated an application for setting aside or suspending the award in that country. In the latter situation he is only entitled to a possible adjournment of the decision on enforcement as laid down in Art. VI of the NYC.⁴²

8.3.2 Enforcement of Previously Set Aside Awards

⁴⁰ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 350. He has stated that the phrase "or under the law of which, that award was made" contained in Art. V(1)(e) refers to the theoretical case in which the parties agreed upon a foreign law to govern the award which is different from the law of the country in which the award was made. So, it has been observed that:

[T]he phrase "or the country in which, or under the law of which" is somewhat out of tune with Article. V(1)(a) which accords the primary role to the law as chosen by the parties, and the subsidiary role to the law of the country where the award was made. Although Article. V(1)(e) reverses this order, this has no legal consequence.

Nonetheless, courts have interpreted the phrase "or under the law of which, that award was made" as referring exclusively the procedural and not the substantive law. See, eg, *Intl Standard Elec Corp v Bidas Sociedad Anonima Petrolera* 745 FSupp 172 (US District Court SD NY 1990) 178; *M & C Corp v Erwin Behr GmbH & Co KG* 87 F3d 844 (US Court of Appeals 6th Circ 1996) 848; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 289. See also, Dicey, Morris and Collins, *Conflict of Laws* para 16-119.

⁴¹ See, eg, *Norsolor v Pabalk* (1982) VII YBCA 312 (Austria Supreme Court 1980); *Coutinho Caro USA Inc & Co v Marcus Trading* (20001) XXVI YBCA 894 (US District Court Connecticut 2000) 901; *Gabon v Swiss Oil Cor* (1989) XIV YBCA 621 (Cayman Grand Court 1988) pp 623-25; *Nicor Intl Corp El Pasa Cor* (2004) XXIX YBCA 1140 (US District Court SDF 2003) 1157; *Empresa Colombiana de Vias Ferreas v Drummond Ltd* 653; *Four Season Hotels & Resorts BV v Consorcio Barr SA* (2004) XXIX YBCA 882 (US District Court SDF 2003) pp 893-96; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 289. See also, van den Berg, 'Consolidated Commentary' (2003) pp 572, 662.

⁴² See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 350; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1687.

Recently, especially after the *Chromalloy* US case⁴³ and the French exceptional case of *Hilmarton*,⁴⁴ the question whether an arbitral award that has been set aside in its country of origin should be nevertheless enforced in another country under the NYC has given rise to extensive debate in international arbitration literature and practice.⁴⁵

In answering this question, four main approaches have been advanced:

First, the conservative approach, which appears to be adopted by many courts⁴⁶ and writers,⁴⁷ is that an award set aside in the place of origin is, as a general rule, not enforceable elsewhere under Art. V(1)(e). This approach is simply based upon the letter of Art. V(1)(e) which provides that the enforcement of awards may be refused if the award has been set aside in the country where it was made. The Convention

⁴³ *Chromalloy Aeroservices Inc v Arab republic of Egypt* .

⁴⁴ *Hilmarton Ltd v Omnium de Traitement et de Valorisation OTV* .

⁴⁵ See, eg, E Gaillard, 'Enforcement of Awards Set Aside in the Country of Origin: The French Experience' (ICCA Congress Series no 9 Paris 1998) 505; D Rivkin, 'The Enforcement of Awards Nullified in the Country of Origin: The American Experience' (ICCA Congress Series no 9 Paris 1998) 528; A El-Kosheri, 'The Enforcement of Awards Nullified in the Country of Origin' (ICCA Congress Series no 9 Paris 1998) 544; K Sachs, 'The Enforcement of Awards Nullified in the Country of Origin: The German Perspective' (ICCA Congress Series no 9 Paris 1998) 552; Freycr and Gharavi, 'Finality and Enforceability of Foreign Arbitral Awards: From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity' 101; R Chan, 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of *Chromalloy*' (1999) 17 (1) *Boston Univ Intl L J* 141; M Hwang and A Chan, 'Enforcement and Setting Aside of International Arbitral Awards - The Perspective of Common Law Countries' (ICCA Congress Series no 10 New Delhi 2000) 145; P Mayer, 'Revisiting *Hilmarton* and *Chromalloy*' (ICCA Congress Series no 10 2000 New Delhi 2000) 165; C Drahozal, 'Enforcing Vacated International Arbitration Awards: An Economic Approach' (2000) 11 *Am Rev Intl Arb* 451; Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* .

⁴⁶ In favour of this approach from courts, see, eg, *Claude Clair v Louis Berardi* (1982) VII YBCA 319 (France Court of Appeal 1980); *Baker Marin Ltd v Chevron Ltd* 191 F3d 194 (US Court of Appeals 2nd Cir 1999); *Marin I Spier v Calzaturificio Tecnica* 71 F Supp 2d 279 (US District Court SDNY 1999); *MIR Mecauteahhtik v KB Most-Bank KG - A40/4363-03* (Russia Appeal Court 29 July 2003); *X v X* (2000) XXV YBCA 717 (Germany Court of Appeal 28 Oct 1999) 719; The Chinese Supreme people's Court Notice on the implementation of the NYC, cited in Chang, 'Enforcement of Foreign Arbitral Awards in the People's Republic of China' pp 468-69.

⁴⁷ In favour of this approach from writers, see, eg, A Rogers, 'The Enforcement of Awards Nullified in the Country of Origin' (ICCA Congress Series no 9 Paris 1998) 548; E Schwartz, 'A Comment on *Chromalloy-Hilmarton*, a l'americaine' (1997) 14 (2) *J Intl Arb* 125 at 131; G Sampliner, 'Enforcement of Nullified Foreign Arbitral Awards - *Chromalloy* Revisited' (1997) 14 (3) *J Intl Arb* 141; Rognlien, the Norwegian delegate at the NYC's Conference, UN Doc. E/CONF.26/SR.17p 11; Dicey, Morris and Collins, *Conflict of Laws* para 16-118; Ajons 'Enforcing Annulled Arbitral Awards - A Comparative View' (2000) 7 *Croat Arbit Yearb* 55, cited in Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 26-110 fn 167; Giarding 'The International Recognition and Enforcement of Arbitral Awards Nullified in the Country of Origin' in Briner, et al (eds) *Law of Intrenational Business and Dispute settlement in the 21st Century* (2000) 205, cited in Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 26-110 fn 167; See also in general, Mayer, 'Revisiting *Hilmarton* and *Chromalloy*' 165; R Smit, 'International Arbitration of Infrastructure Project Disputes and the Enforcement Regime Under the New York Convention' (2003) <<http://www.stblaw.com/content/Publications/pub224.pdf>> (accessed 27/2/2006) 12.

specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law.⁴⁸ It is argued that arbitral awards derive their force from the legal system of the country in which they are made, and, accordingly, the nullification of an award by the courts of that country deprives the award of force in other countries, as recognised by Art. V(1)(e). In other words, an award set aside by a court of the country in which it was rendered simply no longer exists and, therefore, is incapable of enforcement in any other jurisdiction.⁴⁹ Prof van den Berg stated that:

The disregard of annulment of the award ... involves basic legal concepts. When an award has been annulled in the country of origin, it has become non-existent in that country. The fact that the award has been annulled implies that the award was legally rooted in the arbitration law of the country of the origin. How then is it possible that courts in another country can consider the same award as still valid? Perhaps some theories of legal philosophy may provide an answer to this question, but for a legal practitioner this phenomenon is inexplicable. It seems that only an international treaty can give a special legal status to an award notwithstanding its annulment in the country of origin.⁵⁰

This justification, however, has been criticized on the basis that the existence of an award, as an expression of a contract between the parties, cannot be assumed to be a matter for the exclusive determination by the courts in the State where it was rendered. The criticism follows the approach common to most questions that involve a conflict of laws; if a forum properly establishes jurisdiction, a matter can be determined as valid in accordance with the laws of that forum despite lacking validity under the laws of another.⁵¹ Moreover, the conservative approach would pose an obvious danger to the harmonisation of the legal regime of international arbitration by inviting the application of national criteria which may be contrary to the

⁴⁸ See, *Marin I Spier v Calzaturificio Tecnica* p 285.

⁴⁹ See, in general, Smit, 'International Arbitration of Infrastructure Project Disputes and the Enforcement Regime Under the New York Convention' p12; UN Doc. A/CN.9/460 para 137;

⁵⁰ AJ van den Berg, 'Annulment of Awards in International Arbitration' (International arbitration in the 21st century: towards "judicialization" and uniformity? 1992) 161, cited in Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* 84.

⁵¹ See, in general, UN Doc. A/CN.9/460, para 137.

contemporary international consensus.⁵² However, this approach has been also used to support the conservative view, as will be seen below.

Another argument in favour of the conservative approach is that, giving the enforcing court discretion to enforce foreign awards although they have been set aside in the country of origin would lead to different results in different countries, and therefore would threaten the international harmony of the enforcement of foreign awards intended by the NYC.⁵³ In criticising this argument, it has been said that such a lack of harmony is a common and even normal situation under international private law in which the world is divided into a multiplicity of sovereign States. Each country has a legitimate right to assess the value of the award by reference to its own criteria and its own conflict of laws rules, and the result will inevitably differ from country to country. More specifically, it is unanimously admitted in the field of arbitration that when an award has been affirmed by a court of the seat of the arbitration, the courts of other country where enforcement is sought still have jurisdiction over the enforcement of the award in their territory, and may refuse to grant enforcement if the award is not in compliance with the requirements of their own laws. If it is acceptable to disregard the court of the arbitration seat's judgment in confirming the award, why should it be necessary to abide by its judgment in the converse situation, namely when it has annulled the award? International harmony is not more important in the first situation than in the second.⁵⁴

A further argument for supporting the conservative approach is that when the parties have agreed to hold the arbitration in a particular country, it can be presumed that they have freely chosen to be subject to the laws of that country. Accordingly, enabling an

⁵² In this regard, it was argued that one can imagine a situation where the courts of the place of arbitration apply criteria for the annulment of awards which are clearly contrary to the contemporary international consensus, such as allowing review of the merits of awards or invalidating awards for failure to abide by pointless formalities, which neither party had raised during the arbitration. That is bad enough. But one can also imagine criteria which would be internationally intolerable, such as invalidating awards because all the arbitrators were not of a certain religion, or were not of the male gender. See, Paulsson, 'Awards set aside at the place of arbitration' 24.

⁵³ See, in general, Mayer, 'Revisiting Hilmarton and Chromalloy' 170.

⁵⁴ *ibid* pp 170-71.

enforcing court to disregard the setting aside of the award by a court in the seat would circumvent the will of the parties.⁵⁵

The second approach, which seems broadly liberal, is that the setting aside of an award abroad must be excluded as ground for refusing enforcement. Thus, an enforcing court simply would not be required, nor indeed entitled, to give any weight to what a foreign court may have done to an award. Therefore, the award must be enforced even if it has been set aside by a court of the seat of arbitration. This approach has been progressively established by four separate French decisions and seems to hold sway in France.⁵⁶ It is based on ignoring article V(1)(e) entirely, on the view that the NYC under article VII allows each country to adopt a more liberal regime in favour of enforcement. This approach would entirely displace the control function of enforcement jurisdictions. If an award meets the criteria of the enforcement jurisdiction, the judge there simply would not be required, nor indeed entitled, to give any weight to what a foreign court may have done to an award; that would be a matter of purely local consequence in that country. However, this argument has been considered to be too radical, and contrary to current expectations of both lawyers and users. Relying on Art. VII to totally exclude the setting aside ground of Art. V(1)(e) has been criticised on the ground that, unlike France, not every country has provisions for enforcing annulled awards which are more favourable than the NYC. Hence, it is argued that virtually all countries except France have domestic laws which considers that the setting aside of an award in the country of origin is a ground for refusing of enforcement.⁵⁷ Therefore, for example, when the US District Court enforced the annulled award in *Chromalloy* on the ground that it could not deny a party's right to rely on US domestic laws for enforcement because the FAA provided more-favourable provisions the NYC, it was criticised because the FAA in fact has no such provisions.⁵⁸ Moreover, enforcing courts ignoring Art. V(1)(e)

⁵⁵ See, in general, UN Doc. A/CN.9/460 para 142.

⁵⁶ See, eg, *Pabalk Ticaret Ltd Sirketi v Norsolor SA* (the French Supreme Court 1984) pp 489-90; *Polish Ocean Line v Jolasry* (the French Supreme Court 1993) 663; *Hilmarton Ltd v Omnium de Traitement et de Valorisation OTV* (the French Supreme Court 1994) pp 656-57; *Egypt v Chromalloy Aeroservices Inc* (French Court of Appeal 1997) pp 692-93. See, also in general, Paulsson, 'Awards set aside at the place of arbitration' 24.

⁵⁷ See, van den Berg, 'The Application of the New York Convention by the Courts' 33

entirely is argued to constitute a real obstacle to the uniformity of international arbitration and to demonstrate the limits of any harmonization through model laws.⁵⁹

A further argument in favour of enforcing the annulled award was that the practice of enforcement of awards set aside in their country of origin would increase the effectiveness and the popularity of international commercial arbitration as a binding dispute settlement mechanism.⁶⁰ It would also avoid rendering international arbitral awards ineffectual by discouraging courts of those countries from setting aside awards rendered against their citizens and, especially, their government or state corporations.⁶¹

The third approach is that the setting aside of an award by a court in the arbitration seat should not lead to an absolute refusal to enforce that award in other countries, but should rather be subject to the discretionary power of the court where enforcement is sought.⁶² This approach can be supported by reference to the same arguments as the second approach. But it is particularly based upon the permissive character of Art. V(1) by using the term "may". It is argued that the non-mandatory nature of Article V(1)(e) would permit the enforcement of a foreign arbitral award that has been set aside in its country of origin, because it provides only that an enforcing court "may" refuse enforcement of such awards, not that it "must" do so.⁶³ Yet, this argument is open to criticism. Prof Sanders stated:

⁵⁸ See, Chan, 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of *Chromalloy*' 162; Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* pp 99-100.

⁵⁹ See, Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* pp 86-87.

⁶⁰ See, Sampliner, 'Enforcement of Nullified Foreign Arbitral Awards - *Chromalloy* Revisited' 141 at 165; Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award*

⁶¹ See, in general, Freyer and Gharavi, 'Finality and Enforceability of Foreign Arbitral Awards: From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity' 109.

⁶² In favour of this approach from courts, See, eg, *Chromalloy Aeroservices Inc v Arab republic of Egypt* (US District Court Colu 1996). In favour of this approach from writers, see, eg, Davidson, *Arbitration* 396; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-104; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 169.

⁶³ See, eg, *Chromalloy Aeroservices Inc v Arab republic of Egypt* pp 909, 914; Smit, 'International Arbitration of Infrastructure Project Disputes and the Enforcement Regime Under the New York Convention' 12; W Park and J Paulsson, 'THE Binding Force of the International Arbitration Awards'(1982-1983) 23 *Virginia J Intl L* 253 at 258.

In my understanding, "may" points to the requirement that the party against whom enforcement is sought must first have proven that one of the following grounds exists, but that once one or more of the grounds are proven, refusal of enforcement will follow. ... In conclusion, enforcement of an annulled award cannot be based upon the use of "may" in the heading of Article V".⁶⁴

Similarly, the US Court of Appeal has said in *Baker Marin Ltd v Chevron Ltd* that "under the Convention and principles of comity, it would not be proper to enforce a foreign arbitral award when such an award has been set aside by the Nigerian courts".⁶⁵

The fourth approach is that the annulment of an award by a court of the country of origin may lead to refusal of enforcement abroad under Art. V(1)(e) only if such annulment is based on grounds comparable to the grounds listed in Art. V(1)(a-d) of the NYC.⁶⁶ This approach goes back to article V(1), and proceeds on the basis that its language is permissive which seems to grant the enforcing court discretion to enforce an award that has been annulled in the place where it was rendered. As regards how the enforcing court should use its discretion, it is suggested that it should distinguish between "international standards" and "local standards". International standards would comprise those grounds for annulment which consistent with grounds listed in paragraphs (a) through (d) of article V(1) of the NYC. But the grounds of annulment would be deemed as local standard if they are different than those in Art. V(1)(a-d) of the NYC. Under this proposal only decisions to set aside based on an international standards would constitute grounds for refusing enforcement of foreign arbitral awards, whereas setting aside based on any other grounds would not prevent

⁶⁴ P Sanders, *Quo vadis arbitration? : sixty years of arbitration practice : a comparative study* (Kluwer Law International, The Hague 1999) pp 77-78; Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* 97.

⁶⁵ *Baker Marin Ltd v Chevron Ltd* 196. Likewise, the Chinese Supreme people's Court Notice on the implementation of the NYC confirms that if the party resisting enforcement proved that the award contained one of the grounds specified in Art. V(1), the Chinese competent court shall reject the application to enforce the award. See, Chang, 'Enforcement of Foreign Arbitral Awards in the People's Republic of China' pp 468-69.

⁶⁶ In favour of this approach, see, Paulsson, 'Awards set aside at the place of arbitration' 25; Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 28; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 175-176. See, also in general, van den Berg, 'The Application of the New York Convention by the Courts' 33; UN Doc. A/CN.9/460 para 143; Mayer, 'Revisiting Hilmarton and Chromalloy' pp 165-76.

enforcement of the award in other countries. The proponents of this approach also argue that it would lessen the temptation to issue annulments based on local standards, as well being entirely consistent with the 1961 European Convention, thus contributing to harmonisation.⁶⁷

In the light of the foregoing considerations, the present question appears to be problematic and controversial. Indeed, a leading authority on the Convention, Prof Berg, cannot decide whether he favours the first or the fourth approach. Yet, the fourth approach may appear to be the most convincing, since it constitutes a compromise solution between the extreme conservative and extreme liberal approaches. Also, it to be borne in mind that although the convention allows only competent courts in the seat of arbitration to set aside an award, this should be not interpreted to mean that the NYC recognizes any grounds available in the country of origin for setting aside the award even if not consistent with the grounds mentioned in Art. V(a) to (e) of the NYC, as this would mean that all manner of grounds from different national laws would be indirectly introduced as grounds for refusing enforcement under Art. V(1)(e). This would breach the key principle, which clearly intended by the drafters and unanimously adopted by the courts, that enforcement of binding foreign awards may be refused only by grounds exhaustively listed in Art. V of the NYC. Finally, this approach should not affect the application of Art. VII allowing the winning party to seek enforcement under any more-favourable- provisions available in the country where enforcement is sought.

8.3.3 Successful Case Law

Setting aside as ground for resisting enforcement has rarely been raised due to the fact that arbitral awards that have been set aside in the country of origin are not common.

⁶⁸ Nonetheless, it was generally assumed that an award could not be enforced under the NYC if it has been set aside in its country of origin. Consequently, enforcement has been denied in several cases on the basis that the award has been set aside in the seat of arbitration. For example, a French court of appeal refused enforcement of

⁶⁷ See, Paulsson, 'Awards set aside at the place of arbitration' 25. See, also in general, UN Doc. A/CN.9/460 para 143.

⁶⁸ See, van den Berg, 'The Application of the New York Convention by the Courts' 33.

award rendered in Geneva because the award had been set aside by Geneva Court of Appeal which considered the award was arbitrary.⁶⁹ In another case, the German Court of Appeal revoked leave to enforce an award when it was set aside in Moscow where it had been made.⁷⁰ Again, in *Baker Marin Ltd v Chevron Ltd* a US court of appeal refused to enforce two awards rendered in Nigeria on the basis that the awards were set aside by a Nigerian court on the grounds that the arbitrators had improperly awarded punitive damages, gone beyond the scope of the submissions, incorrectly admitted parole evidence, and made inconsistent awards. A US district court denied enforcement, holding that under Art. V(1)(e), "it would not be proper to enforce a foreign arbitral award under the Convention when such an award has been set aside by the Nigerian courts".⁷¹ On appeal the plaintiff argued that the awards were set aside by the Nigerian courts for reasons that would not be recognized under US law as valid grounds for vacating an arbitration award, and that under Article VII of the NYC (allowing enforcement where local law favours it), it might invoke US national arbitration law, regardless of the action of the Nigerian court. The Court of Appeal rejected this argument holding that

It is sufficient answer that the parties contracted in Nigeria that their disputes would be arbitrated under the laws of Nigeria. The governing agreements make no reference whatever to United States law. Nothing suggests that the parties intended United States domestic arbitral law to govern their disputes.⁷²

With reference to certain works of Prof Berg, the Court additionally noted as a practical matter that:

[M]echanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary "with enforcement actions from

⁶⁹ *Claude Clair v Louis Berardi*.

⁷⁰ *X v X* (Germany Court of Appeal 28 Oct 1999) 719.

⁷¹ *Baker Marin Ltd v Chevron Ltd* pp 194-96.

⁷² *ibid* pp 196-97.

country to country until a court is found, if any, which grants the enforcement". (citation omitted)⁷³

The plaintiff also contended that Art. V employs permissive rather than mandatory language, providing that enforcement "may" be refused, which implies that the enforcing court might have discretion to enforce the awards, regardless of the fact that they had been set aside by the Nigerian Court. The US Court of Appeal rejected also this contention, holding that it was sufficient answer that plaintiff had shown no adequate reason for refusing to recognize the judgments of the Nigerian court. The Court went on to distinguish the *Chromalloy* case where a US district court enforced a foreign award although it has been set aside in Egypt where it was made. It held that:

Unlike the petitioner in *Chromalloy*, (the plaintiff) is not a United States citizen, and it did not initially seek confirmation of the award in the United States. Furthermore, (the defendants) did not violate any promise in appealing the arbitration award within Nigeria. Recognition of the Nigerian judgment in this case does not conflict with United States public policy. (Whereas the US District Court in *Chromalloy*) concluded that Egypt was seeking "to repudiate its solemn promise to abide by the results of the arbitration," and that recognizing the Egyptian judgment would be contrary to the United States policy favoring arbitration.⁷⁴

In another US case, the District Court in *Marin I Spier v Calzaturificio Tecnica SpA* relied on the decision in *Baker Marine* to refuse enforcement of an award made and set aside in Italy.⁷⁵ However, some of the justifications presented by the US Court of Appeal in *Baker Marin Ltd v* may be criticised. First, the Court refused to apply the provision of Art. VII(1) of the NYC that permits a party seeking enforcement to rely on laws in the enforcing state which are more favourable to enforcement, merely because the governing agreements made no reference to United States law. Yet, Art. VII(1) does not make the ability to rely on provisions in the law of the enforcing state, which are more favourable to enforcement, dependent on the agreement of the parties. Indeed, Art. VII(1) entitles 'any interested party' to rely on such provisions. Secondly, the attempt to distinguish *Chromalloy* on the basis that, "unlike the petitioner in *Chromalloy*, (the plaintiff) is not a United States citizen", lacks merit,

⁷³ *ibid* 197 fn 2.

⁷⁴ *ibid* 197 and fn 3.

⁷⁵ *Marin I Spier v Calzaturificio Tecnica*.

since it makes the application of the NYC contingent on the nationality of the parties, despite the fact that the NYC aims to facilitate the enforcement of foreign awards, and in most cases a foreign party will seek enforcement of such awards against a citizen party.

In a more recent case, a Russian commercial court declined to enforce an award on the basis that it had been set aside by a Stockholm district court, the award being made in Sweden. As an appeal was rejected, the Russian Court of Appeal finding that the commercial court had correctly noted that the award had been set aside by the competent Swedish court, which constitutes grounds for refusal of recognition and enforcement.⁷⁶

8.3.4 Unsuccessful Case Law

Conversely, the traditional view that the setting aside of an award in its country of origin should bar its enforcement in other countries under Art. V(1)(e) has recently been challenged by courts in France, Belgium, Austria and the USA, those courts granting enforcement of awards which had been set aside in their respective seats of arbitration.

The French Courts were the first to consider enforcing awards which had been set aside. On several occasions since 1984, French courts have taken the line that they may enforce awards that have been set aside in their state of origin. The first French case to do so was *Norsolor*, where an award made in Austria was annulled by a court of appeal of Vienna on the grounds of transnational rules. The French Court of Appeal having refused to enforce the award on the basis of Art. V(1)(e), the French Supreme Court overturned that decision, holding that Art. VII of the NYC provides that the provisions of the Convention do not deprive any interested party of any right he may have to avail himself of an arbitral award in the country where enforcement is sought. Accordingly, the enforcing court cannot refuse enforcement when its own

⁷⁶ *MIR Meauteahhitik v KB Most-Bank*, cited in D Tapola, 'Recent Case Law on the Recognition and Enforcement of Foreign Arbitral Awards in Russia'(2005) 22 (4) J Intl Arb 331 p 5.

national laws permit it, and this award would be enforceable in France under Art. 12 of the Code of Civil Procedure.⁷⁷

In the *Polish Ocean Line* case (1993), although enforcement was opposed on the basis that the award has been suspended, the French Supreme Court ruled on both principles of suspension and setting aside of an award, confirming a judgement of the French Court of Appeal granting leave to enforce an award that had been rendered and suspended in Poland. The French Supreme Court stated:

Art. VII of the 1985 New York Convention, to which both France and Poland are parties, does not deprive any interested party of any right it may have to avail itself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon. As a result, a French court may not deny an application for leave to enforce an arbitral award which was set aside or suspended by a competent authority in the country in which the award was rendered, if the grounds for opposing enforcement, although mentioned in Art. V(1)(e) of the 1958 New York Convention, are not among the grounds specified in Art. 1502 of the NCP. The Court of Appeal was therefore correct in deciding that the setting aside action in Poland and the Polish court's decision to suspend enforcement cannot justify a refusal of enforcement of the award in France.⁷⁸

Equally, in the *Hilmarton* case (1994) the French Supreme Court upheld the decision of the French Court of Appeal confirming the enforcement of an award made and set aside in Switzerland, holding that:

The lower decision correctly held that, applying Art. VII of the [1958 New York Convention], OTV (the winning party) could rely upon the French law on international arbitration concerning the recognition and enforcement of international arbitration awards rendered abroad, and especially upon Art. 1902 NCCP, which does not list the ground provided in Art. V of the 1958 Convention among the grounds for refusal of recognition and enforcement.

Lastly, the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in

⁷⁷ See, *Pabalk Ticaret Ltd Sirketi v Norsolor SA* pp 489-91.

⁷⁸ *Polish Ocean Line v Jolasry* 663.

existence even if set aside and its recognition in France is not contrary to international public policy.⁷⁹

Finally the French Court of Appeal in the *Chromalloy* case (1997) affirmed a decision of a lower court granting enforcement of an award notwithstanding its having been rendered and set aside in Egypt. The Court again relied upon the more-favorable-provisions right provided by Art. VII of the NYC, and accordingly concluded that:

A French judge may refuse to grant exequatur only in cases specified and limitatively enumerated by Art. 1502 of the New Code of Civil Procedure (NCCP) which is his national law in this matter and on which *Chromalloy* is thus authorized to rely. Art. 1502 NCCP does not contain a number of grounds for refusal of recognition and enforcement which are provided in Art. V of the 1958 Convention, the application of which, consequently, is precluded. The award made in Egypt is an international award which, by definition, is not integrated in the legal order of that State so that its existence remains established despite its being annulled and its recognition in France is not in violation of international public policy. Thus, the ground developed by the Arab Republic of Egypt to support its appeal is unfounded.⁸⁰

The above French decisions show a welcome clarification of the principle that the setting aside of an award in the country in which it was made does not in itself constitute grounds for refusing enforcement of an award pursuant to the applicable criteria of France law and Art. VII of the NYC, and that such a principle is not contrary to the French conception of international public policy.⁸¹ In light of the French cases mentioned above, the possibility of enforcement of an annulled award is today firmly established as a clearly defined principle in France,⁸² a fact which has produced contrasting reactions.⁸³

⁷⁹ *Hilmarton Ltd v Omnium de Traitement et de Valorisation OTV* pp 656-57.

⁸⁰ *Egypt v Chromalloy Aeroservices Inc* pp 692-93.

⁸¹ However, for literary criticisms of French cases, see, Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* pp 81-82.

⁸² See, Gaillard, 'Enforcement of Awards Set Aside in the Country of Origin: The French Experience' p 507; Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* 77.

⁸³ See, in general, Gaillard, 'Enforcement of Awards Set Aside in the Country of Origin: The French Experience' 516 and fns 42, 43; Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* pp 81-82.

In Belgium in the *Sonatrach* case (1988), a Court of first instance declined to overturn a decision by the president of the court of first instance of Brussels granting enforcement of an award rendered in Algeria and annulled by the Algerian Court of Appeal. It also refused to suspend its decision on enforcement until all ordinary and extraordinary means of appeal against the annulment order were used up before the Algerian Supreme Court. The court reasoned that the annulment of the award in the country of the arbitral seat is not included among the grounds for refusing of enforcement listed in Art. 1723 of the Belgian Judicial Code. It also decided that Art. V(1)(e) was inapplicable, as Algeria had not yet adopted the NYC when the award was made.⁸⁴ Regardless of being frequently mentioned, the above case is not a true example of a court enforcing an annulled award under the NYC, given that the NYC was not applicable. As there is no other case in which a Belgian court has enforced an award which has been set aside, the position remains unclear in Belgium.

The Austrian Supreme Court in the *Radenska* case (1993) overturned the judgment of the Court of Appeal refusing enforcement of an award rendered in Belgrade on the ground that it had been annulled in its country of origin for breach of public policy of Serbia. The Austrian Supreme Court applied Art. IX(2) of the European Convention on International Commercial Arbitration of 1961 which states that the setting aside of an award in a contracting state will only constitute a ground for refusing enforcement in another contracting state if the award has been set aside for reasons specified in the Convention. The Court held that:

Art. IX(2) para. 1 of the European Convention restricts the application of the terms of Art. V(1)(e) of the New York Convention admitting the setting aside of an award- without any restriction- as a ground for refusing its enforcement, to the grounds for such a refusal enumerated in Art. IX(1). The violation of the public policy of the country of origin does not figure in this enumeration. Thus pursuant to Art. IX of the European Convention, the setting aside of the present award is not a reason to refuse its enforcement.⁸⁵

⁸⁴ *SONATRACH v Ford Bacon & Davis Inc* (1990) XV YBCA 370 (Belgium Court of First Instance 1988) pp 372-76.

⁸⁵ *Kajo-Erzeugnisse Essenzen GmbH v DO Zdravilisce Radenska* (1993) pp 1055-56.

The Austrian Supreme Court confirmed its approach again in 1998 in the same case.⁸⁶ The cases mentioned above, illustrate that the Austrian Supreme Court appears to be the first authority to adopt the principle that enforcement of a foreign award may be refused only if the setting aside in the country of origin occurred on one of the grounds listed in Art. V(1)(a-d) of the NYC (as provided by Art. IX(1) of the European Convention of 1961). Therefore, violation of, for example, the public policy of the country in which an award has been annulled does not amount to a ground for refusing enforcement because it is not listed among those grounds.

In the *Chromalloy* case, as seen above, an award rendered and annulled in Egypt was enforced in France in 1997. Prior to this leave to enforce was granted in US by a Court of the District of Columbia in 1996 on three grounds. First, the Court held that Article V(1)(e) was discretionary, not mandatory, relying on the use of the word "may". Therefore, it took the view that an enforcing court is granted a discretion whether or not to enforce an award where the grounds under Art. V for refusing enforcement are satisfied, including the case where an award has been annulled in the country of origin.⁸⁷ Secondly, the court also relied upon the more-favourable-provisions right provided for by Art. VII(1) of the Convention. The Court claimed that Art. VII(1) required it to examine the Federal Arbitration Act (FAA), the domestic arbitral law of the United States, where the award was sought to be enforced. The Court then found that American law did not allow an enforcing court to refuse enforcement of an award affected by error of law. The Court therefore concluded that enforcement of the award was proper, so as not to deprive the plaintiff of its right to enforcement under United States law.⁸⁸ Finally, the Court noted that the arbitration agreement provided that the award was not to be subject to any appeal or other recourse before the Egyptian courts, by providing that the decision of the arbitrators would be "final and binding". Accordingly, the application to an Egyptian court to set the award aside was held to be a repudiation of that agreement, and the

⁸⁶ *Kajo-Erzeugnisse Essenzen GmbH v DO Zdravilisce Radenska (1998)* pp 924-25.

⁸⁷ *Chromalloy Aeroservices Inc v Arab republic of Egypt* pp 909, 914.

⁸⁸ *ibid* pp 909-10, 914.

view was taken that recognition of the Egyptian annulment decision by the US Courts would violate the clear US public policy in favour of final and binding arbitration.⁸⁹

It is worthwhile to observe that the US District Court in *Chromalloy* interpreted Art. VII(1) of the NYC as mandatory in requiring enforcement of an award if such an award is enforceable under the laws and treaties applicable in US.⁹⁰ However, the foundations of that decision have been subject to criticism by the most distinguished experts.⁹¹ Prof van den Berg stated that the approach of the US District Court in *Chromalloy*:

is unclear since the opinion is rather confusing, mixing residual discretionary power with US standards for setting aside awards and applying half-heartedly the more-favourable right provision of Art. VII(1) of the Convention ("cherry picking" which is not allowed under the Convention). The opinion is a bad precedent for what might be a good cause.⁹²

In particular, as regards the court's interpretation of the permissive language (i.e. "may be refused") of Art. V to mean that the enforcing court is not bound to refuse enforcement of a foreign award even if that award has been set aside in the country of origin, Prof Fouchard sarcastically said "it is only today, apparently, that the discovery has been made that the application of the grounds for refusing enforcement may be optional for the courts... ." ⁹³ Prof Sanders also believes that "may" cannot be interpreted as granting a discretionary power to enforce an annulled award.⁹⁴ More significantly, the FAA in implementing the NYC, like the official French version of the Convention, uses a formula⁹⁵ that appears to give no discretionary power at all to

⁸⁹ *ibid* pp 912-13.

⁹⁰ Hwang and Chan, 'Enforcement and Setting Aside of International Arbitral Awards - The Perspective of Common Law Countries' 149.

⁹¹ See, eg, Rogers, 'The Enforcement of Awards Nullified in the Country of Origin' 548; Chang, 'Enforcement of Foreign Arbitral Awards in the People's Republic of China' 34. See, also in general, Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* pp 96-107; Rivkin, 'The Enforcement of Awards Nullified in the Country of Origin: The American Experience' pp 528-43 and fns 5, 6. Chan, 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of *Chromalloy*'.

⁹² van den Berg, 'The Application of the New York Convention by the Courts' 34.

⁹³ Fouchard, 'Suggestions to Improve the International Efficacy of Arbitral Awards' pp 607-8.

⁹⁴ Sanders, *Quo vadis arbitration? : sixty years of arbitration practice : a comparative study* pp 77-78; Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* 97.

⁹⁵ US Federal Arbitration Act, Chap. 2 Sec. 2007 which states that:

the enforcing court.⁹⁶ Even more significantly, the District Court's grounds for granting enforcement of an annulled award were not followed by the US Court of Appeal in *Baker Marin* nor the US District Court in *Marin I Spier*. Therefore, the principle on which awards which have been set aside might yet be enforced under the NYC remains unclear in the USA.

Finally, it may be thought significant to recall that most of the Courts that enforced awards which had been set aside mainly relied upon Art. VII. of the NYC - the more favourable-right provision.

8.4 Suspension

The second part of Art. V(1)(e) provides that the enforcing court may refuse enforcement if the party opposing enforcement can prove that the award has been suspended by a competent court of the country in which, or under the law of which, that award was made. There is no definition of the term "suspended" under the NYC, and therefore it is unclear what the drafters precisely meant thereof. However, this formula is generally construed to "refer presumably to a suspension of the enforceability or enforcement of the award by the court in the country of origin" until it decides over an application to set the award aside.⁹⁷ It is to be observed that, just like the setting aside ground, an award has to be successfully suspended by the court of the place where the award was made in order to allow the losing party to invoke this ground for resisting enforcement under Art. V(1)(e). Thus, the suspension of the award can not be relied upon as a non-enforcement ground if the party resisting enforcement has merely initiated an application for setting aside or suspending the award in the seat of arbitration. In that case, a party is entitled at best to an adjournment of the decision on enforcement as laid down by Art. VI.

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court *shall* confirm the award *unless* it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention. (emphases added)

⁹⁶ See, Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* pp 97-98.

⁹⁷ See, van den Berg, 'Consolidated Commentary' (2003) 664; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1690.

It may also be observed that several courts have confirmed the principle that, in order to be a ground for refusing enforcement of the award, its suspension must have been successfully ordered by the relevant court in the seat of arbitration. Therefore, any suspension of an award that results automatically from the operation of law in the seat is not sufficient for refusal of enforcement under Art. V(1)(e).⁹⁸

The suspension ground however has very rarely led to enforcement being refused. A rare example of a successful attempt to invoke the ground is found in the decision of a Swiss court of appeal confirming a lower court's refusal to enforce an award rendered in France because that award was subject to an application for setting aside before a French court, and filing such an application automatically suspends the enforcement of an award under French law.⁹⁹ Yet, this approach is at odds with the general approach mentioned above that mere initiation of an application for setting aside, or automatic suspension of an award as a result of operation of law in the arbitral seat are not enough to allow enforcement to be refused, but are rather only grounds for a possible adjournment of the decision on enforcement under Art. VI. A better example is a decision of a French court of appeal to adjourn its decision on enforcement of an award rendered in Austria until the Austrian court of appeal had given its decision on an appeal against the award.¹⁰⁰

Conversely, an example of an unsuccessful defence to enforcement based on the suspension of the award is provided by the decision of the French Supreme Court in which it confirmed a judgement of the French Court of Appeal granting leave to enforce an award rendered and suspended in Poland, holding that by applying Art. VII to allow reliance on domestic laws which are more favourable to enforcement, the suspension of the award in Poland could not justify refusing enforcement of the award

⁹⁸ See, eg, *AB Gotaverken v General National Maritime Transport Co* pp 241-42; *SPP Ltd v Egypt* pp 489-90; *White Knight ISA v Nu-Swift* (English IIC 14 Jul 1995, unreported), cited in Davidson, *Arbitration* 397; *Gabon v Swiss Oil Cor* pp 623-25. See, also in general, Davidson, *Arbitration* 397; van den Berg, 'Consolidated Commentary' (2003) 664; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1690; Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 28; Dicey, Morris and Collins, *Conflict of Laws* para 16-120; Sajko, 'The New York Arbitration Convention of 1958 from the Yugoslav Point of View: Selected Issues' 212 fn 46.

⁹⁹ See, *Continaf BV v Polycoton SA* (1987) XII YBCA 505 (Switzerland Court of Appeals 1985).

¹⁰⁰ *Norsolor SA v Pabalk Ticaret Ltd Sirketi* (1983) VIII YBCA 362 (France Court of Appeal 1981).

in France, because such an action was not among the grounds for refusing enforcement specified in Art. 1502 of the French Code of Civil Procedure.¹⁰¹

8.5 The Position in Saudi Arabia

8.5.1 Not Binding

As regards the ground that the award has not become binding, it to be noted first that Saudi Arbitration law provides no answer as to the binding nature of foreign arbitral awards and when they may be regarded as having become binding. Yet, the Circular of the Grievance Board regarding enforcement of foreign judgments and arbitral awards of 1985, Art. 1 lays down that the scope of recognition and enforcement of foreign judgments in SA is merely exclusive to final judgments.¹⁰² Similarly and more precisely, Art. 5 of the same Circular states that the competent court, when considering petitions to enforce foreign arbitral awards, has to ensure that the foreign award has become final in the country in which it had been rendered.¹⁰³ From such stipulations, one might reasonably think that the finality requirement is also applied to enforcement under the NYC in SA, a requirement that leads to the problem of so-called "*double exequatur*". Indeed, this is what one Saudi lawyer thinks, stating that in order to be enforceable under the NYC in Saudi, the award has to be binding i.e. final and not subject to annulment or suspension by the court of the state where it was made.¹⁰⁴ Yet this is without doubt wrong for several reasons. First, although that Circular generally concerns enforcement of foreign judgments and awards, it was released before SA adopted the NYC, and refers particularly to the Arab League Convention on Enforcement of Judgments and Awards of 1952, which requires any judgment or award to be final. Secondly, after adhering to the NYC, finality in an award is no longer required for enforcement of NYC awards in SA, since the NYC inserted the word "binding" instead of "final" clearly to avoid the problem of "*double*

¹⁰¹ *Polish Ocean Line v Jolasry* 663.

¹⁰² the Circular of the Grievance Board regarding Enforcement of Foreign Judgments and Arbitral Awards, no 7 dated 15/8/1405 H (1985), Art. 1

¹⁰³ *ibid* Art. 5.

¹⁰⁴ M Koman, 'Status of Enforcement of a foreign arbitral award in the Kingdom' (1999) 50 (5) *The Markets* 58.

exequatur”, which existed under the Geneva Convention of 1927. Thirdly, Saudi courts have in several cases enforced foreign awards without requiring that should be final or be declared enforceable by the courts of the seat.¹⁰⁵ So, the Saudi courts have confirmed the principle that finality is not required or, in other words, that leave to enforce in the country of origin is not required under the NYC, a principle that is almost unanimously affirmed by the courts of other states.

As to the question when the foreign award can be considered to have become binding for the purposes of Art. V(1)(e), Saudi arbitration law, as stated above, is silent in relation to this matter. Therefore, it is worth outlining the *Shari'ah* position thereon. According to the prevailing perspective of *Shari'ah* Scholars, including the *Hanafis*, *Malikis*, most of *Shafis* and *Hanbalis*, an arbitral award once issued by an arbitrator binds the parties to the arbitration and becomes enforceable, just like an ordinary judgement. Binding character is conferred on the award once it is rendered by the arbitrator without need of confirmation by the relevant court.¹⁰⁶ The rationale of this principle is that the outcome of arbitration is regarded as an outcome of a binding agreement in *Shari'ah*. The opponents freely appointed the arbitrator to arbitrate between them, and accepted his authority over their dispute. Thus, his award must bind them absolutely, and must be enforced as a consequence of carrying out their arbitral agreement, since Allah the Almighty generally enjoins in *Qur'an* that “O you who believe! Fulfil (your) obligation”.¹⁰⁷ Moreover, it is said that an arbitrator is just like an ordinary judge, and his award is binding upon the parties to arbitration, otherwise it would render the whole arbitration useless and simply a delaying device and a waste of money, time and effort.¹⁰⁸ Furthermore and more significantly, the

¹⁰⁵ See, the 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997); the 25th Subsidiary Panel, decision No. 11/D/T/25 dated 1417 H (1996); the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997).

¹⁰⁶ See, in general, S Salch, *Commercial arbitration in the Arab Middle East : Shari'a, Lebanon, Syria and Egypt* (2nd edn, Hart, Oxford 2006) 68; Al-Qaradaghi, 'The General Principles of Arbitration in Islamic Fiqh ' pp 29, 35; Aag Beeg, 'Arbitration in Islamic Shari'ah and Islamic Fiqh ' 23; Al-Nashmi, 'International Arbitration and Arbitrating in Islamic Shari'ah' 28; Al-Sartawy, 'The Scope of Arbitration and the Power of the Arbitrator' pp 9, 16; Gattorah, *Arbitration in the Light of the Islamic Shari'ah* 84; A El-Ahdab, *Arbitration: Its Provisions and Sources* (Noful Paris 1990 "in Arabic") vol 1 p 89; Rifat, *National and International Commercial Arbitration in the Kingdom of Saudi Arabia* pp 72-73.

¹⁰⁷ *The Qur'an, Al-Ma'idah* [5:1].

¹⁰⁸ See, Al-Sartawy, 'The Scope of Arbitration and the Power of the Arbitrator' 16; Rifat, *National and International Commercial Arbitration in the Kingdom of Saudi Arabia* pp 70-72; Z Al-Zaid,

majority of Islamic Jurisprudents support the view that an arbitral award should not be, in principle, subject to judicial review (i.e. on the basis of error of fact or law), and cannot be revoked by the court, unless it involves obvious unfairness or breach of the basic principles of *Shari'ah*.¹⁰⁹ This principle has been officially affirmed by the Islamic Fiqh Academy (IFA), which says that an arbitral award, once issued, is binding and must be respected by all parties to the arbitration, without being subject to judicial revocation, unless it constitutes a clear injustice or breach of the *Shari'ah* principles.¹¹⁰

The same principle has been followed in several cases by Saudi courts in enforcing foreign arbitral awards. In first case, a Saudi enforcing court (the 9th Administrative Panel) stated that an arbitral award becomes binding once is rendered, according to the majority of Scholars of Islamic Jurisprudence.¹¹¹ Similarly, another Saudi enforcing court (the 25th Subsidiary Panel) conceded that a foreign award rendered in Jordan by a sole arbitrator appointed by the ICCA became final when confirmed by the general secretary of the ICCA in Paris, and was therefore enforceable under the NYC in SA.¹¹² This approach was then affirmed by the Appeal Court.¹¹³ Yet, it is not clear what the Courts exactly meant by 'final' here. The best guess is that the courts intended to embrace the general view of *Shari'ah* Scholars that an award binds the parties and is not subject to judicial reviews. In the third case that came before a Saudi enforcing court (the 18th Administrative Panel), a Saudi party opposed enforcement of an Egyptian award on several grounds, one of which was that the award had not become binding since an appeal was still taking place in the Egyptian courts. The Saudi Court however rejected this objection, holding that the binding

'Arbitration; Its Definition and its Importance ' (Session of the Shariah and law Principles of Arbitration, Riyadh 2002 'in Arabic') 12.

¹⁰⁹ See, in general, Al-Zaid, 'Arbitration; Its Definition and its Importance ' 14; A Al-Sadan, 'Enforcement of Arbitral Awards and its Difficulties ' (Symposium of Conciliation and Arbitration, Al-Taif Saudi Arabia 2004 'in Arabic') 29; Rifat, *National and International Commercial Arbitration in the Kingdom of Saudi Arabia* pp 72-73; Al-Qaradaghi, 'The General Principles of Arbitration in Islamic Fiqh ' pp 29, 35; Aag Beeg, 'Arbitration in Islamic Shari'ah and Islamic Fiqh ' pp 23-24; Al-Sartawy, 'The Scope of Arbitration and the Power of the Arbitrator' 16; El-Ahdab, *Arbitration: Its Provisions and Sources* vol 1 p 88.

¹¹⁰ The Islamic Fiqh Academy, 'Decision No. 91 (8/9) About the Principle of Arbitration in Islamic Fiqh'(1996) 2 (9) Islamic Fiqh Academy Journal 5. paras 1, 5.

¹¹¹ the 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997) p 11.

¹¹² the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996) p 5.

¹¹³ the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997) 5.

nature of the award was not affected by the existence of means of recourse against the award in its country of origin, a factor which does not block enforcement of a foreign award in SA.¹¹⁴ This decision was afterwards affirmed by the Appeal Court.¹¹⁵

The foregoing discussion demonstrates that Saudi courts adopt a friendly principle under the *Shari'ah* that an arbitral award becomes binding once it is issued by the arbitrator, and becomes enforceable in SA without need for a previous leave of enforcement or a formal confirmation by the court in the arbitral seat. It also illustrates that Saudi courts follow the principle that an award is enforceable even if it is still open or subject to an appeal in its country of origin.

8.5.2 Setting Sside and Suspension

As regards the issue of setting aside or suspension the award, there are no provisions nor case law available to shed light on the attitude of the Saudi courts regarding the enforcement of an award that has been set aside or suspended in its country of origin. Thus, it has been alleged that it is difficult to enforce such an award in SA. One author contended that grounds for annulment remain governed exclusively by national laws which are extremely diverse, ranging from the clear and liberal provisions of the French Code of Civil Procedure to the unpredictable and conservative provision of the Saudi Arbitration Regulation which empower the Saudi Courts to hear challenge the award without, however, listing the grounds for the challenge.¹¹⁶

Yet, the opposite could be argued, and not listing the grounds under the Saudi law for challenging domestic awards can be seen as an advantage for supporting the enforcement of annulled foreign awards in SA. This is because the fact that Saudi law does not specify grounds of challenge means it implicitly refers to the *Shari'ah* rule, which does not allow courts to review or vacate arbitral awards, unless in exceptional cases such as plain unfairness. Thus from a theoretical point of view, one may suggest that enforcement of award which have been set aside or suspended might be possible in SA under the application of Art. VII of the NYC (i.e. the more-favourable-

¹¹⁴ the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003) pp 5-6.

¹¹⁵ the 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004).

¹¹⁶ Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* pp 39, 115.

provision) for two reasons. Firstly, because Saudi domestic law, like French law, does not explicitly nor implicitly contain annulment or suspension of an award as a ground for refusing enforcement. Secondly, according to the principle adopted by the majority of Shari'ah scholars, an arbitral award once rendered would not be liable to challenge or revocation by the court, unless it violates essential principles of the *Shari'ah* such as clear injustice.

Finally, it may be observed that, as was seen above, when a Saudi party requested the Saudi enforcing court (the 18th Administrative Panel) to refuse enforcement of the foreign award because of an appeal against the award in Egypt where it was made, the Court, not only declined to refuse enforcement, but did not adjourn its decision on enforcement until the appeal was resolved as provided in Art. VI. This case may indicate that the Saudi courts are willing to enforce a foreign award even if it has been suspended in its country of origin.

8.6 Conclusion

According to the first part of Art. V(1)(e), enforcement of a foreign award may be refused if it has not become binding. This however does not require a previous leave of enforcement or a formal confirmation from the court of the country of the arbitration seat, the so-called "double exequatur". This has almost unanimously been affirmed by the courts including the Saudi Courts.

On the question of when a foreign award can be deemed as to have become binding, there are diverse views. Some courts referred to the applicable law of the country of the arbitration to resolve this issue. Others interpret the word binding as autonomous of the law of that state. The latter approach has given rise to several alternative interpretations, the prevailing interpretation being that the award becomes binding when it is no longer open to a genuine appeal on the merits (i.e. ordinary recourse) to a second arbitral tribunal or to a court. A few courts and authors believe that the award should be considered binding in so far as it no longer subject to an appeal to a second arbitral tribunal, whereas a handful consider the award to be binding as soon as it is rendered even if it is still open to any further means of recourse. The latter approach is adopted by the majority of scholars of the *Shari'ah*, and has been

followed by the Saudi courts on several occasions. To the best knowledge, no award has ever been refused enforcement on this ground.

According to the second part of Art. V(1)(e), enforcement of a foreign award may be refused if it has been set aside or suspended by the competent court of the country of origin. Such setting aside and suspension must have been effectively decided by a court in its country of origin in order to constitute a ground for refusing enforcement under Art. V(1)(e). Thus, the mere raising of an action to annul or suspend the award is not a ground for refusing enforcement under Art. V(1)(e), although it is a ground for a possible adjournment under Art. VI. Moreover, automatic suspension of an award by the operation of law in the country where the award was made has been generally considered to be insufficient for enforcement to be refused under Art. V(1)(e). This ground has also rarely seen enforcement being refused.

Although the ground that the award was set aside has been rarely invoked to oppose enforcement, it has been successfully invoked in a number of cases. However, courts in France, Austria and the US have shown themselves willing to enforce arbitral awards even if they have been set aside in their country of origin, relying on (i) the discretionary power of the enforcing court provided by the permissive language (i.e. may) of Art. V(1), and (ii) the more-favourable-provision principle stated by Art. VII(1).

There is considerable controversy as to whether the previous annulment of an award in its country of origin should block its enforcement in other countries under the NYC. The most conservative view is that such an annulment should, as a matter of principle, block enforcement. Another view is that such an annulment should be totally disregarded. A third view is that enforcement of annulled awards should be left to the discretion of the enforcing court. The final approach is that if the annulment is based on grounds that similar to those listed in Art. V(1)(a-d) (i.e. international standards of annulment), then it may block enforcement in other countries, but the application of national standards of annulment should be disregarded internationally.

CHAPTER NINE

Non-Arbitrability

9.1 Introduction

The sixth ground for refusal of enforcement is non-arbitrability. Having discussed the grounds of Art. V(1)(a-e), which must be raised and proven by the party resisting enforcement, it is now time to consider the grounds set forth in Art. V(2)(a-b) which can be raised by the enforcing court of its own motion to safeguard the fundamental values of the country where enforcement is sought. These grounds are the non-arbitrability of the dispute and the fact the award breaches public policy. The arbitrability of the dispute is a precondition of the validity of both the arbitration agreement and the arbitral award. Thus, Art. V(1) lays down that:

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.¹

This chapter is devoted to the examination of several important matters concerning non-arbitrability as a ground for refusing enforcement of foreign arbitral awards under Art. V(2)(a) of the NYC. It first discusses the relationship between the arbitrability and public policy defences. Secondly, it examines the question of what system of law is applicable to determine whether a matter is arbitrable or not. Thirdly, it outlines the diversity of national laws regarding the issue of arbitrability. Fourth, it points out the distinction between domestic and international arbitrability. Fifth, it examines relevant case law. Finally, the Saudi Arabian position regarding the question of arbitrability and its application as a ground for refusing enforcement of foreign awards will be highlighted.

¹ NYC of 1958, Art. V(1)(a).

9.2 The Relationship between Arbitrability and Public Policy

It may be though appropriate to ask at the outset whether arbitrability simply constitutes one aspect of public policy, and if so, whether non-arbitrability should be listed as a separate ground from public policy under Art. V(2)(1)? Many authors have argued that including non-arbitrability as a separate ground for refusing enforcement is superfluous, since its subject matter is deemed to form part of the concept of Public Policy under Art. V(2)(b).² The legislative history of the NYC shows that the French delegate objected to the separation of inarbitrability from public policy on the ground that this could tempt a court "to give international application to rules which were of exclusively domestic validity and that the exception of incompatibility with public policy was quite sufficient".³ Nonetheless, it was decided to retain inarbitrability as a separate defence under Art. V(2)(a), as proposed by the ICC draft of 1953 and the ECOSOC draft of 1955,⁴ following the Geneva Convention of 1927.⁵

Other commentators are supporting the separation, arguing that the inarbitrability ground derives from the exclusive jurisdiction of national courts. As such, Art. V(2)(a) aims to provide a type of scrutiny different from those provided by Art. V(2)(b). Art. V(2)(a) invokes the jurisdiction of a State authority, and constitutes an absolute procedural bar to the recognition of an arbitral award, irrespective of its findings, whereas Art. V(2)(b) is concerned with the merits of awards, and with setting standards to be respected by arbitrators and their awards.⁶ In addition, non-

² See, eg, Sanders, 'A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' at 270; Gaja, *International Commercial Arbitration* para 1.C.5; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 360, 368; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1704; Garnett and others, *International Commercial Arbitration* 108; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* pp 149, 471; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-111; T Carbonneau, 'The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi'(1986) 19 *Vanderbilt Journal of Transnational Law* 265 at 270; A Sheppard, 'Interim Report on Public Policy as a Bar to Enforcement of International Arbitralawards' (International Law Association London Conference 2000) 15.

³ UN Doc. E/CONF.26/SR.11p 7.

⁴ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 368.

⁵ Geneva Convention of 1927, Art.1(b).

⁶ See, H Arfazadeh, 'Arbitrability under the New York Convention: the Lex Fori Revisited'(2001) 17 (1) *Arb Intl* 73 at 83.

arbitrability relates both to the enforcement of the arbitral agreement and to the enforcement of the award, where the public policy defence applies only to the enforcement of the award.⁷ Moreover, no significant difficulties have occurred in consequence of separating the non-arbitrability and public policy defences.⁸

9.3 Law Applicable to Questions of Non-Arbitrability

The NYC requires a dispute to be arbitrable at both the pre-award stage in order to enforce the arbitral agreement, and the post-award stage in order to enforce a foreign award. But while Art. II(1) merely requires the arbitration agreement to concern 'a subject matter capable of settlement by arbitration' without indicating which law should determine the question of arbitrability, Art. V(2)(a) provides explicitly that it is a ground for resisting enforcement that "the subject matter of the difference is not capable of the settlement by arbitration under the law of" the country where enforcement is sought.⁹ Thus, it is unanimously recognised by the courts that the law of the country where enforcement of the award is sought must be applied to determine the question of the arbitrability of the dispute at the stage of enforcement of the award.¹⁰ Yet, some writers argue that arbitrability may also be determined under some other law, such as the law to which the parties have subjected the arbitral agreement to or the law of the country where the award was rendered.¹¹ The latter

⁷ Carbonneau, 'The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi' 270.

⁸ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 369.

⁹ NYC of 1958, Art. V(2)(a).

¹⁰ See, eg, *Italian Party v Swiss Company* 828; *Thyssen Haniel Logistic Intl GmbH v Barna Consignataria SL* (2001) XXIV YBCA 851 (Spain Supreme Court 1998) 852; *Consmaremma - Consorzio v Hermanos Escot Madrid SA* 859; *Audi-NSU Auto Union A.G v S. A. Adelin Petit & Cie* (1980) V YBCA 257 (Belgium Supreme Court 1979); *Nitron Intl Corp v Golden Panagia Maritime Inc* (2000) XXV YBCA 924 (US District Court SD NY 1999) 927; *Seven Seas Shipping Ltd v Tondo Limitada* (2000) XXV YBCA 987 (US District Court SD NY 1999) 989; *Societe Van hopplynus v Societe Coherent Inc* (1997) XXII YBCA 637 (Belgium Court of First Instance 1994) 640.

From writers also, see, eg, Arfazadch, 'Arbitrability under the New York Convention: the Lex Fori Revisited' pp 74, 85; van den Berg, 'Consolidated Commentary' (2003) at 630; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 176; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-113.

¹¹ See, in general, Gaja, *International Commercial Arbitration* para I.C.5 and fn 82; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 369.

view has been strongly criticized.¹² Not only is it out of line with the unanimous judicial opinion, but it also comes up against the fact that non-arbitrability is deemed so significant by the NYC that an enforcing court can raise the issue of its own motion.¹³ Furthermore, the language of Art. V(2)(a) is entirely straightforward in referring the question of arbitrability exclusively to the law of the country where enforcement of the award is sought, and a contrary interpretation is unthinkable. Moreover, as arbitrability is generally considered to form part of public policy, it would appear therefore logical that enforcing courts would only apply their national standards to the issue.

9.4 Non-Arbitrability in Domestic Laws

What is the justification for referring the question of arbitrability to the national law of the country in which enforcement is sought? The primary reason appears to be that each country is entitled to determine which disputes must be resolved judicially, to ensure that essential domestic standards regarding social, moral, political and economic policy are not subject to potential compromise via non-judicial means of disputes settlement.¹⁴ Of course, this reference to the national law of the enforcing court means that a uniform standard for what matters are or are not arbitrable is missing from the NYC. On the contrary, national laws often impose restrictions on what type of issues can be arbitrated, but those restrictions vary from country to country. Each country has its own concept of what disputes should be the exclusive domain of national courts and which can be referred to and resolved by arbitration. Therefore, a number of subject matters which are arbitrable under the law of one state

¹² See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 369; Gaja, *International Commercial Arbitration* in 82.

¹³ However, inarbitrability under the law governing the award may indirectly play a role at the enforcement stage under the NYC if the award has been set aside on the inarbitrability defence in the country of origin. Enforcement may then be declined under Art. V(1)(e) of the NYC. See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 369.

¹⁴ See, A Okekeifere, 'Public Policy And Arbitrability Under The UNCITRAL Model Law(1999) 2 (2) Intl Arb L R 70 at 72; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 148; Davidson, *Arbitration* 373; P Baron and S Liniger, 'A Second Look at Arbitrability'(2003) 19 (1) Arb Intl 27.

are not arbitrable in another state where the interests involved are deemed to be more important.¹⁵

Examples of subject matters that are generally considered as non-arbitrable under national laws are matters of criminal or family law, protection of certain weaker parties, such as minor children, and the determination of the status (e.g. insolvency or bankruptcy) of an individual or a corporate entity. In certain countries one may add to issues such as competition and anti-trust law, the determination of intellectual property rights, securities transactions, fraud, corruption, bribery (on a contract), disputes regarding investment in national resources and disputes involving the state or state entities that are not allowed to arbitrate at all or which require prior authorisation to do so.¹⁶

In some countries, particularly those of a common law background, the issue of non-arbitrability is governed by case law only,¹⁷ leading to uncertainty in areas where precedents are lacking.¹⁸ In other countries, particularly those of a civil law background, the issue is dealt with by statute.¹⁹ For example, Art. 2060 of the French Civil Code provides that:

It is not permissible to submit to arbitration matters of civil status and capacity of individuals, or relating to divorce or judicial separation of spouses, or disputes concerning public communities and public establishment, and, more general, all matters which concern public policy. However, certain categories of public establishment of an industrial or

¹⁵ See, in general, Gaja, *International Commercial Arbitration* para para I.C.5; Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* paras 9-2, 9-5; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 369; Baron and Liniger, 'A Second Look at Arbitrability' 27; Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 31; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 471.

¹⁶ See, eg, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 149; Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* paras 9-2, 9-6, 9-41; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 369; Born, *International Commercial Arbitration* 246.

¹⁷ This is the case, eg, in US. See, Baron and Liniger, 'A Second Look at Arbitrability' 28; Born, *International Commercial Arbitration* 246.

¹⁸ This is the case, eg, in UK. See, Sutton and Gill, *Russell on Arbitration* pp 12- 13; Davidson, *Arbitration* 61.

¹⁹ See, in general, UN Doc. A/CN.9/460 para 32; Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 9-19; Soo, 'International Enforcement of Arbitral Awards' at 257.

commercial character may be authorized by decree to submit to arbitration.²⁰

Likewise, Art. 806 of the Italian Code of Civil procedure provides:

The parties may have the disputes arising between them decided by arbitrators, with the exception of the disputes provided for in Articles 409 [i.e. individual labour disputes] and 442, 1 [i.e. social security and obligatory medical aid] those concerning issues of personal status and marital separation and those other disputes which may not be the subject of a settlement.²¹

Chinese Arbitration law also establishes under Art. 3 that: "The following disputes may not be arbitrated: (1) Marital, adoption, guardianship, support and succession disputes; (2) administrative disputes that shall be handled by administrative organs as prescribed by law".²²

It can be observed that excluding certain issues from the scope of arbitration reflects the fundamental policies of most countries. An example would be a foreign award granting divorce, while other non-arbitrable issues, such as disputes regarding financial provision on divorce, are less fundamentally objectionable.²³ Similarly, while criminal liability is obviously not capable of private resolution, given the public interest therein, there is no reason why the civil consequences of criminal behaviour should not be arbitrable.²⁴ Thus, it has been held that in order to consider a matter as non-arbitrable by the enforcing court, the special national interest must be more than incidentally involved in the resolution of dispute.²⁵ Equally, the mere fact that an issue of national interest may incidentally figure in the resolution of foreign arbitration proceedings for a breach of contract claim does not make the dispute non-arbitrable. Rather, certain categories of claims may be non-arbitrable because of the special national interest vested in their resolution.

²⁰ French New Code of Civil Procedure of 1981, Art. 2060.

²¹ Italian Code of Civil procedure, Art.806.

²² Chinese Arbitration Law of 1994, Art. 3.

²³ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1706.

²⁴ See, Davidson, *Arbitration* 61.

²⁵ *Parsons & Whittemore Overseas Co v RAKTA* 975; Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 29; van den Berg, 'The Application of the New York Convention by the Courts' 374.

9.5 The Distinction between Domestic and International Arbitrability

The NYC makes no distinction between domestic and international arbitrability, as Art.V(2)(a) simply refers the question of arbitrability to the national law of the country in which enforcement is sought. Thus, it was generally accepted that contracting countries were entirely free to determine disputes that are not capable of resolution by arbitration in their own realm for the purpose of Art.V(2)(a). However, there is an increasing trend in recent times to distinguish between national and international non-arbitrability in order to limit the scope of the latter concept. This means that what national law considers to be non-arbitrable in relation to domestic arbitration would not be necessarily deemed so in relation to international arbitration. Thus, enforcing courts should interpret the restrictions imposed by national law upon arbitrability narrowly if the arbitration is related to international transactions.²⁶ The underlying rationale of this distinction is that the needs of international trade are different from those of domestic commerce. As seen above, the exclusion of some matters from arbitrability under national law reflects the political, social and economic prerogatives of the state and its general attitude towards arbitration. These elements would require a balance between the mainly domestic importance of reserving particular matters to be dealt with judicially, and the more general public interest of promoting international trade and comity through an effective means of dispute settlement. Such considerations have led to the conclusion that the scope of arbitrability in the international arbitration context may be wider than the purely national context.²⁷ Thus several US cases have emphasised that the congressional interest in encouraging international trade and commerce through arbitration of

²⁶ In favour of this approach from courts, see, eg, *Fritz Scherk v Alberto-Culver Co* 417 US 506 (US Supreme Court 1974); *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (US Supreme Court 1985). In favour of this approach from authors, see, eg, Gaja, *International Commercial Arbitration* para I.C.5; van den Berg, 'Consolidated Commentary' (2003) 667; van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 630; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1707; Carbonneau, 'The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi' 271; Born, *International Commercial Arbitration* 278; Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 26-113; Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* 176; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 148; Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 26.

²⁷ See, Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 9-35; Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* 178; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 148; Baron and Liniger, 'A Second Look at Arbitrability' 27.

transnational dispute (as manifested by the countries' accession to the NYC) should prevail over any concern that such matters were intended to be specifically reserved for judicial resolution.²⁸ In addition, this distinguishing between national and international non-arbitrability may be further supported by the fact that such a distinction appears to be one aspect of the recent trend of distinguishing between national and international public policy under Art. V(2)(b) of the NYC,²⁹ which will be discussed in more detail in the next chapter.³⁰ Consequently, courts in several countries have considered subject matters, such as antitrust³¹ and securities transactions,³² to be arbitrable in international cases, although they are not capable of settlement by arbitration under national law.

However, the above distinction has been gruffly criticised on the ground that it compromises national interests in favour of the foreign policy objectives of the enforcing state.³³ It has been said that:

The doctrine that ... (the court wanted to affirm the unbounded scope of the arbitral internationalism) is excessive and does injustice to the domestic antitrust in public law by minimizing the public policy character of antitrust regulation. The spectre of the talisman is becoming all too real; if such fundamental issue as antitrust matters (and RICO claims) can be submitted to arbitration, what possible limits could there be to the reach of arbitrability in the international (and also possibly in the domestic) context? The confusing and potentially dangerous shift of domestic public law concerns to the enforcement stage is likely to be ineffectual, destined to act as the shadow of a safeguard rather than a genuine means of protection. ... The court's rush to eradicate all national legal constraints not only compromises legitimate national concerns, but also threatens the integrity of international arbitral adjudication itself, frustrating its normal tendency to seek guidance and appropriate limits from external factors. The court's failure to acknowledge logical, sensible and necessary restraints countermands the basic consensus of the New York Arbitration Convention and moves closer to placing international

²⁸ See, Garnett and others, *International Commercial Arbitration* 108.

²⁹ See, in general, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1707; van den Berg, 'Consolidated Commentary' (2003) 667.

³⁰ See, *infra* ch 10 para 10.5.

³¹ See, eg, *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*.

³² See, eg, *Fritz Scherk v Alberto-Culver Co*.

³³ See, Garnett and others, *International Commercial Arbitration*

dispute resolution thorough arbitration in a realm of "a national" lawlessness.³⁴

Given the tendency to distinguish between national and international arbitrability in order to broaden the scope of the latter, several commentators have suggested that attempts should be made to draw up a generally acceptable list of non-arbitrable subject matters in the context of international arbitration in order to reduce the risk of uncertainty caused by the diversity in the laws of contracting states regarding non-arbitrability, and to establish a uniform international standard for the application of the non-arbitrability defence under Art. V(2)(a). It was added that if such uniformity seems unfeasible, then each state should at least make a list of non-arbitrable claims so as to provide certainty and easy access to information about such issues. Proponents concluded that if neither suggestion seemed feasible, a mere attempt in that direction would be desirable, since the result of a world-wide discussion would in itself be revealing and useful.³⁵

The above proposals, however, provoked criticism from several distinguished commentators on the NYC who believe that the creation of such lists is highly unlikely,³⁶ even if they were restricted to three or four items.³⁷ In particular, Prof van den Berg stated that establishing a list of non-arbitrable matters for each Contracting State will prove to be difficult since the basic question of which matters are non-arbitrable is still unclear in various states. Moreover even where the law is clear, a list could not easily lay down all the necessary kinds of subtle distinctions within the law. He continues that it would be difficult to reduce to writing all cases in which the distinction between domestic and international public policy could be

³⁴ Carbonneau, 'The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi' pp 297-98.

³⁵ See, UN Doc. A/CN.9/64 para 172; UN Doc. A/CN.9/460 paras 33-34; G Grilliti, 'Possible issues for an annex to the UNCITRAL Model Law' (Enforcing arbitration awards under the New York Convention: experience and prospects 1998) 46. See, also in general, Sanders, *The work of UNCITRAL* 168; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 375.

³⁶ See, Sanders, *The work of UNCITRAL* 168; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 375; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1709; Okekeifere, 'Public Policy And Arbitrability Under The UNCITRAL Model Law' 77.

³⁷ See, Sanders, *The work of UNCITRAL* 168.

made. In addition, such a list would vitiate instead of improving the existing situation, as it may tempt States to reverse the order by considering as arbitrable only the claims expressly laid down in the list.³⁸ Therefore, the question to which extent the distinction between domestic and international arbitrability can be applied or, more precisely, the question which subject issues are arbitrable under the international standard remains unclear.

Finally, mention may be made of the fact that a further definition of the scope of non-arbitrability or, in other words, a further restriction on the field of arbitrability can be found when a contracting state has used the second reservation of Art. I (3) of the NYC which allows the state at the time of adherence to the Convention to "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".³⁹ 44 States from 137 contracting States have used this reservation so far,⁴⁰ which may lead to a potential exclusion of any non-commercial disputes, such as civil, labour and governmental disputes, from the application of the NYC.⁴¹

9.6 Case Law

Notwithstanding the diversity of contracting countries regarding non-arbitrability and the consequent lack of uniformity under the NYC, the non-arbitrability defence has been invoked in relatively few cases.⁴² It has been argued that this is mainly due to

³⁸ van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 375.

³⁹ NYC of 1958, Art.I(3). See, also, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 373-74.

⁴⁰ UNCTRAL, 'Status; 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards' .

⁴¹ eg, A US District Court has declined a motion to refer dispute over the salvage of a U.S. warship to arbitration in London, holding that relation arising out of the activities of warship have never been deemed as commercial, and the US used the commercial reservation laid down in Art. I (3) of the NYC. See, *BY Bureau Wijsmuller v United States* 291.

⁴² See, van den Berg, 'Consolidated Commentary' (2003)' 666; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1708; Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 31; Sajko, 'The New York Arbitration Convention of 1958 from the Yugoslav Point of View: Selected Issues' 208.

the application of the distinction between domestic and international public policy.⁴³ Yet, the main reason appears to be that the non-arbitrability defence is often raised at the pre-award more than at the enforcement stage.

In conformity with the principle of interpreting Art. V narrowly and the principle of distinction between domestic and international arbitrability, national courts have often refused to decline enforcement of foreign awards on the basis of non-arbitrability.⁴⁴ For example, a US court of appeals in *Parsons & Whittemore Overseas Co v RAKTA* rejected the defendant's argument against enforcing a foreign award that the dispute significantly affected US foreign policy, specifically with Egypt with whom the US had severed relations. The court held that "simply because acts of the United States are somehow implicated in a case one cannot conclude that the United States is rightly interested in its outcome." The court thus concluded that "there is no special national interest in judicial, rather than arbitral, resolution of the breach of contract claim underlying the award in this case."⁴⁵

On the other hand, the defence of non-arbitrability has been successfully invoked only in few cases.⁴⁶ An exceptional example of a successful attempt to invoke Art. V(2)(a) is a case in which a dispute regarding the termination of an exclusive distributorship agreement was held to be non-arbitrable. In this case, Audi (a German car manufacturer) terminated the distributorship of their Belgian distributor and commenced arbitration in Zurich as provided for by the arbitration agreement. The arbitral tribunal rendered its award in favour of Audi holding that the agreement was duly terminated and the distributor was not entitled to recover any damages from Audi. However, the Belgian Supreme Court relied on Art. V(2)(a) to refuse enforcement of the award in view of the need for protection of the Belgian agency as

⁴³ van den Berg, 'Consolidated Commentary' (2003) 667.

⁴⁴ See, eg, *Parsons & Whittemore Overseas Co v RAKTA*; *X (Syria) v X (Germany Court of Appeal 1998)* 669; *Exclusive Distributor (Spain) v Seller (Germany)* (2004) XXIX YBCA 715 (Germany Court of Appeal 2000) 719; *Italian Party v Swiss Company* 828; *Fincantieri-Cantieri navali italiani SpA and Oto Melara SpA v M and arbitral tribunal* (1995) XX YBCA 766 (Switzerland Supreme Court 1992) 770.

⁴⁵ *Parsons & Whittemore Overseas Co v RAKTA* 975.

⁴⁶ See, for successful invocation of the non-arbitrability ground, *Audi-NSU Auto Union A.G v S. A. Adelin Petit & Cie*; *Scherk Enterprises Aktiengesellschaft v Societe des Grands Marques* (1979) IV YBCA 286 (Italy 1977) 288; *Libyan American Oil Co v Socialist People's Libyan Arab Jamahiriya* 482 FSupp 1175 (US District Court D.Colum 1980); *Eddie Javor & Fusion- Crete Inc v Luke Francoeur & Fusion- Crete Products Inc* (2004) XXIX YBCA 596 (Canada Supreme Court 2003) 602.

the weaker party. It noted that according to the Belgian law of the Unilateral Termination of Concession for Exclusive Distributorships for an Indefinite Time, any disputes arise out of this law are exclusively reserved for the judicial resolution of the Belgian courts.⁴⁷

A further exceptional example of refusal of enforcement on the ground of non-arbitrability emerges in *LIAMCO v Libya*⁴⁸ where Libya nationalized LIAMCO's assets within Libya. To resist this process, LIAMCO sought to arbitrate as provided for in the concession agreement. The arbitration ended with an award in favour of LIAMCO, but the US district court refused to enforce it against Libya on the ground that Libya's nationalization, being an act of state, is a subject matter not capable of being resolved by a private arbitral tribunal. The court noted that:

Had this question been brought before this court initially, the court could not have ordered the parties to submit to arbitration because in so doing it would have been compelled to rule on the validity of the Libyan nationalization law ... [which would therefore breach] the act of state doctrine.⁴⁹

Likewise, the Italian supreme court has refused to enforce a foreign award rendered in Zurich regarding trade marks disputes on the ground that such disputes are deemed not arbitrable under Italian law.⁵⁰

9.7 The Position in Saudi Arabia

9.7.1 Non-Arbitrability under Saudi Laws

How would the Saudi courts deal with the non-arbitrability defence under Art. V(2)(a)? The SAL of 1983 sets forth a general rule regarding the domain of arbitrability, rather than listing the non-arbitrable matters. So, Art. 2 of that Law states

⁴⁷ *Audi-NSU Auto Union A.G v S. A. Adelin Petit & Cie*.

⁴⁸ *Libyan American Oil Co v Socialist People's Libyan Arab Jamahriya*.

⁴⁹ *ibid* 1178.

⁵⁰ *Scherk Enterprises Aktiengesellschaft v Societe des Grands Marques* 288.

that "Arbitration shall not be permitted in cases where conciliation is not allowed."⁵¹ But what are these cases in which conciliation is not permitted? Art. 1 of the IRSAL of 1985 offers some examples, providing, "Arbitration in matters wherein conciliation is not permitted, such as *hudoud*, *laan* between spouses, and all matters relating to the public order, shall not be accepted."⁵² *Hudoud* means the prescribed or fixed punishments for certain crimes, such as theft, adultery, alcohol drinking and Highway robbery. *Laan* (divorce because of adultery) means a form of separation that happens between a husband and wife after five oaths which are taken by both spouses if one accuses the other of committing adultery.

Why does Saudi arbitration Law use the capability for conciliation as the measure of arbitrability? There is an Islamic jurisprudential background behind the adoption of that criterion, since the schools of Islamic jurisprudence differ on the question of arbitrability. The *Hanbali* School adopts the view that arbitration is allowed in all disputes that can be resolved by the court since the arbitrator is just like a judge.⁵³ But the majority of Islamic Jurisprudential schools (including *Hanafi*, *Maliki* and *Shafi*) agree generally that any rights that can be subject to compromise, conciliation or forgiveness by people are arbitrable and vice versa. They generally agree that matters representing the right of God, such as fixed punishments, are not capable of settlement by arbitration since these matters have a public dimension and thus cannot be subject to compromise, forgiveness or conciliation except by the government or its representative (i.e. the competent court), whereas matters of purely private right such as property dispute are arbitrable, since such rights are of purely private interest and therefore can be subject to forgiveness, compromise and conciliation. So their justification is based on the ground that arbitration is not permitted in matters other than those in which the adversaries may relinquish or compromise their rights.⁵⁴ Yet,

⁵¹ SAL of 1983, Art. 2.

⁵² IRSAL of 1985, Art. 1.

⁵³ See, Al-Zaid, 'Arbitration; Its Definition and its Importance ' pp 10-11; Al-Hasen, *The Shari'ah Rules of Arbitration* 38; Gattarah, *Arbitration in the Light of the Islamic Shari'ah* 82; Jameel, 'Arbitration In Islamic Shari'ah and its Important of Settling Disputes ' pp 19-21; Al-Nashmi, 'International Arbitration and Arbitrating in Islamic Shari'ah' 18; Al-Sartawy, 'The Scope of Arbitration and the Power of the Arbitrator' 7.

⁵⁴ See, Al-Hasen, *The Shari'ah Rules of Arbitration* 38; Gattarah, *Arbitration in the Light of the Islamic Shari'ah* pp 75-83; Aag Beeg, 'Arbitration in Islamic Shari'ah and Islamic Fiqh ' pp 17-20; Jameel, 'Arbitration In Islamic Shari'ah and its Important of Settling Disputes ' pp 19-21; Al-Nashmi,

they differ on matters of mixed rights. For example, *Qisas* (retribution or punishment for murder) has a right of God (i.e. a public right) because it concerns the security and safety of the whole community. On the other hand, it contains rights of individuals (private rights), as the next of kin of a murder victim are recommended to forgive the murderer or to compromise the matter with him, rather than insisting on their right that the murderer be executed by the Islamic ruling authority. The opinion that appears to carry more weight regarding mixed rights is that if the subject matters is closer to a right of God then it is not arbitrable. But if it is closer to an individual right then it would be arbitrable.⁵⁵ Saudi arbitration law thus use the capability for conciliation as a determining factor of arbitrability in order to draw the attention to the fact that although the *Hanbali* School is officially followed in SA, the law here however follows the approach of other Islamic Jurisprudential schools regarding the question of arbitrability.

Thus, Art. 2 of the SAL and Art. 1 of its Implementation have been interpreted to exclude criminal issues and some family matters. Criminal issues such as *Hudoud* (fixed punishments), *Tazir* (discretionary punishments), *Qadhf* (libel) as well as *Qisas* (punishment of murderers) are all reserved to the jurisdiction of courts only. Some family matters such as, *laan* (divorce because of adultery), *nasab* (descent), whether a person is an inheritor or not, custody or guardianship over an infant, and whether a marriage contract is valid are deemed to be not eligible for arbitration.⁵⁶ However, the financial consequences of a void marriage or the evaluation of the amount of alimony to be paid are allowed to be settled by arbitration.⁵⁷

In addition, issues pertaining to public order are not arbitrable by the virtue of Art. 3 of the SAL and Art. 1 of the IRSAL of 1985. This means that disputes relating to the government authorities or agencies are within the expulsive competence of the Board

'International Arbitration and Arbitrating in Islamic Shari'ah' pp 18-19; Al-Sartawy, 'The Scope of Arbitration and the Power of the Arbitrator' pp 4-7.

⁵⁵ See, Al-Zaid, 'Arbitration; Its Definition and its Importance ' 11; Al-Hasen, *The Shari'ah Rules of Arbitration* 37.

⁵⁶ See, A Al-Rodaiman, 'Arbitration law and its procedures in the Kingdome of Saudi Arabia ' (Session of the Shariah and law Principles of Arbitration Riyadh 2002 'in Arabic') 4; El-Ahdab, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part 1' pp 37-38.

⁵⁷ El-Ahdab, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part 1'part one 38.

of Grievance and cannot be referred to arbitration, unless the consent of the President of the Council of Ministers is obtained.⁵⁸ Yet, this restriction on Saudi government authorities might have less practical importance in the context of international arbitration, as seen earlier.⁵⁹

On the other hand (apart from the subjects mentioned above), all other disputes (e.g. commercial, civil and labour disputes) are considered as being capable of resolution by arbitration⁶⁰ since they can be subject to conciliation. In this regard and as far as the NYC is concerned, it is to be noted that unlike many contracting States, SA did not use the second reservation contained in Art. I(3) of the NYC to restrict the application of the NYC to commercial disputes only.

Finally, it may be worth mentioning that some writers have submitted that some commercial disputes such as disputes amongst partners of a company or between a company and its partners, disputes concerning commercial agency contracts, and disputes between a foreign contractor and his Saudi sponsor are not allowed to be arbitrated according to various Saudi regulations.⁶¹ However, this submission seems to be without merit, as these restrictions are no longer valid, having been made before the SAL of 1985 and its implementation of 1985 which contain no such restrictions. Besides, the broad field of arbitration under the *Hanbali* School has its own direction and should take into consideration when interpreting the non-arbitrable issues under the Saudi arbitration, since the *Hanbali* doctrine is officially adopted in SA.

9.7.2 Case Law

The non-arbitrability defence has been invoked against enforcement in the Saudi courts in two cases. In the first one, a Saudi enforcing court (the 18th Subsidiary Panel) rejected an attempt to block enforcement of an award concerning the building

⁵⁸ See, SAL of 1983, Art.3; IRSAL of 1985, Art.8; Turck, 'Saudi Arabia' 11.

⁵⁹ See, supra Ch 3 para 3.9.2

⁶⁰ See, Z Alqurashi, 'Arbitration Under the Islamic Sharia'(2003) 1 (2) Oil, Gas & Energy Law Intelligence, para 5.4; El-Ahdab, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part 1' 8; Turck, 'Saudi Arabia' 11.

⁶¹ See, El-Ahdab, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part 1' 9; Turck, 'Saudi Arabia' pp 11-13.

of a wall around a university and the purchase of land, holding that these subject matters are deemed to be capable of settlement by arbitration.⁶² In the second case, another Saudi university opposed enforcement of an award rendered in favour of a Dutch company. It based its objection mainly on the ground that the dispute was not allowed to be resolved by arbitration because a university is a government body belonging to the Saudi High Education Ministry and Saudi Law bans the government bodies from resorting to arbitration. A Saudi enforcing court (The 9th Administrative Panel) agreed with the university that, as a matter of Saudi law, the disputes are relating to administrative or governmental matters and therefore not arbitrable, as a rule, but reserved to jurisdiction of the Board of Grievance. However, the Court held that since the contract between the university and the company contained an arbitration clause, and the University had participated in the arbitral procedure, it was not fair to accept the University's objection of non-arbitrability after the award had been made against it. The Court supported its conclusion by relying on the principles of *Shari'ah* to achieve a just result by the virtue of the following principles. First, the *Shari'ah* provision emphatically upholds the moral obligation to fulfil one's contracts and undertakings, as expressed in the *Qur'an*: "O you who believe! Fulfil all obligation"⁶³ as well as in Prophet's *Hadith*: "Muslims are bound by their clauses except for a stipulation that makes the unlawful lawful or makes the lawful unlawful."⁶⁴ Secondly, the majority of *Shari'ah* Scholars adopt the principle that the arbitral award is binding upon parties. As a consequence, the Court granted the Dutch Company's petition to enforce the arbitral award against the Saudi University.⁶⁵ This case is particularly significant in illustrating the attitude of the Saudi Courts that arbitrability should be accorded a wide scope, and in demonstrating their willingness to interpret the restrictions imposed by Saudi law upon arbitrability very narrowly in the context of international arbitration.

9.8 Conclusion

⁶² the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003) p 5.

⁶³ The *Qur'an*, Al-Maidah [5:1].

⁶⁴ Reported by Ibn Hibban, *Sahih*, no 257.

⁶⁵ the 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 II (1997) p 11.

In this chapter, special attention was paid to the non-arbitrability ground under Art.V(2)(a) of the NYC. It was noted that, unlike the grounds listed under Art. V(1), an enforcing court may of its own motion to refuse enforcement on the grounds of non-arbitrability (Art.V(2)(a)) and breaching of public policy (Art.V(2)(b)) as they involve with the fundamental interests of the country where enforcement is sought. It was observed that despite being listed as a separate ground under Art.V(2)(a), the non-arbitrability defence is generally deemed to form part of the principle of public policy under Art. V(2)(b).

As regards the applicable law, it was seen that courts had invariably taken the view that the question whether the subject matter of the dispute is arbitrable or not is to be determined by reference to the law of the country where enforcement is sought, as indeed is explicitly provided by Art. V(2)(a). Therefore, there is a lack of a uniform standard as to what matters may not be referred to arbitration under the NYC, that question vary from country to country according to the domestic concept of arbitrability, albeit that there were certain matters that were usually non-arbitrable in any state. At the same time, there was found an increasing trend to distinguish national from international non-arbitrability in order to limit the latter scope. By this was meant that what national law considers to be non-arbitrable in relation to domestic arbitration would not be necessarily deemed so in relation to international arbitration, so that enforcing courts should see the scope of non-arbitrability as more limited in international cases. While suggestions that a general list of non-arbitrable subject matters in the context of international arbitration should be drafted have come to nothing thus far, courts have nonetheless generally interpreted domestic restrictions on arbitrability narrowly in the context of international arbitration. This is a significant achievement for the application of the NYC.

It was remarked that the non-arbitrability defence has been invoked in relatively few cases, and has rarely led to a refusal of enforcement a foreign award, although this may be due to the fact that non- arbitrability is more often raised at the pre-award more than the enforcement stage.

It was found that Saudi laws has a fairly wide view of arbitrability. Just as importantly, Saudi Courts have interpreted the non-arbitrability defence narrowly, favouring the enforcement of foreign awards. Therefore, in practice the non-

arbitrability defence constitutes no real threat to the enforcement of foreign awards under Art. V(2)(a) of the NYC in SA.

CHAPTER TEN

Violation of Public Policy

10.1 Introduction

The seventh and final ground for refusing enforcement of foreign arbitral awards enshrined in Art. V of the NYC is that enforcement of the award would violate the public policy of the enforcing Country. This is also the second of two grounds listed under Art. V (2) which may be raised by the enforcing court on its own motion, without a request of the party resisting enforcement. Accordingly, Art. V(2) of the NYC states that:

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:

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.¹

This chapter aims to examine the public policy ground under Art. V(2)(b) of the NYC, concentrating on both relevant principles and judicial practice. It will firstly outline the importance of the public policy defence. Secondly, it will examine attempts to define public policy under Art. V(2)(b). Thirdly, it discusses the law applicable to that Public policy. Fourthly, the principle of distinction between national and international public policy will be examined by considering; (i) international public policy; (ii) transnational public policy. Fifthly, it will then deal with the issues that are commonly invoked in practice as violations of public Policy under Art. V(2)(b). Finally, the considerations relevant to the concept public policy ground and its application in Saudi Arabia will be focused on.

10. 2 The Importance of the Public Policy Defence

¹ NYC of 1958, Art.V(1)(b).

Public policy is a well-known defence in international relationships. Indeed, it is deemed to be one of the most fundamental principles in private international law and is accepted by the law of every country.² It is a means for a state to refuse to give effect to foreign acts, judgments or awards in its territory if they are found to be offensive to the basic principles of its own system.³ Therefore, the public policy ground has long been a basis for refusing enforcement, which can be found in almost every international convention⁴ and treaty pertaining to enforcement of foreign arbitral awards.⁵ Accordingly, Art. V(2)(b) of the NYC establishes the public policy exception to enforcement as an acknowledgement of the power of each contracting state to exercise final control over foreign awards to ensure that the fundamental interests, policies, creeds and morals of that nation are safe from serious violations that may be caused by enforcements of foreign awards.⁶

However, it should be observed that while the NYC generally places significant emphasis on party autonomy under Art. V(1) in general, the public policy exception under Art. V (2)(b) indicates that such autonomy is not without limits. The Public policy principle thus defines the boundary between party autonomy in the settlement of disputes on the one hand and the interests of the forum state on the other, putting them in direct competition.⁷

² See, J Lew, 'Recognition and Enforcement of Arbitration Awards in England'(1976) 10 Intl Lawy 425 at 432.

³ See, P Turner and J Paulsson, 'Grounds For Refusal Of Recognition And Enforcement Under The New York Convention: A Comparative Approach' (UNCTRAL, Experts Group Meeting on Dispute Resolution and Corporate Governance, Vienna 2003) 7.

⁴ Apart from the Washington Convention of 1965, on the Settlement of Investment Disputes between States and Nationals of Other States. See, Washington Convention of 1965, Art. 52 and Art. 53(1).

⁵ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 360; H Seriki, 'Enforcement of Foreign Arbitral Awards and Public Policy - a Note of Caution'(2000) 3 ADRLJ 192 at 195; ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' (ILC Conference London 2000) 2.

⁶ cf. van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 360.

⁷ See, Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' at 172; A Barraclough and J Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration'(2005) 6 Melbourne J Intl L 205 pp 206, 243; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-144; Delvolvé, Rouche and Pointon, *French arbitration law and practice* 156.

In addition, since the purpose behind the public policy ground in Art. V(2)(b) is generally acknowledged, it is rare to find suggestions that the ground should be removed entirely. Yet, it has been argued:

The public policy defence set forth in Article V(2)(b) of the New York Convention permits the circumvention of the Convention's objective; the uniform enforcement of foreign arbitral awards. As this circumvention is contrary to the goals of the international community, the New York Convention should be amended to remove Article V(2)(b), thus giving the Convention its intended effect.⁸

However, the above suggestion appears to be too simplistic to be realistic. One can hardly deny the necessity for each state to have the right to safeguard its most fundamental economic, legal, moral, political, religious and social standards in the context of international affairs. Indeed, the public policy defence allows states to adopt the NYC without sacrificing their basic national interests, and may be seen as one of the main reasons why it has been largely adopted by 137 countries.

10.3 Definition of Public Policy under Art. V(2)(b)

A key question is whether there is a definition of public policy under Art. V(2)(b). Although public policy (or *ordre public*) has been for a long time a ground for refusing enforcement of foreign laws, judgments and arbitral awards, there is no precise definition of its contents. This is not an unexpected fact as one of national public policy's essential characteristics is its uncertainty and ambiguity, and its vague nature is hence well recognised.⁹ This is because the principle of public policy touches a very great variety of subjects,¹⁰ and its content changes as public convictions,

⁸ Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' at 953.

⁹ See, Redfern, 'Commercial Arbitration and Transnational Public Policy' pp 1-2; ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' 4; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-115; Dicey, Morris and Collins, *Conflict of Laws* 642; A Sheppard, 'Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard?' (2004) 1 (1) *Transnational Dispute Management*, para 1.

¹⁰ See, P Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' (ICCA Congress Series no 3 New York 1986) 309. Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 179; M Buchanan, 'Public policy and International Commercial Arbitration' (1988) 26 (3) *Am Bus L J* 511 at 513.

beliefs, and interests change from time to time and from country to country.¹¹

Burroughs J. said in the 19th century in *Richardson v Mellish* that:

Public policy ... is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all, but when other points fail.¹²

Yet, it is said that the very ambiguity of public policy is intended to make its scope flexible so as to enable courts to decide its content in the light of changing national interests, needs, attitudes and convictions.¹³

As far as Art. V(2)(b) is concerned, the NYC offers no definition of the term “public policy,” nor does it provide guidance as to how that term should be applied as a ground for refusing enforcement of foreign award. As a result, the public policy ground set forth in Art. V(2)(b) has created the most discussion and litigation, and often overlaps with other grounds such as Art. V(1)(a) (capacity of the parties or invalid arbitral agreement), Art. V(1)(b) (violation of due process), Art. (1)(c) (excess of jurisdiction), Art. V(1)(d) (improper procedure or composition of the arbitral tribunal), and Art. V(2)(a) (non-arbitrability).¹⁴

It is generally accepted that the concept of the public policy is incapable of precise definition in the context of enforcement of arbitral awards.¹⁵ The English Court of Appeal in *DST v Rakoil* emphasised that:

Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. ... It has to be shown that there is some element of illegality or that the enforcement of the

¹¹ See, Redfern, 'Commercial Arbitration and Transnational Public Policy' 2; Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 26-117; Sheppard, 'Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard?', para I.

¹² *Richardson v Mellish* [1824-1834] All ER Rep 258 (UK Court of Common Pleas).

¹³ See, A Biah, 'Features and conditions of communication with the other; means and mechanisms' (We and Other 2006 'in Arabic'); Delvolvác, Rouche and Pointon, *French arbitration law and practice* 156.

¹⁴ See, Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' p 32.

¹⁵ See, ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' p 4; Lew, Mistelis and Krèoll, *Comparative International Commercial Arbitration* para 26-115; Dicey, Morris and Collins, *Conflict of Laws* 642; Seriki, 'Enforcement of Foreign Arbitral Awards and Public Policy - a Note of Caution' 196; Sheppard, 'Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard?', para I.

award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.¹⁶

The same conclusion has been reached by the Indian Supreme Court in observing that “the concept of what is for the public good or in the public interest or what is injurious or harmful to the public good or public interest has varied from time to time”.¹⁷ Most recently, the Swiss Supreme Court observed, with regard to the use of public policy in the context of Art. V of the NYC and Art. 109(2) of the Swiss Law on Private International Law, that,

The fleeting character of public policy may be inherent to the concept, due to its excessive generality; the wide scope of the almost countless opinions proffered in this regard would tend to prove it ... [A]ll attempts to answer the numerous recurring questions raised by the interpretation of this concept merely resulted in raising further thorny or polemical questions...¹⁸

On the other hand, there have been attempts to provide a general definition of the concept. The US Court of Appeals in *Parsons v Whittemore* defined public policy simply as “the forum state’s most basic notions of morality and justice”.¹⁹ A Russian district court concluded that the public policy of the Russian Federation would be breached only if the award violated “the basis of the State’s political and legal system and legal order of the Russian Federation”.²⁰ A German court of appeal has stated that:

According to German law, an arbitral award only violates public policy (under Art. V(2)(b) of the NYC) when it violates a norm that regulates

¹⁶ *Deutsche Schachtbau- und Tiefbohrergesellschaft MBH v Ras Al Khaimah National Oil Co* [1987] 2 Lloyd’s Rep 246 (UK Court of Appeal) 254.

¹⁷ *Renusagar v Renusagar Power Co. Ltd v General Electric Co* (1995) XX YBCA 681 (India Supreme Court 1993) 696.

¹⁸ *Tensaccia SPA v Freyssinet Terra Armata RL* (Switzerland Supreme Court 2006, unreported), cited in M Reisman, ‘Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration’ (ICCA Congress Series no 18 Montreal 2006)13 fn 3.

¹⁹ *Parsons & Whittemore Overseas Co v RAKTA*, 974.

²⁰ *Kotraco v V/O Rosvneshtorg* (1998) XXIII YBCA 735 (Russian District Court 1995) 737, see also, Turne and Paulsso, ‘Grounds For Refusal Of Recognition And Enforcement Under The New York Convention: A Comparative Approach’ 9.

state or economic principles or when it is unacceptable at odds with the German principles of justice.²¹

The Egyptian Supreme Court considers public policy to consist of "social, political, economic or moral bases which relate to the supreme interests of the community",²² while the Korean Supreme Court suggests its basic tenet is to "protect the fundamental moral beliefs and social order of the enforcement country from being harmed by enforcement of a foreign award."²³

Prof Lew as well observes that while a totally comprehensive definition of public policy has never been proffered:

... it is clear that (it) reflects the fundamental economic, legal, moral, political, religious and social standards of every State or extra-national community. Naturally public policy differs according to the character and structure of the State or community to which it appertains, and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception.²⁴

Yet, none of the above definitions make obvious what may or may not violate public policy. Therefore, the ILC Committee on International Commercial Arbitration report regarding public policy ground attempted to provide more details thereon by dividing the classifications of public policy grounds into procedural and substantive. Substantive categories of public policy would include infringing mandatory laws or fundamental principles of law, and acting contrary to good morals or national interests

²¹ *Manufacturer (Slovenia) v Exclusive Distributor (Germany)* 696. Similarly, The German Supreme Court stated that: "From the viewpoint of German procedural public policy, the recognition of a foreign arbitral award can therefore only be denied if the arbitral procedure suffers from a grave defect that touches the foundation of the State and economic foundations". See, *charterer (German) v shipowner (Rumanian)* (1987) XII YBCA 489 (Germany Supreme Court 1986) 490. Besides, the German Supreme Court has held that: A violation of essential principle of German law (order public) exists only if the arbitral award contravenes a rule which is basic to public or commercial life, or if it contradicts the German idea of justice in a fundamental way. See, BGH, 12 July 1990- III ZR 174/89, NJW 1990 p 3210, cited in ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' 5 fn 9; Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' 172.

²² A El-Kosheri, 'Commentary on Public Policy under Egyptian Law', cited in Buchanan, 'Public policy and International Commercial Arbitration' 525.

²³ *Adviso NV v Korea Overseas Construction Corp* (1996) XXI YBCA 612 (Korea Supreme Court 1995) 615.

²⁴ J Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Publications, Dobbs Ferry, N.Y. 1978) 532.

or foreign relations. Procedural categories might include fraud or corruption, breach of natural justice or due process, lack of impartiality, lack of reasons in the award, manifest disregard of the law or the facts, annulment of the award at the place of arbitration.²⁵ This classification however might not be universally accepted as it emerges from case law in a limited number of countries. Indeed, examples abound where awards have been enforced despite suffering from certain of the above 'defects'. Besides, public policy has, by its very nature, a dynamic character, so that any classification may crystallise public policy only at a certain period of time.²⁶

10.4 Law Applicable to Public policy under Art. V(2)(b)

Having observed that the concept of public policy is difficult to define, the next logical question that should be presented is what law would govern the public policy under the NYC. As has been seen above, the NYC does not define public policy, but rather refers the question to the laws of the enforcing country. Art V(2) clearly invokes the law of the enforcing country to govern both (a) the issue of non-arbitrability and (b) the issue of violation of public policy. Thus, the public policy referred to in Art. (V)(2)(b) is plainly the public policy rules of the country where enforcement is sought.²⁷ In this respect, the Supreme Court of India rejected the argument that the use of the words "public policy" in the Indian statute which enacted the NYC, rather than the words "public policy of India", meant that those words were not restricted to Indian public policy, but also extended to the public policy of the law governing the contract and the law of the arbitration seat.²⁸

²⁵ ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' pp 15, 17-30.

²⁶ See, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-117.

²⁷ See, *Renusagar Power Co. Ltd v General Electric Co* (India Supreme Court 1993) pp 701-2; *Eddie Javor & Fusion- Crete Inc v Luke Francoeur & Fusion- Crete Products Inc* 602; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 472; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1710; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 180; Merkin, *Arbitration law* para 19.58; ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' 30.

²⁸ See, *Renusagar Power Co. Ltd v General Electric Co* pp 701-702.

However, and exceptionally, there are some circumstances in which the enforcing court may take account of the public policy rules of a foreign country.²⁹ Thus, an English court might not enforce a contract governed by the law of a foreign country which requires performance in such a country, if the contract is unlawful according to the law of that country. For example, a contract, involving the purchase of personal influence to be performed in England would not be enforced on the basis that it is contrary to English domestic public policy. But where such a contract is to be performed abroad, an English court might enforce it if performance is not contrary to the domestic public policy of the country in question. In the same way, an arbitral award giving effect to such a contract has been held to be enforceable in England.³⁰

It may be concluded that since the NYC does not spell out the contents of public policy, but rather refers the issue to the law of the enforcing country, and since national laws do not provide a precise definition of the concept, it is clear that the ultimate decision on what may violate public policy of the enforcing country is left to the discretion of the courts of that country. Hence, it may differ not only from state to state, but from case to case, from time to time, and from court to court of the same country.

10.5 Distinction between National and International Public Policy

10.5.1 Introduction

When considering an allegation that enforcement would breach public policy, should enforcing courts apply the same standards they apply to domestic awards? The general trend is in favour of a negative answer,³¹ since the purposes of domestic and

²⁹ See, Delvolvâe, Rouche and Pointon, *French arbitration law and practice* 157; ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' pp 18, 31; Merkin, *Arbitration law* paras 19.75, 19.76

³⁰ See, *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65 (UK Court of Appeal) 74; *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] 1 Lloyd's Rep 361 (UK QBD Comm Ct); Merkin, *Arbitration law* paras 19.75, 19.76; ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' 31.

³¹ There were only a few writers of the opinion that foreign awards should be subject to the same standard of public policy that is applicable to domestic awards. See, Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' 172 fn 3.

international relations are different.³² Indeed, it is generally felt important to make a distinction between domestic and international public policy in the context of enforcing foreign awards as will be seen below. Yet, within this general trend there is significant diversity in judicial and theoretical approaches. Two main approaches are presented below.

10.5.2 International Public Policy

The first approach involves the application of “international public policy”. It means that the principles of domestic public policy of the state in question is to be applied very narrowly to the enforcement of foreign awards. Accordingly, it is emphasised that not every breach of a mandatory rule of the enforcing state justifies the denial of enforcement of foreign awards, since while breach of public policy must infringe a mandatory rule, not every mandatory rule involves an issue of public policy. Therefore, foreign awards should be refused enforcement only if they clearly violate the most fundamental principles of the enforcing country. That is to say, although international public policy is not independent of the standards of domestic public policy of the enforcing country, it reflects only a restricted version of these standards.³³

This approach is increasingly accepted by the majority of courts³⁴ and authors,³⁵ as well as being expressed in some national legislation.³⁶ Prof Sanders stated years ago

³² See, van den Berg, 'Consolidated Commentary' (2003) at 665; Sheppard, 'Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard?'

³³ See, M Buchanan, 'Public policy and International Commercial Arbitration'(1988) 26 (3) American Business Law Journal 511 at 514; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* paras 1711, 1712; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 181.

³⁴ See, e, *Firm P (US) v Firm P (Germany)* (Germany Court of Appeal 3 Apr 1975) ; *Renusagar Power Co. Ltd v General Electric Co* (India Supreme Court 1993) pp 696-702; *Kersa Holding Co v Infancourtage* at 626; *Manufacturer (Slovenia) v Exclusive Distributor (Germany)* (German Court of Appeal 1999) 696; *Hebei Import & Export Corp v Polytek Engineering Co Ltd* pp 674, 691.

³⁵ See, eg, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1712; van den Berg, 'Consolidated Commentary' (2003) 665; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 181; Davidson, *Arbitration* 374; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 473; Redfern, 'Commercial Arbitration and Transnational Public Policy' 3; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* paras 26-114, 26-126, 26-145; Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' 172;

that the concept of international public policy covers a narrower field than domestic public policy.³⁷ In terms of judicial support, the Korean Supreme Court has held that regard should be given to both international public policy and domestic concerns, so that Art. V(2)(b) of the NYC must be construed narrowly.³⁸ A German court of appeal, after making reference to the principle of distinction between domestic and international public policy, observed that in the case of foreign awards not all contraventions of mandatory provisions of German law constitute a breach of German public policy, as the latter only includes extreme cases.³⁹ Another German Court of Appeal stated that:

According to German law, an arbitral award only violates public policy (under Art. V(2)(b) of the NYC) when it violates a norm that regulates state or economic principles or when it is unacceptably at odds with the German principles of justice. This agrees with the opinion held by a large majority that also from the point of view of public policy the recognition of foreign arbitral awards is subject to a less stringent regime than is the case with domestic arbitral awards, because there is a distinction between national and international public policy.⁴⁰

The Hong Kong Court of Final Appeal, while rejecting the suggestion that the public policy ground under Art. V(2)(b) of the NYC meant "some standard common to all civilised nations",⁴¹ however noted that often the contents of public policy of the forum would coincide with the public policy content of many other countries, which therefore could accurately be deemed as international public policy.⁴² More clearly, a Luxembourg court of appeal has expressly referred to international public policy, in stating that:

According to the (New York) Convention, the public policy of the state where the arbitral award is invoked is ... not the internal public policy of that country, but *its international public policy*, which is defined as being

³⁶ See, eg, French New Code of Civil Procedure of 1981, Art. 1498 and Art. 1502. (5); Portuguese Code of Civil Procedure of 1986, Art. 1096 (f); Lebanese New Code of Civil Procedure of 1983, Arts. 814, 817(5); Algerian Decree no. 83.9 of 1993, Art. 458 bis 23(h).

³⁷ Sanders, 'Consolidated Commentary' (1979) at 251.

³⁸ *Adviso NV v Korea Overseas Construction Corp* 615.

³⁹ *Firm P (US) v Firm F (Germany)* (Germany Court of Appeal 3 Apr 1975) 241.

⁴⁰ *Manufacturer (Slovenia) v Exclusive Distributor (Germany)* 696.

⁴¹ *Hebei Import & Export Corp v Polytek Engineering Co Ltd* 675.

⁴² *ibid* 691.

“all that affects the essential principles of the administration of justice or the performance of contractual obligations”, that is, all that is considered ‘as essential to the moral, political or economic order’ (emphasis added)⁴³

Likewise, the Indian Supreme Court has interpreted public policy restrictively when dealing with the question of whether it should apply the narrower concept of public policy in the sense in which it is applied in the field of private international law, or the wider concept of public policy as applicable in domestic law. The Court concluded that the narrower interpretation should prevail and violation of public policy in the field of private international law must invoke something more than the violation of Indian law. Consequently, enforcement would be refused only if such enforcement would be contrary to (i) the fundamental policy of Indian law; or (ii) the national interest of India; or (iii) justice or morality.⁴⁴

In addition, the term of “international public policy”, rather than simply “public policy”, is also referred to by several national statutes.⁴⁵ For example, the French New Code of Civil Procedure, Art. 1502(5) provides that:

Appeal of a court decision granting recognition or enforcement is only available ... if recognition or enforcement is contrary to international public policy.⁴⁶

This provision has been interpreted however as follows:

The international public policy to which Article 1502.5 refers can only mean the French conception of international public policy or, in other words, the set of values a breach of which could not be tolerated by the French legal order, even in international cases.⁴⁷

⁴³ *Kersa Holding Co v Infancourtage* 625.

⁴⁴ *Renusagar Power Co. Ltd v General Electric Co* pp 701-2.

⁴⁵ See, French New Code of Civil Procedure of 1981, Art. 1498 and Art. 1502. (5); Portuguese Code of Civil Procedure of 1986, Art. 1096 (f); Lebanese New Code of Civil Procedure of 1983, Arts. 814, 817(5); Algerian Decree no. 83.9 of 1993, Art. 458 bis 23(h).

⁴⁶ French New Code of Civil Procedure of 1981, Art. 1498 and Art. 1502. (5).

⁴⁷ Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1648; Delvolvâe, Rouche and Pointon, *French arbitration law and practice* pp 156, 157.

Consequently, a French court of appeal has applied the principle of distinction between domestic and international public policy by holding that:

A breach of domestic public policy – assuming it has been established – does not provide the grounds on which to appeal against a ruling granting enforcement in France of a foreign arbitral award, because Article 1502 5 only refers to cases in which the recognition or enforcement of an award be contrary to international public policy.⁴⁸

Following the French provision, the New Lebanese Code of Civil Procedure Art. 817 (5) states that the enforcement of an award made abroad or in an international arbitration may be appealed against if its enforcement “violates a rule relating to international public policy”.⁴⁹ Likewise, The Portuguese Code of Civil Procedure refers to the international public policy, as it states that “for the (foreign) award to be confirmed it is necessary: that it contains no decisions contrary to the principles of *Portuguese* international public policy (emphasis added)”.⁵⁰ the latter provision, as can be noted, is more direct in emphasising that the application and content of “international public policy” is still specific and subjective to Portugal’s perception of that concept as the country where enforcement is sought.⁵¹

10.5.3 Truly International or Transnational Public Policy

The second approach is so-call “transnational public policy” or “truly international public policy”,⁵² which has been adopted and developed by some writers,⁵³ and

⁴⁸ *Intrafor Cofor v Gagnant* (France Court of Appeal 12 Mar 1985), cited in Gaillard and Savage (eds), Fouchard, Gaillard, Goldman on International Commercial Arbitration, para 1647 fn 368 .

⁴⁹ Lebanese New Code of Civil Procedure of 1983, Art. 817 (5).

⁵⁰ Portuguese Code of Civil Procedure of 1986, Art. 1096 (f).

⁵¹ See, ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' 6.

⁵² The term “transnational law” is not new as it was referred to by Judge Jessup in his lectures at Yale thirty years ago. Then it was presented in great details and supports by Pierre Lalive in his report of “Transnational (or Truly International) public policy an International Arbitration” at the ICCA Congress no 3 in 1986. see, Redfern, 'Commercial Arbitration and Transnational Public Policy' 1; Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' .

⁵³ See, eg, Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' pp 257-318; Buchanan, 'Public policy and International Commercial Arbitration' 514 and fn 15.

accepted by a few courts.⁵⁴ Unlike international public policy which is based on each state's individual view of that concept, truly international or transnational public policy is intended basically to encompass nothing more than rules and policies considered imperative by the international community, rather than any individual state.⁵⁵ Thus, it only includes principles that represent an international consensus as to essential principles or fundamental norms of conduct that must always apply in the law of international trade.⁵⁶ It is suggested that the concept of this kind of public policy comprises "fundamental rules of natural law, principles of universal justice, *jus cogens* (compelling law) in public international law, and the general principles of morality accepted by what are referred to as civilised nations".⁵⁷ Moreover, it has been observed that while transnational public policy closely resembles international public policy, they are clearly distinct. The latter unavoidably embodies the particular character of public policy within each individual state, whereas the former is less restrictive, reflecting the common fundamental values of the world community.⁵⁸

With regard to the courts, although there appear to be no cases in which the theory of transnational public policy is expressly applied, in a small number of cases a court has made reference to that theory. For instance, although an Italian court of appeal stated that Art. V(2)(b) involves international public policy, it however defined that concept as a "body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions".⁵⁹ Equally, the Swiss Supreme Court appeared to be in favour of taking into consideration a "universal conception of public policy, under

⁵⁴ See, eg, *Allsop Automatic Inc v Tecnoski snc* (1997) XXII YBCA 725 (Italy Court of Appeal 1992) 726; *W v F and V* (Switzerland Supreme Court 30 Dec 1994), cited in ILA Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' 7.

⁵⁵ See, Turne and Paulsso, 'Grounds For Refusal Of Recognition And Enforcement Under The New York Convention: A Comparative Approach' 7.

⁵⁶ See, Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' 287; Buchanan, 'Public policy and International Commercial Arbitration' 514.

⁵⁷ See, ILA Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' pp 6-7; Turne and Paulsso, 'Grounds For Refusal Of Recognition And Enforcement Under The New York Convention: A Comparative Approach' 8.

⁵⁸ See, Buchanan, 'Public policy and International Commercial Arbitration' 514.

⁵⁹ See, *Allsop Automatic Inc v Tecnoski snc* 726.

which an award will be incompatible with public policy if it is contrary to the fundamental moral or legal principles recognized in all civilised countries".⁶⁰

Yet, the concept of transnational public policy has attracted harsh criticism.⁶¹ First, it is said that the text of Art. V(2)(b) leaves no room for doubt in making reference to the enforcing country's conception of international public policy, and not to a truly international public policy rooted in the law of the community of nations. The logic of Art. V(2)(b) of the NYC is to enable the country where enforcement of foreign awards is sought to protect its fundamental convictions from being breached by foreign awards. Therefore, it is completely natural that enforcement of a foreign award should be viewed in the light of fundamental considerations of the enforcing country's law.⁶² Secondly, (truly) international public policy is a term of almost unlimited and protean potential and its application would therefore lead to great uncertainty.⁶³ Accordingly, the distinguished commenter Dr Redfern has very recently said that any scholar charged with the task of codifying "transnational public policy" would be entitled to shed a bitter tear.⁶⁴ Thirdly, unlike in international law, public policy in domestic law is a legal concept with a verifiable judicial history. Transnational public policy could be an easy way for those claiming to have an insight into the heart and the soul of international law to affect their own preferences without being obliged to prove that they become customary international law. Fourthly, protecting the virtue of international commercial arbitration does not require such a slippery and malleable concept, as no national legal system exists which fails to defend fundamental principles of justice and morality.⁶⁵

⁶⁰ See, *W v F and V*.

⁶¹ See, eg, *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (Hong Kong Court of Final Appeal 1999) 675; Reisman, 'Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration' pp 12-17; Redfern, 'Commercial Arbitration and Transnational Public Policy'; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* paras 1648, 1712.

⁶² See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* paras 1648, 1712.

⁶³ See, Reisman, 'Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration' pp 12-13; Redfern, 'Commercial Arbitration and Transnational Public Policy' pp 1-2.

⁶⁴ See, Redfern, 'Commercial Arbitration and Transnational Public Policy' 1.

⁶⁵ See, Reisman, 'Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration' pp 16-17.

10.6 Case Law for Common Violations of Public Policy

It is important firstly to mention that, although Art. V(2)(b) is the most invoked ground in resisting enforcement of foreign awards, its invocation is rarely successful.

⁶⁶ It may also be worth recalling that the lack of a definition of public policy has led to considerable overlap between Art. V(2)(b) and other grounds, such as Art. V(1)(a) (incapacity of the parties or invalid arbitral agreement), Art. V(1)(b) (violation of due process), Art. (1)(c) (excess of jurisdiction), Art. V(1)(d) (improper procedure or composition of the arbitral tribunal), and Art. V(2)(a) (non-arbitrability).

Yet, there are various issues that are commonly invoked in practice as violations of public policy under Art. V(2)(b). Thus, this section will attempt to identify the issues which are most frequently raised in case law in this context. These issues will be divided into several common categories, some of which are procedural, and others substantive, although some issues may come under more than one category.

10.6.1 Corruption

The public policy defence has been invoked, but often unsuccessfully, on the ground that the underlying contract or arbitral procedure is illegal because, for instance, the award deals with issues such as corruption, fraud, bribery, smuggling, drug trafficking, prostitution or slavery. ⁶⁷ The Report of the UNCITRAL Commission on International Trade Law states that:

It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects.

⁶⁶ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1713; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* para 26-118; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 184; Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' 14; Seriki, 'Enforcement of Foreign Arbitral Awards and Public Policy - a Note of Caution' 195.

⁶⁷ cf. *Kersa Holding Co v Infancourtage* (Luxembourg Court of Appeal 1993) 625; *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1998] 2 Lloyd's Rep 111 (UK QBD Comm Ct); *AAOT Foreign Economic Association (Vo) Technostroyexport v International Development and Trade Services Inc*; *X (Syria) v X* (Germany Court of Appeal 1998) pp 669-70; *Europcar Italia SpA v Maiellano Tours Inc* 156 F3d 310 (US Court of Appeals 2nd Circ 1998) pp 315-16; *Harendra H Mehta et al v Mukesh H Mehta et al* (2000) XXV YBCA 721 (India Supreme Court 1999) pp 726-27.

Thus, instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside.⁶⁸

By way of example, in *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd*⁶⁹ an ICCA award rendered in Swaziland related to an agreement, governed by Swiss law, for the supply of military equipment from Yugoslavia to Kuwait under which it was alleged that bribes were to be made to Kuwaiti officials to obtain the contract. After failing to set aside the award in Swaziland on the ground of public policy, the plaintiff sought enforcement of the award in England. The defendant challenged the enforcement on the ground that the contract was void and immoral as it included an agreement to purchase personal influence and to bribe Kuwaiti officials to obtain the contract, and was therefore contrary to public policy in England. The English Court held first that if proved that the underlying contract was indisputably illegal at common law, an award would be unenforceable in England for it would be contrary to public policy. Yet, it dismissed the challenge, reasoning that it was requested to enforce the award rather than the underlying contract.⁷⁰ As to whether it should allow a re-opening of the arbitrators' findings of fact on the bribery issue, the Court stated the underlying contract was governed by Swiss law and the allegation of illegality of the contract had been raised before the arbitral tribunal and the Swiss courts, but they all found that the contract was valid under the laws applicable to it. Thus, it was inappropriate that an English court should rehear that issue. The Court concluded that:

[N]o doubt that an English Court would give predominant weight to the public policy of sustaining the parties' agreement to submit the particular issue of illegality and initial invalidity to ICC arbitration rather than to the public policy of sustaining the non-enforcement of contracts illegal at common law.⁷¹

The Court further emphasized that:

That conclusion is not to be read as in any sense indicating that the Commercial Court is prepared to turn a blind eye to corruption in international trade, but rather as an expression of its confidence that if the

⁶⁸ UN Doc. A/40/17, para 297.

⁶⁹ *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* 74.

⁷⁰ *ibid* 132.

⁷¹ *ibid* 129.

issue of illegality by reason of corruption is referred to high calibre ICC arbitrators and duly determined by them, it is entirely inappropriate in the context of the New York Convention that the enforcement Court should be invited to retry that very issue in the context of a public policy submission.⁷²

The respondent appealed the decision, and Waller L.J. sought to summarise the relevant principles as follows:

(1) There are some rules of public policy which if infringed will lead to non-enforcement by the English Court whatever their proper law and wherever their place of performance, but others are based on considerations which are purely domestic.

(2) Contracts for the purchase of influence are not in the former category.

(3) Thus contracts for the purchase of personal influence if to performed in England would not be enforceable as contrary to English domestic public policy.

(4) But where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country also that the English Court would not enforce it.⁷³

He further confirmed that the desirability that arbitral awards should be final is itself a dimension of public policy, stating:

The Court is in this instance performing a balancing exercise between the competing public policies of finality and illegality; between the finality that should prima facie exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the executive power of the English Court is not abused.⁷⁴

The Court of Appeal dismissed the appeal and upheld the enforcement of the award. It concluded that although the underlying contract which alleged to involve bribery would have been contrary to the public policy of Kuwait, its enforcement was not contrary to the public policy of Switzerland. Consequently, it would not be contrary to English public policy to enforce an award that did not offend public policy under the

⁷² *ibid* 131.

⁷³ *Westacre Investments Inc v Jugimport-SPDR Holding Co Ltd* 74.

⁷⁴ *ibid* pp 80-82.

proper law of the contract or the curial law, even if English public policy might have taken a different view.⁷⁵

In the above case the English courts sought to balance the importance of finality of awards and the need to curb illegality, ultimately favouring enforcement by taking a restrictive view of public policy. Indeed, applying an international public policy standard. It further shows that English courts are willing to support enforcement to the extent that violation of mandatory rules of a foreign country (i.e. Kuwait) does not constitute a ground for refusing enforcement, as long as it is not contrary to England public policy. By contrast, if the law applicable to the contract is not violated the courts may favour enforcement even if this conflicts with domestic English public policy.

10.6.2 Irregularity of Procedure or Due Process

Although breach of due process and procedural irregularity are separate grounds under Arts. V(1)(b) and V(1)(d), often such matters are dealt with as violations of public policy Art. V(2)(b), as will be seen below. Yet, sometimes courts may not allow such issues to be raised under the public policy ground. For example, a Hong Kong court in *Qinhuangdao Tongda Enterprise Development Co And Another v Million Basic Co Ltd*,⁷⁶ refused to consider a plea that enforcement of an award rendered in Beijing should be refused on the ground that a party had no opportunity to present its case, so that enforcement would be contrary to the public policy of Hong Kong. After considering the principle of interpreting public policy narrowly, the court held that:

The public policy ground for refusal must not be seen as a catch-all provision to be used wherever convenient. It is limited in scope and is to be sparingly applied.⁷⁷

The court was not prepared to allow the defendant to raise issues of irregularity in the arbitral procedure under the public policy defence.⁷⁸

⁷⁵ *ibid* .

⁷⁶ *Qinhuangdao Tongda Enterprise Development Co And Another v Million Basic Co Ltd* .

⁷⁷ *ibid* 178.

However, allegations of violation of due process or irregular procedure have frequently been invoked under the public policy ground, albeit usually without success.⁷⁹ It may be appropriate to give brief examples since most aspects of violation of due process or procedural irregularity have already been discussed in detail in the context of Art. V(1)(b and d).⁸⁰ One example is where a French court of appeal refused to enforce an award rendered in Germany on the basis of public policy because the German court had suspended the statutory limitation period without jurisdiction. Yet, on appeal the Supreme Court overturned the earlier decision, reasoning that “the rule whereby a claim before a court which has no jurisdiction suspends a limitation period is not part of the French conception of international public policy”.⁸¹ In another case, enforcement of an award rendered in Turkey was opposed on grounds of public policy, the respondent alleging that it had not been granted the right to be heard, as the tribunal had refused its motion to take evidence which had not already been heard in earlier arbitration proceedings. A German court of appeal rejected this objection holding that such preclusion of evidence did not of itself part form a breach public policy. The court suggested that the refusal of such motions would only amount to a denial of the right to be heard and thus a violation of the public policy if it was shown that the evidence could have caused the case to be decided differently.⁸² Moreover, a Luxembourg court of appeal rejected a challenge to enforcement on the ground that the award violated mandatory principles of due process and thus was contrary to public policy. The Court held that since the award had not been challenged in the country of origin, and since neither the impartiality nor the independence of the arbitrators had been criticised, there had been a fair trial, so that enforcement of the award would not violate Luxembourg international public

⁷⁸ Davidson, *Arbitration* 401.

⁷⁹ See, eg, *Czechoslovak Firm C v German (FR) OHG Sch & B Sch & Personally* (1977) II YBCA 235 (Germany Supreme Court 1969); *X SA (Switz) v Y (Spain)* (1983) VIII YBCA 406 (Spain Supreme Court) 407; *Mediterranean Shipping Co v URCOOPA* 1998 Bull Civ I, No 227 157 (France Supreme Court 1998), cited in Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1659-1; *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (the Hong Kong Court of Final Appeal 1999) pp 691-92; *Italian Party v Swiss Company* pp 828-29; *Union de Cooperativas Agricolas Epis Centre v La Palentina SA* pp 538-39;

⁸⁰ See, supra Ch 3 & Ch 2.

⁸¹ *Mediterranean Shipping Co v URCOOPA*, cited in Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1659-1.

⁸² *X v X* (Germany Court of Appeal "Oberlandesgericht Bremen, 2 Sch 4/99" 30 Sep 1999, Unreported), cited in, S Kroll, 'Germany: Setting Aside An Award'(2001) 4(4) *International Arbitration Law Review* N26 at N27.

policy.⁸³ Yet the important point was that the court was prepared to consider this challenge under the public policy heading.

Nonetheless, a few cases have actually seen enforcement refused on the ground of public policy where there has been a lack of due process. For example, a German Appeal Court refused to enforce a foreign award on the public policy ground where there was an extreme violation of the principle of fair hearing by the arbitrator, and the award was made without the respondent having an opportunity to obtain full knowledge of the claim.⁸⁴

10.6.3 Lack of Impartiality of the Arbitrator

It goes without saying that it is a fundamental requirement upon every arbitrator to act impartially throughout the arbitral process. This requirement is violated if the arbitrator, for example, has a personal interest in the case.⁸⁵ Consequently, the lack of impartiality of arbitrators has frequently been invoked under the public policy head, but often unsuccessfully.⁸⁶ One example of unsuccessful challenge is a case where the Hong Kong Court of Final Appeal overturned a decision refusing enforcement of a foreign award on the ground that the award was contrary to public policy of Hong Kong, as there was a strong case of apparent bias. The Court held that there must be compelling reasons to deny enforcement of a NYC award on public policy grounds, concluding that:

I think that a distinction can and should be made between the effect of actual bias and that of apparent bias. (When I say "bias" I mean a lack of the impartiality required of judges and arbitrators.) Actual bias would be more than our courts could overlook even where the award concerned is a convention award. But short of actual bias, I do not think that the Hong

⁸³ See, *Kersa Holding Co v Infancourtage* pp 623-24, 626.

⁸⁴ *Firm P (US) v Firm F (Germany)* (Germany Court of Appeal 3 Apr 1975) 241.

⁸⁵ See, van den Berg, 'Consolidated Commentary' (2003) 667; Di Pietro and Platte, *Enforcement of international arbitration awards: the New York Convention of 1958* 187.

⁸⁶ See, eg, *Fitzroy Engineering Ltd v Flame Engineering Inc*; *Buyer (PR China) v Seller (Japan)* (1995) XX YBCA 742 (Japan High Court 1994) pp 743-44; *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (Hong Kong Court of Final Appeal 1999) 676; *Manufacturer (Slovenia) v Exclusive Distributor (Germany)* (German Court of Appeal 1999); *Transocean Shipping Agency P Ltd v Black Sea Shipping* 718; *Logy Enterprises Ltd v Haikou City Bonded Area Wanshen Products Trading Co* (1998) XXIII YBCA 660 (Hong Kong Court of Appeal 1997) pp 662-65.

Kong courts would be justified in refusing enforcement of a convention award on public policy grounds as soon as appearances fall short of what we insist upon in regard to impartiality where domestic cases or arbitrations are concerned. Our stance must be that something more serious even than that is required for refusing such enforcement. In adopting such a stance, we would be proceeding in conformity with the stance generally adopted in regard to convention award enforcement by the commercial jurisdictions whose decisions from around the globe
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Another unsuccessful example is *Fitzroy Engineering, Ltd v Flame Engineering, Inc*⁸⁸. In opposing enforcement of an award made in New Zealand, the defendant alleged that its New Zealand counsel had a conflict of interest in that he had acted for the adversary, so that enforcement should be denied on the public policy ground. After confirming the importance of interpreting the public policy ground very narrowly, a US district court held that the defendant had failed to submit evidence suggesting that the potential conflict of interest identified would render enforcement of the award offensive of US's most basic notion of morality and justice. Again in *AAOT Foreign Economic Association (Vo) Technostroyexport v International Development and Trade Services Inc* a US court of appeals rejected the defendant's allegation that enforcement of an award rendered in Russia should be refused on the public policy ground of Art. V(2)(b) because the arbitral tribunal was corrupt. The court relied on the principle of waiver, holding that:

The settled law of this circuit precludes attacks on the qualifications of arbitrators on grounds previously known but not raised until after an award has been rendered. Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection."⁸⁹

Similarly, in *Imperial Ethiopian Government v Baruch-Foster Corp* the defendant having opposed enforcement on the ground that the president of the arbitration panel had served for four years as a draftsman of a civil code for the Ethiopian government

⁸⁷ *Hebei Import & Export Corp v Polytek Engineering Co Ltd* 676.

⁸⁸ *Fitzroy Engineering Ltd v Flame Engineering Inc* . similarly, *Transmarine Seaways Corp of Monrovia v Marc Rich & C AG* 480 FSupp 352 (US District Court SD NY 1979) pp 357-58.

⁸⁹ *AAOT Foreign Economic Association (Vo) Technostroyexport v International Development and Trade Services Inc* 982.

(the prevailing party) fifteen to twenty years earlier, the US Court of Appeal held that there was no substance in the allegations.⁹⁰

By contrast, a Swiss Court of first Instance refused enforcement on the ground that the Swiss public policy requirement of independence and impartiality of arbitrators was violated where the arbitrator had been the lawyer of the winning party for years, and had drawn up the contract, naming himself as arbitrator in the event that there be a dispute as to interpretation, and a prohibiting his removal under a penalty of Swiss Francs 1,000,000.⁹¹ Similarly, the French Supreme Court has refused to enforce an Italian award on the ground of violation of French public policy, where an arbitrator was connected to one of the parties, and having sat on both French and Italian arbitral panels dealing with the case, had conveyed to the latter erroneous information of such nature to influence that tribunal's decision on jurisdiction.⁹²

10.6.4 Lack of Reasons in Award

According to the arbitration laws of many countries, it is a mandatory requirement that the award must include the reasons for the decision.⁹³ Such laws, considered it important to provide adequate explanations of the reasons on which the arbitral award is based because it is necessary to inform the party how justice has been done in their case.⁹⁴ While the absence of reasons prevents the parties seeking to prove that the arbitrators were wrong,⁹⁵ by contrast, it is customary in several Common law countries not to give reasons for the award.⁹⁶

⁹⁰ *Imperial Ethiopian Government v Baruch-Foster Corp* 337.

⁹¹ *X v X* (Switzerland Court of first Instance 26 May 1994) pp 758-62.

⁹² *Excelstor Film TV srl v UGC-PH* (1999) XXIV YBCA 643 (France Supreme Court 1998) 644.

⁹³ See, eg, Brazilian Arbitration Act of 1996, Art. 26(II); French New Code of Civil Procedure of 1981, Art. 1471; Italian Code of Civil procedure, Art. 823 (3); Chinese Arbitration Law of 1994, Art.54; Russian International Commercial Arbitration Law of 1993, Art. 31(2). See also, van den Berg, 'Consolidated Commentary' (2003) 668; Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* pp 189-90.

⁹⁴ See, van den Berg, 'Consolidated Commentary' (2003) 668.

⁹⁵ See, Di Pietro and Platte, *Enforcement of international arbitration awards : the New York Convention of 1958* 190.

⁹⁶ See, van den Berg, 'Consolidated Commentary' (2003) 688

In practice, the issue of lack of reasons has frequently been raised under the public policy head. However, the courts generally appear not to consider lack of reasons as a matter of international public policy, so that it does not constitute a ground for refusing enforcement of foreign awards, notwithstanding that the giving reasons may be mandatory under the relevant national law.⁹⁷ Thus, an Italian court of appeal has enforced an award rendered in US, rejecting the objection that the award violated Italian public policy because it lacked reasons (which are mandatory under Italian law). The Court Concluded that:

It is fundamental principle that the violation of the public order must be appreciated on the basis of the decision and not the reasoning of the award. The New York Convention does not provide any requirement as to the reasoning for an arbitral decision. Furthermore, the Convention excludes a re-examination of the merit of the award, from which it follows that the reasoning has no relevance. Moreover, the fact that the reasoning constitutes a principle of the Italian Constitution is not important because what is fundamental in Italian law of procedure may not be considered as such be foreign legislative and judicial authorities (such as US law and the European Convention of 1961 on International Commercial Arbitration).⁹⁸

Similarly, where it was alleged that enforcement of an award made in Turkey would contravene German public policy because it did not reveal why the tribunal had judged the respondent's defences insufficient, a German court of appeal held that although it would be incompatible with German internal public policy for arbitrators to merely state that they had considered all the facts without giving any detailed reasoning, this did not violate international public policy, which would be only contravened if the award were so contrary to the fundamental principles of German procedural law that the result could not be fair, or if it contained substantial errors touching upon the very foundations of public and economic life.⁹⁹ Equally, a Belgian court of first instance has rejected a similar challenge, holding that failure to provide

⁹⁷ See, eg, *Bobbie Brooks Ins v Lanificio Walter Banci SAS* 292; *Isaac Glicer v Moses Israel Glicer & Estera Glicer-Nottman*; *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d'Investissements* pp 651-52, 666-67; *Inter-Arab Investment Guarantee Corp v Banque Arabe et International d'Investissements SA* (1998) XXIII YBCA 644 (France Court of Appeal 1997) pp 652-53; *X v X (Germany Court of Appeal "Oberlandesgericht Bremen, 2 Sch 4/99" 30 Sep 1999, Unreported)* cited in, S Kroll, 'Germany: Setting Aside An Award'(2001) 4 (4) Intl Arb J. R 26 at N27.

⁹⁸ *Bobbie Brooks Ins v Lanificio Walter Banci SAS* 292.

⁹⁹ *X v X (Germany Court of Appeal "Oberlandesgericht Bremen, 2 Sch 4/99" 30 Sep 1999, Unreported)* cited in, Kroll, 'Germany: Setting Aside An Award' at N27.

reasons in the award does not violate public policy in Belgian private international law. This decision was upheld by the Belgian court of Appeal.¹⁰⁰

10.6.5 Mandatory Laws

Mandatory laws have been described as imperative provisions of laws that must be applied irrespective of the applicable law to a contract or the procedural rule chosen by the parties, reflecting states' internal or international public policy.¹⁰¹ Frequent examples of mandatory laws are competition and antitrust laws, currency controls, certain tax laws, import/export laws, environmental protection laws, and measures of embargo, blockade or boycott rules, laws to protect parties presumed to be in an inferior bargaining position (e.g. wage-earners or commercial agents),¹⁰² law governing interest rates, and even mandatory procedural law.

Nonetheless, in the context of enforcement of foreign awards, it is generally accepted by courts that not all national mandatory rules embody public policy.¹⁰³ For example, the Swiss Supreme Court has said that substantive public policy is not necessarily contravened where a foreign award is not in conformity with mandatory provisions of Swiss law.¹⁰⁴ Furthermore, a German court of appeal, after making reference to the principle of distinction between domestic and international public policy, observed that in the case of foreign awards not all contraventions of mandatory provisions of German law constitutes a breach of German public policy, since the latter only includes extreme cases.¹⁰⁵

¹⁰⁰ *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d'Investissements* pp 651-52, 666-67.

¹⁰¹ See, Barraclough and Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' 206; P Mayer, 'Mandatory Rules of Law in International Arbitration'(1986) 2 *Arb Intl* 274 .

¹⁰² See, in general, Barraclough and Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' 206; Mayer, 'Mandatory Rules of Law in International Arbitration' 275; IIA Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' 17.

¹⁰³ See, eg, *Inter Maritime Management SA v Russin & Vecchi* (1997) XXII YBCA 789 (Switzerland Supreme Court 1995) 797; *Renusagar Power Co. Ltd v General Electric Co* (India Supreme Court 1993) 702; *Firm P (US) v Firm F (Germany)* (Germany Court of Appeal 3 Apr 1975) 241; *Bobbie Brooks Ins v Lanificio Walter Banci SAS* 292; *Adviso NV v Korea Overseas Construction Corp* (Korea Supreme Court 1995) 615.

¹⁰⁴ *Inter Maritime Management SA v Russin & Vecchi* 797.

¹⁰⁵ *Firm P (US) v Firm F (Germany)* (Germany Court of Appeal 3 Apr 1975) 241.

In the light of above consideration, courts have often declined to deny enforcement of foreign awards on public policy grounds simply because they were contrary to national mandatory laws.¹⁰⁶ For example, the Korean Supreme Court has rejected an allegation that enforcement of a foreign award would violate Korean public policy just because the limitation period under Dutch law applied in that award is contrary to the mandatory Korean law thereof. The Court noted that the violation of mandatory provisions of Korean law does not of itself necessarily constitute a valid reason to refuse enforcement under the public policy exception. Enforcement should be refused only if it is contrary to the morality or social order of Korea.¹⁰⁷ In another case, a respondent resisted enforcement of a foreign award on the grounds that the amounts awarded were unreasonable and excessive in terms of Swiss law. The Swiss Supreme Court dismissed the objection, holding that public policy should be understood in the narrow sense, and even more so as far as enforcement of foreign awards is concerned. It suggested that enforcement of an award should only be refused on the public policy ground, if it amounted to an intolerable breach of Swiss law, or otherwise breached the fundamental principles of the Swiss legal system. The fact that an award ran contrary to a mandatory provision of Swiss law, such as the prohibition of compound interest, did not of itself infringe substantive public policy.¹⁰⁸ Moreover, an Italian court of appeal rejected an objection that enforcement would violate Italian public policy because an award ordered payment in US dollars, contrary to the Italian foreign currency exchange law. The court held that ordering payment in dollars does not violate Italian public policy.¹⁰⁹

By contrast, the *Laminoirs-Trefleries-Cableries de Lens SA v Southwire Co & Southwire International Corp* case is a rare example of the public policy defence being successfully used. The respondent opposed enforcement of a foreign award on

¹⁰⁶ See, eg, *X SA (Switz) v Y (Spain)* (Spain Supreme Court 1981); *Adviso NV v Korea Overseas Construction Corp* (the Korean Supreme Court 1995) 615; *Andre & Cie SA v Molino e Pastificio di Ponte San Giovanni SpA* (1985) X YBCA 458 (Italy Court of Appeal 1981) 461; *Inter Maritime Management SA v Russin & Vecchi* (Switzerland Supreme Court 1995) pp 797-98; *X (Syria) v X (Germany Court of Appeal 1998)* 672; *Abbott Laboratories v Baxter Intern Inc* 2002 WL 467147 (US District Court ND Illinois 2002); *Baxter International Inc v Abbott Laboratories* 315 F3d 829 (US Court of Appeals 7th Cir 2003).

¹⁰⁷ *Adviso NV v Korea Overseas Construction Corp* 615.

¹⁰⁸ *Inter Maritime Management SA v Russin & Vecchi* pp 797-98.

¹⁰⁹ *Andre & Cie SA v Molino e Pastificio di Ponte San Giovanni SpA* 461.

the ground that the tribunal adopted a French legal rate of interest which contravened the US public policy because the rate was excessive. The court agreed and refused to enforce that portion of the award, holding that the arbitrators' decision that interest rates should rise by an additional 5% p.a. two months from the date of the award in accordance with the French statute was "penal rather than compensatory and bears no reasonable relation to any damage resulting from delay in recovery of the sums awarded", and therefore clearly offensive to US public policy.¹¹⁰

10.6.6 National Interests/ Foreign Relations

Enforcement of a foreign award may be opposed on public policy grounds where it might threaten a state's national interests or prejudice foreign relations. In the leading case of *Parsons & Whittemore Overseas Co v RAKTA*, the American party sought to resist enforcement on the basis that would significantly affect US foreign policy because relations with Egypt would be damaged. The US Court of Appeals first acknowledged that extensive construction of the public policy defence would vitiate the basic effort of the NYC to remove pre-existing obstacles to enforcement.¹¹¹ The court held further that:

[T]he Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.¹¹²

The Court therefore concluded that US public policy was not to be equated with national policy (in the diplomatic or foreign policy sense), and that it would not refuse to enforce an award in favour of an Egyptian party simply because of tensions at that time between the United States and Egypt.¹¹³ This was later followed by a US district court in *National Oil Corp v Libyan Sun Oil Corp* where it was contended that enforcement of the award would violate US public policy as it was in favour of the Libyan Government, a state known to sponsor international terrorism. The Court

¹¹⁰ *Laminours-Trefileries-Cableries de Lens SA v Southwire Co & Southwire International Corp.*

¹¹¹ *Parsons & Whittemore Overseas Co v RAKTA*, 973.

¹¹² *ibid.*, 974.

¹¹³ *ibid.*

confirmed the principle that the public policy ground had to be interpreted narrowly, continuing,

To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy'.¹¹⁴

The Court noting that the US still recognised the government of Libya, had not declared war on it, and had specifically given it permission to bring the action, therefore dismissed the challenge.¹¹⁵ Again, in *Dalmia Dairy*, the English Court of Appeal held that it would not be contrary to English public policy to enforce an award in favour of a national of one friendly state (India) against a national of another friendly state (Pakistan), even though those states were enemies of one another.¹¹⁶

10.6.7 Case Law Analysis

The foregoing cases show that, since the NYC does not define the contents of public policy, an extensive range of procedural and substantive issues is frequently raised under this, thus a harmonisation of the applications under this ground is somewhat remote. Yet, the cases illustrate that the public policy defence is often rejected for these reasons. First and most importantly, because national courts have acknowledged that the concept of public policy in Art. V(2)(b) is international, which is more restrictive than considerations of domestic public policy, so that the public policy defence should be interpreted very narrowly, and applied only to very serious violations. Secondly, courts sometimes deem a losing party to have waived his right to raise public policy at the stage of enforcement when that party failed to raise such objection before the arbitrator or the court of the arbitration seat, as in the *AAOT* case and the *Kersa Holding Co* case mentioned above. Thirdly, courts sometimes enforced the award because the alleged violations of public policy had no vital impact on the outcome of the arbitration. Fourthly, some courts limited their review of the award to the decision itself and refused to look at whether the underlying contracts violated

¹¹⁴ *National Oil Corp v Libyan Sun Oil Co* 733 FSupp 800 (US District Court D Delaware 1990) 819.

¹¹⁵ *ibid* 820.

¹¹⁶ *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (UK CA) 224.

public policy. Fifthly, some courts attempted to strike a balance between the protection of their essential national interests and values on the one hand, and their foreign relations and international interests on the other, the latter including the commercial benefits deriving from the finality of foreign awards.

It might be suggested that defences such as incapacity of the parties, invalidity of the arbitral agreement, violation of due process, excess of jurisdiction, defective composition of the tribunal, or procedural irregularity should not be allowed to be raised under the public policy ground, as these are already established as grounds under in Art. V(1). Such grounds were established to allow the losing parties to protect their legitimate rights, and thus can be invoked only by that party who has to prove them, whereas the public policy ground in Art. V(2)(b) can be raised by the enforcing court on its own motion, as it is intended to allow the enforcing court to protect the essential principles, interests and morals of that country. These considerations indicate that the NYC intended to exclude grounds listed in Art. V(1) from the scope of public policy in Art. V(2)(b). The above suggestion would limit the range of applications of the public policy ground in conformity with the prevailing spirit of narrow interpretation of the grounds under Art. V, and would thus serve the general policy of “pro-enforcement bias” of the NYC.

Finally, it may be noticed that the principle of international public policy has often been applied against foreign governments or private parties. It is not clear how the principle of international public policy is to be applied when a foreign award is contrary to the interests of the enforcing country itself, as where the award is made against its government or agencies.

10.7 The Position in Saudi Arabia

10.7.1 Introductory Remarks

In general, SA has been frequently stigmatised as having a conservative and negative attitude towards international arbitration. In fact, it is commonly cited as the black

sheep of international arbitration.¹¹⁷ It was referred to in just such a manner by three speakers and one paper just during the June 2006 ICCA Congress held in Montréal.¹¹⁸

In particular, the Public policy ground is widely considered as the greatest obstacle to enforcement of foreign awards in SA.¹¹⁹ However, no one was able to provide a single case in which enforcement was refused on this ground. The justification for this general allegation is likely to be the fact that the Saudi legal system is essentially based upon the *Shari'ah* principles and all modern Saudi statutes have to be in conformity with the main bases of Islamic *Shari'ah*.¹²⁰ One western writer, for instance, states that:

In trying to assimilate into the Western world, Saudi Arabia and other Islamic countries are facing difficult questions regarding the abandonment of their cultural history. Saudi Arabia has traditionally been hostile to the recognition and enforcement of non-domestic arbitral awards, finding these awards contrary to Saudi Arabian law and public policy. During the 1950's, Saudi Arabia Courts refused to enforce many non-Saudi Arabian arbitral awards, finding them degrading and disrespectful to Saudi Arabia's Islamic legal system.¹²¹

While another writer observes that:

The scope of this public policy exception, which could affect the implementation of the New York Convention in any Contracting State, is

¹¹⁷ See, eg, Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* pp 39, 115; Reisman, 'Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration' 10; Mason, 'International Commercial Arbitration; Saudis Accept N.Y. Convention' at 26; Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' pp 921-22; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention'; Cattan, 'Saudi Arabia'

¹¹⁸ See, for instance, Reisman, 'Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration' 10.

¹¹⁹ In this manner, see, eg, Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' 922; Mason, 'International Commercial Arbitration; Saudis Accept N.Y. Convention' 26; Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?' at 23; El-Ahdab, *Arbitration in Arab Countries* vol. 1 pp 242-43; El-Ahdab, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part 2' pp 50-51.

¹²⁰ See, eg, El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 91; Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' 922; Cattan, 'Saudi Arabia' 246.

¹²¹ Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' at 922.

of particular relevance in the context of Saudi Arabia, where the Shari'ah is the paramount law and, in effect, the ultimate expression of Saudi Arabian public policy. Shari'ah precepts are not always reconcilable with modern commercial practice. The Saudi Arabian Board of Grievances (the enforcement courts), in reliance on the public policy exception, is likely to refuse to enforce arbitral awards or such parts thereof as are deemed to be contrary to the Shari'ah.¹²²

Similarly, Dr. El-Ahdab noted that the significant crisis facing the enforcement of foreign awards in Saudi Arabia is that of the notion of public policy as defined by the *Shari'ah*. Indeed, he suggests that the concept of public policy is sometimes defined in a very broad manner by the court, who often state that arbitration abroad or based on foreign law of itself violates public policy.¹²³ The question whether these theoretical allegations are well founded will be explored below, but after having discussed the nature of Saudi public policy.

10.7.2 *Shari'ah* and Saudi Public Policy

The Saudi legal system is deeply rooted in Islamic *Shari'ah* rules. The rules of Shari'ah regulate not only, as one might think, the religious life of Muslims, but their commercial and political activities as well. Art. 1 of the Saudi Constitutional Law emphasises that:

The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; *God's Book and the Prophet's Sunnah* (traditions), are its constitution... (emphasis added)¹²⁴

Art. 7 of the same law further lays down that:

The regime derives its power from the Holy *Qur'an* and the Prophet's *Sunnah* which rule over this law and all other State Laws.¹²⁵

As regards the judicial system, Art. 48. of the Saudi Constitutional Law states that:

¹²² Cattani, 'Saudi Arabia' 246.

¹²³ See, El-Ahdab, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part 2' 48.

¹²⁴ Saudi Basic Law of Governance of 1992, Art. 1.

¹²⁵ *ibid* Art. 7.

The courts will apply, in the cases brought before them, the rules of the *Islamic Shari'ah* in accordance with what is indicated in *the Book (Qur'an)* and *the Sunnah*, and *statutes decreed by the Ruler which do not contradict the Book or the Sunnah*.¹²⁶

With regard to arbitration, Art. 20 of the SAL of 1983 stipulates, particularly, that the award must be not contrary to Shari'ah in order to be granted leave to enforce. It states that:

An arbitral award shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute, this order shall be made on the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in Shari'ah. (emphasis added)¹²⁷

More particularly, the Circular of the Grievance Board regarding enforcement foreign judgments and arbitral awards of 1985 requires conformity with public policy by affirming that:

The Arab League Convention on Enforcement of Judgments (and Awards of 1952) empowers the competent court in the country where enforcement is sought to refuse to enforce the foreign award if it contradicts the public policy or the good public morals of the enforcement country, and that court has the discretion to estimate this matter. Accordingly, *it is not possible in any case to grant execution of any foreign award that violates any general principles of Shari'ah* (such as interest), since the Islamic Shari'ah is the constitution and highest reference for the judiciary and the governance in Saudi Arabia (emphasise added).¹²⁸

The above provisions make it clear beyond doubt that the Islamic *Shari'ah* based upon *Qur'an* and *Sunnah* has sovereignty over the Saudi legal system, and that therefore the Islamic Shari'ah rules constitutes Saudi public policy in the context of enforcing arbitral awards. Yet, it is important to note that although the Shari'ah is the main source of Saudi public policy, some aspect of administrative law may also form

¹²⁶ *ibid* Art. 48.

¹²⁷ SAL of 1983, Art. 20.

¹²⁸ the Circular of the Grievance Board regarding Enforcement of Foreign Judgments and Arbitral Awards, no 7 dated 15/8/1405 H (1985), Art.s. 3, 5.

part of public policy,¹²⁹ such as, the non-arbitrability of administrative disputes without obtaining authorisation from the President of the Council of Ministers.¹³⁰

10.7.3 Definition of Saudi Public policy

Having seen that the *Shari'ah* rules constitute the Saudi public policy, the key question is whether all mandatory rules of *Shari'ah* constitute public policy in the context of enforcement of foreign awards under the NYC. Is there a definition of public policy for the purpose of enforcing foreign awards? Before dealing with this question, it may be helpful to define briefly the concept of *Shari'ah*. Generally speaking, *Shari'ah* means the Islamic divine law based on the teachings of the *Qur'an* and the traditional sayings and doings of Prophet Muhammad (*Hadith* and *Sunnah*), prescribing religious, moral, secular duties and in some cases penalties for lawbreaking. Some of these rules are mandatory while others are not (recommending things to do or to avoid).

As regards the definition of Saudi public policy, it seems that, as in other countries, there is no precise definition of the *Shari'ah* mandatory rules which constitute Saudi public policy. Nonetheless, there are attempts to give a general explanation of public policy in Muslim law in general, and in SA in particular. One writer has said that:

In Muslim Law, the concept of public policy is based on the respect of the general spirit of the *Shari'a* and its sources (the Koran and the Sunna, etc.) and on the principle that "individuals must respect their clauses, unless they forbid what is authorized and authorize what is forbidden."¹³¹

Moreover, a Saudi writer defines public policy, in a way close to the definition in other countries, as "a collection of political, social and economic foundations that a society stands upon in a certain time".¹³² Dr. El-Ahdab further says, in the context of

¹²⁹ See, Al-Samaan, 'The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia' at 235; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 88; Turck, 'Saudi Arabia' 27.

¹³⁰ SAL of 1983, Art. 3.

¹³¹ A El-Ahdab, 'General Introduction on Arbitration in Arab Countries' in P Sanders and AJ van den Berg (eds) *International Handbook on Commercial Arbitration* (Kluwer, 1998) Suppl. 11 p 14.

¹³² M Al-Marzouqi, *Legislative Authority in the Kingdom of Saudi Arabia* (Obeikan, Riyadh 2004 'in Arabic') 83.

enforcement of arbitral awards, that Saudi public policy is the *Shari'ah*. The prophet (PBUH) says the following: "Muslims must comply with the conditions (provided for by the *Shari'ah*) because no condition ever forbade a good action or authorized an evil one." Ibn Taymiyya, one of the main leaders of the *Hanbali* School applied in Saudi Arabia, explains this rule of Public Order as follows: The rule in the contracts and conditions is validity, whereas the exception is the illegality only for those voided or prohibited by a text (of *Qur'an* or *Sunnah*) or by analogy (*Qiyas*). *Shari'ah*, for example, has forbidden aleatory contracts or those containing interest. He concluded that as a general rule, the criterion for Saudi Public policy is "the Public Interest".¹³³ Although this explanation has the merit of confirming the rule of the validity of contracts indicating a narrow reading of the concept of Saudi public policy, on the other hand it suggests a wide scope by including every *Shari'ah* obligatory rules. The conclusion that Saudi public policy is "the public interest" remains vague and very broad.

A further definition that has been set forth is that Public policy in Saudi Arabia includes matters which are explicitly prohibited by Islamic *Shari'ah*, such as interest and gambling, as well as matters relating to administrative law.¹³⁴ Yet, not all aspects of administrative law are considered to be matters of public policy.

Thus, it might be suggested that the concept of Saudi public policy as a ground for refusing enforcement of foreign awards should be limited to "the general principles of *Shari'ah* and some fundamental rules of administration". This suggestion may be supported by the text of Art. 3 of the Circular of the Grievance Board in which it confirms that "it is not possible in any case to grant execution of any foreign award that violates *any general principles of Shari'ah*".¹³⁵ This provision indicates clearly that not every breach of mandatory rules of *Shari'ah* would constitute a part of public policy, but only breach of the *general principles* of *Shari'ah* would do so, such as questions of interest, gambling, prostitution, and manifest injustice.

¹³³ See, El-Ahdab, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part 2' 56. See also, El-Ahdab, *Arbitration: Its Provisions and Sources* vol 1 p 89.

¹³⁴ See, Al-Samaan, 'The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia' at 223.

¹³⁵ the Circular of the Grievance Board regarding Enforcement of Foreign Judgments and Arbitral Awards, no 7 dated 15/8/1405 H (1985), Art.. 3.

10.7.4 Distinction between Domestic and International Public Policy

It has frequently been doubted whether that Saudi courts will enforce foreign awards, for example, made by non-Muslim arbitrators, or governed by non-Islamic laws, or including compensation for lost profits or opportunities or awarding interest, regardless of Saudi national mandatory rules, on the ground that national public policy is not the same as international public policy. Alternatively such issues will be held to be contrary to Saudi public policy and thus the awards will not be enforceable.¹³⁶ Accordingly, the crucial question which needs to be investigated is whether Saudi law or Saudi courts distinguish between domestic and international public policy.

There appear to be no explicit reference to “international public policy” by the Saudi arbitration laws or courts. However, the substantive meaning of that doctrine (i.e. interpreting domestic public policy narrowly in the context of enforcing foreign awards) is well recognised in Saudi Arabia. This can be seen by a comparative consideration between the phrases used in the provisions relating to enforcement of domestic and foreign awards. As regards enforcement of domestic awards, Art. 20 of the SAL stipulates that “An arbitral award shall be enforceable ... after ascertaining that *there is nothing that prevents* its enforcement in *Shari'a*”. This Article refers to Shari’ah in a wide term (i.e. *there is nothing*) without any limitation, and thus can be construed literally to include every mandatory rules of *shari’ah*. Whereas, in the context of enforcement of foreign awards, Arts. 3, 5 of the Circular of the Grievance Board clearly limits the concept of the Shari’ah public policy by stating that a foreign award would be not enforceable if it “violates any *general principles* of Shari’ah”. The use of the qualifier “general” indicates that not every violation of mandatory rules or principles of Shari’ah by a foreign award would amount to a ground for refusing enforcement. Only violation of “a *general principle* of Shari’ah” would do so.

This comparison of the two provisions suggests that the Saudi authorities intend to take into account the principle that the concept of public policy in relation to foreign awards is narrower than in relation to domestic awards, inviting the application of an

¹³⁶ See, eg, ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' 21; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 91; Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' pp 950, 259 fn 259.

international public policy standard. Judicial supports for this conclusion can be seen below.

10.7.5 Common Examples of Saudi Public Policy

Having noted that Saudi legislation appears to concede the principle of a distinction between national and international public policy, the question arises as to whether the Saudi courts have recognised that principle in practice as well in dealing with the public policy exception to the enforcement of foreign awards. In answering this question, the Saudi judicial attitude will be examined in the light of issues that are frequently raised as examples of violations of Saudi public policy, such as a foreign award made by non-Muslim arbitrators, or governed by non-Islamic laws, or included compensation for lost profit opportunities or containing interest. These common examples are now considered in turn:

10.7.6 Awards Made by Non-Muslim Arbitrators.

It has been suggested that the enforcement of a foreign award may be refused by the Saudi courts on the ground of public policy if it was rendered by non-Muslim arbitrators.¹³⁷ The IRSAL of 1985 specifies that arbitrators must be Muslim.¹³⁸ Yet by applying the distinction between domestic and foreign awards, the Saudi courts do not consider foreign awards made by non-Muslims to be contrary to Saudi public policy. They adopt the rule that if a Saudi party agrees with a foreign party to arbitrate outside SA, he is bound by the decision of the arbitrators even if they are not Muslim.¹³⁹ For example, a Saudi Appeal Court (the 4th Review Committee) has held where an arbitration agreement provides that any dispute between the parties will be resolved

¹³⁷ M Alhoshan 'The Symposium of European-Arabian Arbitration', cited in El-Ahdab, *Arbitration in Arab Countries* v 2 p 242; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' p 91; ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' 21.

¹³⁸ IRSAL of 1985, Art.3.

¹³⁹ See, Al-Ajlan, *Compilation of judicial principles* pp 61-62; the 4th Review Committee, decision No. 155/T/4 dated 1415 H (1994); the 4th Review Committee, decision No. 43/T/4 dated 1416 H (1995); the 4th Review Committee, decision No. 187/1/4 dated 1413 H (1992); the 4th Review Committee, decision No. 156/T/4 dated 1413 H (1992).

by arbitration in the US, that it means that the parties plainly agree to resolve their difference by arbitration in that country and the Saudi party therefore cannot repudiate that agreement.¹⁴⁰ The same conclusion has been reached in relation to arbitration in Austria¹⁴¹ and France.¹⁴² Accordingly, the Saudi courts have never refused to enforce a foreign award rendered abroad because it was entirely or partly made by non-Muslim arbitrators. In fact the opposite is true.¹⁴³

10.7.7 Governed by Non-Islamic Laws

Similarly, it was thought that Saudi Courts may hold foreign awards governed by non-Islamic law to be against Saudi public policy and therefore not enforceable in Saudi Arabia.¹⁴⁴ It is true that the IRSAL of 1985 particularly requires the arbitrators, in issuing their awards, to follow the provisions of Islamic *Shari'ah* and Saudi applicable laws.¹⁴⁵ Nonetheless, by applying the distinction between domestic arbitration and foreign arbitration, the application of this provision is considered to be limited to domestic awards and to have nothing to do with foreign awards. Moreover, SA is required, by adherence to the NYC, to enforce foreign awards which are often governed by non-Islamic law. Consequently, the Saudi courts adopt the rule that, if an agreement between a Saudi party and a foreign party provides for arbitration abroad, it will be deemed to binding even if governed by non-Islamic law,¹⁴⁶ such as the law of France,¹⁴⁷ the US¹⁴⁸ or Austria.¹⁴⁹ This consequently means that applying non-Islamic law to govern foreign awards will not be in itself deemed to be a violation of

¹⁴⁰ the 4th Review Committee, decision No. 43/T/4 dated 1416 H (1995).

¹⁴¹ the 4th Review Committee, decision No. 187/T/4 dated 1413 H (1992); the 4th Review Committee, decision No. 156/T/4 dated 1413 H (1992).

¹⁴² the 3rd Review Committee, decision No. 15/T/3 dated 1423 H (2002).

¹⁴³ See, eg, the 2nd Review Committee, decision No. 10/T/2 dated 1419 H (1998); the 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997).

¹⁴⁴ See, Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' pp 950, 259 fn 259.

¹⁴⁵ IRSAL of 1985, Art. 39.

¹⁴⁶ pp 61-62; the 4th Review Committee, decision No. 155/T/4 dated 1415 H (1994).

¹⁴⁷ the 3rd Review Committee, decision No. 15/T/3 dated 1423 H (2002).

¹⁴⁸ the 4th Review Committee, decision No. 43/T/4 dated 1416 H (1995).

¹⁴⁹ the 4th Review Committee, decision No. 187/T/4 dated 1413 H (1992).

Saudi public policy in so far as they are not contrary to the general principles of Shari'ah. Thus, the Saudi courts have enforced several foreign awards although they were not governed by Islamic *Shari'ah*,¹⁵⁰ while on the other hand no case can be found in which enforcement of a foreign award was refused because it had been governed by non-Islamic law.

10.7.8 Compensation for Lost Profit or Opportunity

It has been argued that compensation for lost profit is not recognised by the *Hanbali* Doctrine, which applies in Saudi Arabia, and may therefore be held to be contrary to Saudi public policy in the context of enforcement of foreign awards.¹⁵¹ It should be pointed out at the outset that one general condition for compensation is that the loss or damage has actually happened. Application for compensation for actual loss, including the legal and arbitration costs,¹⁵² are clearly accepted within Saudi judicial practice. Reference to the term "actual loss" means that the plaintiff has to prove that such loss had taken place or was certain as result of the default in contractual obligations. The courts are not willing to award compensation upon a mere presumption or possibility. This condition has caused diversity among contemporary *Shari'ah* scholars regarding the issue of compensation for lost opportunity of future benefits including future profits. Until recently applications for this kind of compensation were not commonly raised by parties before Saudi court. Thus, although the principle of compensation for lost future benefits including profits has been accepted by some Saudi courts,¹⁵³ it is not yet established as a settled principle.

¹⁵⁰ the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996); the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997);

¹⁵¹ See, El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 91; ILA Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' 21.

¹⁵² See, eg, the 18th Subsidiary Panel has enforced a foreign award including arbitration and lawyer costs. See, the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003). This decision was upheld by the 4th Review Committee. See, the 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004).

¹⁵³ See, P Pompcn, 'East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Systems'(1992) 14 (4) *Loyola Los Ang Intl & Comp L J* 815 at 843-44. For judicial practices, see, the 2nd Review Committee, decision No. 235/T/2 dated 1415 H (1994); the 4th Review Committee, decision No. 197/T/4 dated 1409 H (1989); the 1st Review Committee, decision No. 30/T/1 dated 1419 H (1998); the 1st Review Committee, decision No. 152/T/1 dated 1412 H

As regards enforcement of awards, a case came before a Saudi enforcing court (the 10th Subsidiary Panel) ¹⁵⁴ in which there was an application for enforcement of a foreign award containing compensation for lost future profits. In this case, disputes arose out of a contract between a Romanian car company and a Saudi party in which the former gave the latter rights to market, sell, and service its cars and spare parts in Saudi Arabia. The disputes were submitted to arbitration as the contract provided for, and an award was made in favour of the Romanian company. The award ordered the Saudi party to pay the damages including a sum of \$2,131,58 as a compensation for loss of profit because the Saudi party had failed to continue to buy the amount of cars agreed upon; a sum of \$253,760,50 as compensation for loss of profit because the Saudi party failed to continue to buy the amount of spare parts agreed upon; and a sum of \$250,000 as compensation for damage to reputation. When the Romanian company sought to enforce the award in a Saudi court, the Saudi party opposed enforcement on the grounds that the Romanian company had breached Saudi mandatory rules in that it had sent cars which were not in conformity with Saudi mandatory standards and measurements. It claimed that this violated their contract which provided that "since (the Saudi party) is legally responsible before the Saudi consumers to ensure that all cars it sells meet the standards applicable in Saudi Arabia ..., (the Romanian company) guarantees that the quality of its cars is in conformity with standards and measurements applied in Saudi Arabia, and (the Saudi party) cannot therefore be held legally responsible for refusing to receive or distribute any amount coming from the first party which is contrary to the legal specifications required in Saudi Arabia." The Saudi party also argued that the award breached the Islamic *Shari'ah* as it ordered compensation for loss profit and moral damages.

The court agreed with these arguments, finding that the Saudi party had proved that the cars in question were contrary to the mandatory standards and measurements of Saudi Arabia so that the Saudi office of standards and measurements seized all Romanian company's cars at the Saudi distributor's branches. More importantly, the court continued that the award aimed mainly to compensate the plaintiff for lost future

(1991); the 12th Subsidiary Panel, decision No. 21/D/F/12 dated 1414 H (1993); the 2nd Review Committee, decision No. 89/T/2 dated 1415 H (1994); the 2nd Commercial Panel, decision No. 65/D/TJ/2 dated 1420 H (1999); the 3rd Review Committee, decision No. 202/T/3 dated 1420 H (1999).

¹⁵⁴ the 10th Subsidiary Panel, decision No. 20/D/F/10 dated 1416 H (1995) pp 1-10.

profits and for moral (reputation) damages arising from the dispute. This, in the opinion of the court, was contrary to Shari'ah principles which require that the damage clearly occurred, whereas the loss of profits and reputation¹⁵⁵ damages alleged by the plaintiff was not certain but merely potential. Accordingly, the court refused to enforce the foreign award.

The plaintiff appealed and the court of appeal (the 2nd Review Committee) voided the lower court's decision on several grounds including the fact that its decision dealt with the award's merits, a matter which was beyond its jurisdiction. More significantly, in reaching the conclusion that the compensation for lost profit and moral damages contained in the award was contrary to Shari'ah rules, it held that the lower court had given justifications in general terms and wide phrases, whereas it should have established the non-compliance of the foreign award with Islamic Shari'ah by using evidence and arguments derived from the unanimity of Islamic Scholars or from the Islamic *Fiqh* (Jurisprudential) Academies or the Council of Senior Scholars confirming that compensation for lost profit, opportunity or moral damages would violate Islamic Shari'ah. Thus, the appeal court sent the case back to the lower court to reconsider it again in the light of the appeal court's remarks.¹⁵⁶

The above case illustrates that the appeal court was in favour of enforcement since it criticized the lower court review of the merits of the award. It also indicates that the court of appeal was reluctant to refuse enforcement of the foreign award on the basis that compensation for lost profit, opportunity or moral damages would constitute a violation of Shari'ah rules (Saudi public policy). This approach of the court of appeal has been accepted by other appeal courts in several cases relating to domestic disputes.¹⁵⁷ For example, the court of appeal (the 4th Review Committee) states that

¹⁵⁵ The author has proven, in a deep study, that compensation for damage to reputation and moral is lawful in Islamic *Shari'ah*. See, W Al-Tuwaigri, *Protection of the Copyright in Islamic Jurisprudence and Statute* (the Higher Judicial Institute Riaydh 1999 'unpublished thesis') pp 208-21

¹⁵⁶ the 2nd Review Committee, decision No. 235/T/2 dated 1415 H (1994).

¹⁵⁷ the 4th Review Committee, decision No. 197/T/4 dated 1409 H (1989); the 1st Review Committee, decision No. 30/T/1 dated 1419 H (1998); the 1st Review Committee, decision No. 152/T/1 dated 1412 H (1991); the 12th Subsidiary Panel, decision No. 21/D/F/12 dated 1414 H (1993); the 2nd Review Committee, decision No. 89/T/2 dated 1415 H (1994); the 2nd Commercial Panel, decision No. 65/D/TJ/2 dated 1420 H (1999); the 3rd Review Committee, decision No. 202/T/3 dated 1420 H (1999).

compensation covers both actual loss and lost profit.¹⁵⁸ However, the difficulty lies in proving the lost opportunity or lost profit as a matter of certainty or predominant probability, and therefore allegations of such loss do not often succeed in practice.¹⁵⁹

Yet, the Saudi courts should relax their domestic standard of compensation for lost profits when dealing with foreign awards. They should take into consideration the position of some early jurists of Shari'ah. Contrary to what one may think, although it was not common at the time of early scholars of Islamic *Shari'ah*, the idea of compensation for lost future benefit (including profits) was confirmed on various occasions by some distinguished scholars of *Shari'ah*. For instance, *Ibn Taymiyya*, from *Hanbali* Doctrine, states as a rule that damage, which requires compensation, is of two types: (i) loss of something which exists (e.g. actual loss); (ii) loss of something that was certainly on the way to happening.¹⁶⁰ Besides, *Kharchi*,¹⁶¹ *Ibn Sahnoun* and *Al-Garavi*¹⁶², from *Maliki* Doctrine, say that he who extorts money from another and detains it at length, will be liable for a sum equivalent to the profit that could have been made if the money had remained with the owner.

10.7.9 Interest

The most common example of breach of Saudi public policy is legal or contractual interest. Arbitrators outside Saudi Arabia normally grant legal or contractual interest alongside the main damages to be paid to the aggrieved party. Yet, it is clear that the Saudi courts will not confer leave to execute interest in foreign awards since they deem interest to enter into the forbidden formwork of usury (*riba*) under the Islamic

¹⁵⁸ the 4th Review Committee, decision No. 197/T/4 dated 1409 H (1989).

¹⁵⁹ For unsuccessful cases, see, the 1st Review Committee, decision No. 268/T/1 dated 1419 H (1998); the 1st Review Committee, decision No. 140/T/1 dated 1420 H (1999);

But for successful cases, see, the 12th Subsidiary Panel, decision No. 21/D/F/12 dated 1414 H (1993), confirmed by the 2nd Review Committee, decision No. 89/T/2 dated 1415 H (1994); the 2nd Commercial Panel, decision No. 65/D/TJ/2 dated 1420 H (1999), confirmed by the 3rd Review Committee, decision No. 202/T/3 dated 1420 H (1999).

¹⁶⁰ A Ibn Taymiyya, *Alfatawa Alkobra* (Dar al-Kutub al-ilmiah, Beirut 1988 'in Arabic') vol. 4 p 489.

¹⁶¹ M Al-Kharchi, *Al-Kharchi Ala Khalil* ('in Arabic') vol. 6 p 146.

¹⁶² A Al-Garavi, *Al-Thakrah* (in Arabic) vol. 8 p 317-318.

Shari'ah.¹⁶³ In principle, The *Qur'an* and *Hadith* clearly prohibit usury. In his book (The *Qur'an*), Allah (the Almighty) forbids usury (*riba*) in peremptory language and warns those dealing in it with the severest threat such as:

But Allah has permitted trading and forbidden *Riba* (usury). So whosoever has receives an admonition from his Lord and desists shall not be punished for the past, and his case is for Allah (to judge); but whoever returns [to dealing in *Riba* (usury)], those are the companions of the Fire; they will abide internally therein. Allah will destroy *Riba* (usury) and will give increase for *Sadaqat* (deeds of charity, alms, etc.) And Allah likes not every sinning disbeliever.¹⁶⁴

Moreover, Allah (the almighty) as well as his Prophet Mohamed (PBUH) have declared war against the usurer, unless he stops dealing in *Riba*. In this regard, Allah says:

O you who believe, fear Allah and give up what remains (due to you) from *Riba* (usury), if you are (really) believers. And if you do not, then be informed of a war [against you] from Allah and His Messenger. But if you repent, you shall have your capital sums. Deal not unjustly (by asking more than your capital sums), and you shall not be dealt with unjustly (by receiving less than your capital sums).¹⁶⁵

In addition to these prohibitive *Qur'anic* verses that deter dealing in *Riba* and accepting interest, many other prohibitive *Hadiths* are stated in the prophet's *Sunnah* (tradition). That is, the Prophet Mohamed (PBUH), for example, regards *Riba* as one of the great destructive sins.¹⁶⁶ He also cursed the one who accepts *Riba*, the one who

¹⁶³ Usury (*Riba*) in Islamic *Shari'ah* is divided into two categories; (a) Excess [Al-Fadl] Usury (To sell a certain amount of anything for a greater quantity of the same thing); (b) Delay [Al-Nasi'ah] Usury (Conditioned excess for delay of payment or to take interest on lent money). See, S Al-Fawzan, *A Summary of Islamic Jurisprudence* (Al-Maiman Publishing House, Riyadh 2005 ' in Arabic') vol. 2 p 38.

¹⁶⁴ *The Qur'an, Al-Baqarah* [2: 275-276]

¹⁶⁵ *ibid* [2: 278-279].

¹⁶⁶ Reported by M Al-Bukhari, *Sahih al-Bukhari* (in Arabic)no. 2266; Muslim, *Sahih Muslim* no. 258.

pays it, the one who records it and the two witnesses to it.¹⁶⁷ Furthermore, Muslim scholars unanimously prohibited usury (*riba*) in general.¹⁶⁸

In the light of the foregoing strong prohibitions of *Riba* (usury) under Islamic *Shari'ah*, one may understand why the Saudi courts consistently refuse to grant or enforce interest. Thus, it is not surprising when Art. 3 of the Circular of the Grievance Board specifies interest to be contradictory to the general principles of *Shari'ah*, as it reads:

It is not possible in any case to grant execution of any foreign award that violates any general principles of *Shari'ah*, and this has been consistently confirmed in the judicial precedents of the (competent courts) ... in which execution of interest contained in foreign awards was prevented.¹⁶⁹

In conformity with the above prohibitive provisions of usury, the non-enforceability of interest has been consistently confirmed by the Saudi courts.¹⁷⁰ For example, a Saudi enforcing court (the 25th Subsidiary Panel) granted execution of an ICCA award in favour of a Dutch party, apart from the award of interest, holding that it is contrary to the rules of Islamic *Shari'ah*.¹⁷¹ This decision was then upheld by the Court of Appeal.¹⁷²

Yet, a few contemporary Islamic scholars argue in relation to the problem of default in payment that if the debtor is dilatory (i.e. financially capable and not in constrained circumstances such as poor or declared insolvent), the judge should, by the request of the creditor, ordered the debtor to pay the creditor not only the capital of delayed payment or debit, but also an extra compensation to cover the unjustified

¹⁶⁷ Reported by Muslim, *Sahih Muslim* no. 4069.

¹⁶⁸ See, eg, Ibn al-Monther, *Al-Ijmaa* (Dar al-Athar, Cairo 'in Arabic') 107; Ibn Qudamah, *Al-Mughnai* vol. 5 pp 421-22; S Al-Dakhil, 'Compensation for Damages caused by Payment Evasion (Part 1)' (2006) *Almoslim* (in Arabic) <http://www.almoslim.net/roku_elmy/show_article_main.cfm?id=730> (accessed 15/7/2006); M Ibn Rushd, *Bedaiat Al Majtahid* (beirut Lebanon 1992 'in Arabic') vol. 2 p 161;

¹⁶⁹ the Circular of the Grievance Board regarding Enforcement of Foreign Judgments and Arbitral Awards, no 7 dated 15/8/1405 H (1985), Art. 3.

¹⁷⁰ See, eg, the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996) 8; the 2nd Review Committee, decision No. 208/1/2 dated 1418 H (1997) 6; the 10th Subsidiary Panel, decision No. 20/D/T/10 dated 1416 H (1995) 2;

¹⁷¹ the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996) 8.

¹⁷² the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997) 6.

procrastination. They consider this extra in payment to be justified under Islamic Shari'ah and not usury, since it is determined by the judge rather than the parties to the contract (i.e. pre-determining the percentage of the interest in case of overdue payment).¹⁷³ One might apply the same conclusion by analogy on the interest contained in foreign awards.¹⁷⁴ However, it is most unlikely, at least for the near future, that the Saudi courts will follow this argument, since they are highly influenced by the opinion of the vast majority of (early and contemporary) Islamic scholars who consider such extra payment due to default in payment to be forbidden usury.¹⁷⁵ In this manner, the Islamic Fiqh Academy, a subsidiary of the Organization of the Islamic Conference, passed a resolution on this issue as follows:

If the buyer/debtor delays the payment of installments after the specified date, it is not permissible to charge any amount in addition to his principal liability, whether it is made a pre-condition in the contract or it is claimed without a previous agreement, because it is *Riba* (usury), hence prohibited in Shari'a.¹⁷⁶

It is prohibited (Haram) for a solvent debtor to delay the payment of the installments from their due dates. However, it is not permissible in Shari'a to impose a compensation in case he delays the payment.¹⁷⁷

¹⁷³ In favour of this approach, see, M Al-Zarqa, 'About the Legitimacy of Imposing the Dilatory Debtor to Compensate the Creditor' (1996) 3 (2) *Journal of Islamic Economic Studies* 11 'in Arabic'; A Ibn Munay, *Total opinions and research Sheikh Abdullah Ibn Munay* (in Arabic); vol. 3 pp 191-261.

¹⁷⁴ See, N Al-Shareef, 'Three Obstacles on Enforcement of Foreign Arbitral Principles' *Al-Eqtisadiyah* (2731, 3/4/ 2001 'in Arabic') 5 .

¹⁷⁵ See, eg, The Islamic Fiqh Academy, 'Decision No. 51 (2/6) About Sales on Installments' (1990) 6 (1) *Islamic Fiqh Academy Journal* 193 s. 3, 4; the Islamic Fiqh Academy, 'Decision No. 109 (3/12) About Penalty Provision' (2000) 12 (2) *Islamic Fiqh Academy Journal* 91 s. 4; IFA the Muslim World League, 'Decision No. 8/11 (1989) about Whether Is it Permissible for the Bank to Impose a Fine on the Debtor Because of the Delay in the Repayment of Debt in Due Time?' (1989) 11th Session <<http://www.themwl.org/Fatwa/default.aspx?d=I&cid=128&l=AR&cid=10>> (accessed 23/7/2006); A Al-Salou, *Islamic Economy and Contemporary Jurisprudence Issues* (Dar Al-Thgafah, Qatar Doha 1995 'in Arabic') vol. 2 p 564; MT Usmani, *Researches on Contemporary Jurisprudential Issues* (Dar al-kalam, 1998) 37; Y Al-Shubaily, *Investment banking Products and their Provisions in Islamic Jurisprudence* (Dar Ibn Aljwzi, Riyadh 2005 'in Arabic') vol. 1 pp 625-56; Al-Dakhil, 'Compensation for Damages caused by Payment Evasion (Part I)'; N Al-Jofan, 'Compensation for Lost Benefit' (2006) *Almoslim* (in Arabic) <http://www.almoslim.net/rokn_elmy/show_article_main.cfm?id=1501> (accessed 15/7/2006).

¹⁷⁶ The Islamic Fiqh Academy, 'Decision No. 51 (2/6) About Sales on Installments' s. 3.

¹⁷⁷ *ibid* s. 4. Similarly, the Islamic Fiqh Academy, 'Decision No. 109 (3/12) About Penalty Provision' s. 4. Where it was decided that "It is permissible to include a Penalty Provision in all financial contracts except when the original commitment is a debt. Imposing a Penalty Provision in debt contracts is usury in the strict sense. ... [I]t is impermissible, for instance, to make a Penalty Provision in Installment Sale

Similarly, the Islamic Fiqh Academy, a subsidiary of the Muslim World League, has come to the same conclusion.¹⁷⁸ Accordingly, it is evident that the Saudi courts would not enforce interest contained in foreign awards.

The next question needs to be raised is whether an award granting interest would be held completely unenforceable or whether the only the part awarding interest will be refused enforcement, so that the rest of the award will remain enforceable as far as it is not clearly against public policy (*Shari'ah* principles). Saudi judicial practice conform that partial enforcement is applied in this situation and consequently several foreign awards have been granted enforcement apart from interest.¹⁷⁹

Yet, it is worth mentioning that some plaintiffs by themselves dropped the sum of interest from their petition to enforce their awards.¹⁸⁰ By way of example, a Dutch party requested a Saudi court to enforce an ICCA award, except for the part relating to the bank interest, reasoning that it breaches the Islamic *Shari'ah* rules.¹⁸¹ By contrast, it is said that some arbitral tribunals, in order to avoid the refusal of the Saudi courts to enforce the interest included in foreign awards, have included amounts representing of interest within the main sum of the award without identifying it separately as interest.

The above considerations show that the Saudi enforcement courts clearly deem interest included in foreign awards to constitute a violation of Saudi public policy (general principles of *Shari'ah*) and therefore not enforceable in Saudi Arabia. Thus, it can be concluded that interest is the only definite matter in which the probability of distinction between domestic and international public policy in the context of enforcement of foreign awards is not available in SA.

on a debtor who delays repayment of outstanding instalments, whether due to insolvency or payment evasion”.

¹⁷⁸ the Muslim World League, 'Decision No. 8/11 (1989) about Whether Is it Permissible for the Bank to Impose a Fine on the Debtor Because of the Delay in the Repayment of Debt in Due Time?'

¹⁷⁹ the 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997); the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996) 8; the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997); the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003); the 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004).

¹⁸⁰ See, eg, the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996) pp 5, 8; the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997) 2; the 10th Subsidiary Panel, decision No. 20/D/F/10 dated 1416 H (1995) 2.

¹⁸¹ the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996) 8.

10.8 Conclusion

The public policy defence under Art. V(2)(b) of the NYC has long been a traditional and fundamental ground for refusing enforcement which can be found in most foreign laws and international conventions dealing with enforcement of foreign arbitral awards. The basic aim of Art. V(2)(b) is to allow each contracting state to protect its most fundamental economic, legal, moral, political, religious and social principles from being harmed by enforcement of foreign awards. While the NYC gives a significant emphasis to party autonomy under Art. V(1), the Convention puts limitations on this freedom under the public policy ground of Art. V(2).

The concept of public policy under Art. V(2)(b) could be practically problematic. The NYC does not spell out the concept and contents of public policy, but rather it refers this matter to the law of the country where enforcement is sought. National courts confirmed that the law governing the concept of public policy in Art. V(2)(b) is the law of the enforcing Country. Yet, the concept of public policy, by its nature, is ambiguous and lacks precise determination under national laws, its contents varying from country to country. This has led to uncertainty and inconsistencies in the interpretation and application of the public policy ground of Art. V(2)(b), creating overlaps with other grounds, such as Art. V(1)(a) (incapacity of the parties and invalid arbitral agreement), Art. V(1)(b) (violation of due process), Art. (1)(c) (excess of jurisdiction), Art. V(1)(d) (improper procedure or composition of the arbitral tribunal), and Art. V(2)(a) (non-arbitrability). Such uncertainty and overlaps potentially could give the losing party wide opportunities to resist enforcement or at least to delay it.

Yet, despite such uncertainty and inconsistencies, the public policy ground has not generated any serious obstacle to enforcement of foreign awards since national courts have generally interpreted public policy under Art. V(2)(b) as meaning international public policy rather than domestic public policy, the former being much narrower than the latter. Thus, many issues sought to be invoked under the public policy ground have been rejected by the courts whether they were procedural issues (such as procedural irregularity, lack of reasons, bias) or substantive issues (such as corruption, violation of mandatory laws, national interests or foreign relations).

In SA, public policy means the general principles of Islamic *Shari'ah* and some fundamental administrative rules. Allegations that enforcement of foreign awards is extremely difficult or impossible because of the Saudi concept of public policy were found to be largely without merit. Indeed, the Saudi courts are reluctant to refuse enforcement of foreign awards on the basis of public policy, unless there are very serious violations. This is because the distinction between domestic and international public policy is recognised by the Saudi courts. Thus for example they have granted enforcement of foreign awards made by non-Muslim arbitrators, or governed by non-Islamic laws, although such matters are contrary to the mandatory Saudi domestic law. Also, it is likely that the Saudi courts would consider that compensation for lost profit or opportunities would not violate Saudi public policy. Thus, the award of interest in awards is the only issue that plainly deemed by the Saudi courts to constitute a serious infringement of Saudi public policy, and consequently awards will be generally enforced except for the part related to interest.

CHAPTER ELEVEN

General Conclusion

11.1 Introduction

I do not presume to think that this treatise settles every doubt in the minds of those who understand it, but I maintain that it settles the greater part of their difficulties. No intelligent man will require and expect that on introducing any subject I shall completely exhaust it; or that on commencing the exposition of a figure I shall fully explain all its parts.¹

The main objective of this thesis has been to examine and evaluate the grounds listed under Art. V of the NYC for refusing enforcement of foreign arbitral awards in terms of both theoretical considerations and concrete application by the courts, especially the Saudi Arabian courts. In this concluding chapter only the main results of the study will be addressed, since each of the previous chapters has contained its own conclusions, and it not appropriate to reproduce them here. This chapter will thus consider in turn: general observations regarding the NYC, shortcomings in Art. V of the NYC, conclusions relating to Saudi Arabia, general recommendations regarding the NYC, and recommendation relating to Saudi Arabia.

11.2 General Observations

The NYC has achieved an extraordinary degree of success in its main object of promoting and facilitating a large degree of uniformity in securing the enforcement of foreign arbitral awards throughout the world, and continues to do so. One important reason behind that success is the fact that the NYC has achieved wide acceptance, the number of the states acceding to it numbering 137 (as at September 2006). That number covers states from every region of the world, including most major trading nations.

¹ M Maimonides, *The guide for the perplexed* (2nd edn, Routledge, London 1904) 2.

Art. V has itself played an important role in the success of the NYC. The fact that the grounds for refusing enforcement set forth in Art. V are reproduced identically in Article 36 of the UNCITRAL Model Law on International Commercial Arbitration of 1985, and to more or less the same effect in many international and regional conventions dealing with the enforcement of foreign awards suggests that Art. V reflects a broad consensus in the international community regarding the grounds on which enforcement of foreign arbitral awards may be refused.

Moreover, Art. V reduces the chances of opposing enforcement by specifying the exclusive grounds on which enforcement of foreign awards may be refused, preventing contracting states from adding other grounds. Unless one of the specified grounds is established, a court has no discretion to refuse to enforce a NYC award. By contrast, the NYC does not prevent contracting states from further restricting the grounds for refusing enforcement, since Art. VII (1) acknowledges the right of a party to avail itself of any law or treaty that might exist in the enforcement state which is more favourable to enforcement of foreign awards than the NYC itself. Accordingly, although enforcement of an award that has been set aside by a competent authority at the place of arbitration may be refused pursuant to Art. V(1)(e), such an award may however be enforced, for example, in France, since French law does not recognise the nullification of an award in its country of origin as a ground to refuse enforcement of a foreign award.

Art. V does not allow enforcing courts to re-examine the merits of the award, while the grounds for refusing enforcement under Art. V must be construed narrowly and may be applied in serious cases only. Indeed, even where such a ground is proved, the enforcing court may still have a residual discretion to grant enforcement when it feels appropriate to do so. Moreover, unlike previous conventions, the NYC does not demand that the party seeking enforcement prove the validity of the award, but instead insists that the party opposing enforcement must prove the existence of the grounds for refusing enforcement. Additionally, rather than refusing enforcement of the award entirely, Art. V permits courts to enforce awards partially, if the enforceable parts of an award can be separated. These factors together reflect the general policy of the NYC known as its “pro-enforcement bias”.

It was seen that the foregoing features and principles have been affirmed many times by the courts of contracting states. Additionally, many courts are reluctant to refuse enforcement of foreign awards where the grounds advanced for refusal have already been considered and rejected by the arbitral tribunal. At the same time several courts have regarded the losing party as estopped from contesting foreign awards at the stage of enforcement where it has participated without objection in the arbitral proceedings. As far as refusing enforcement on the basis that the award offends against the public policy of the enforcing state is concerned, there is an increasing trend towards applying international rather than purely domestic public policy.

Thus courts have generally applied a powerful presumption in favour of the finality and enforceability of awards under the NYC, construing the grounds that would justify denying enforcement narrowly, and refusing enforcement only in the most serious cases. Indeed, the cases reviewed in this thesis show clearly that the grounds set forth in Art. V have been for the most part unsuccessfully invoked and have rarely led to foreign arbitral awards being denied enforcement.

Art. V of the NYC pays attention to the need for balance between the right of parties and the right of the enforcing state. Thus, Art. V(1) aims to emphasise that arbitral justice offers the parties advantages and safeguards that are no less than those offered by ordinary justice, whereas Art. V(2) intends to grant each contracting state the right to protect the basic interests of its nation.

The NYC still serves the international commercial community very well, and its general underlying pro-enforcement policy has created clear, universal trends towards supporting a friendly culture for international arbitration, and has chiefly assisted in making arbitration a desirable and secure method of resolution for international commercial disputes.

11.3 Shortcomings of Art. V

On the other hand, the present study unveils some shortcomings in Art. V. One major shortcoming is that whilst Art. V(1) seems to afford the parties a great deal of autonomy in choosing particular arbitral procedures to resolve their disputes to decide

which law should govern the arbitral agreement and procedure, Art. V(2) limits that autonomy by making it subject to compliance with the public policy and law as to arbitrability of the enforcing state.

Another shortcoming is the requirement of Art. II(1) (also referred to under Art. V(1)(a)) that the arbitration agreement be in written form. This requirement of writing excludes oral arbitral agreements, although the main contract is frequently made orally. Moreover, Art. II(2)'s definition of what constitutes an agreement in writing (i.e. an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams), does not appear to conform with modern practices of international trade, since the means of communication have drastically changed in the last 48 years. Yet, the definition in Art. II(2) is generally deemed to be only a list of examples of the means of commercial communications commonly used in 1958, rather than an exclusive list. Thus, courts have usually interpreted the writing requirement broadly so as to include many different forms of modern communications, such as telex, fax, e-mail and other means of e-communication.

A further shortcoming is that Article V(1)(e) makes it possible for courts to refuse to enforce foreign awards if they have been set aside by the courts in the country where they were rendered. This creates a potential weakness in the Convention system, by making the enforceability of an award subject to all domestic grounds for challenging it in the country where it was rendered. This would violate the general principle that the grounds for refusing enforcement are exclusively listed under Art. V. It was suggested that to avoid the indirect creation of extra grounds, setting aside should not justify enforcement being refused under Art. V(1)(e), unless it was based on grounds similar to those available under Art. V(1)(a-d). Moreover, several national courts, notably in France, Austria and the USA, have shown themselves willing to enforce arbitral awards even if they had been set aside in the country of origin, relying either on Art. VII(1) which allows reliance on a more liberal domestic regime in favour of enforcement, or on the marginal discretion of the enforcing court indicated by the permissive language of Art. V.

An additional shortcoming is that the Art. V leaves the determination of a number of important matters, such as the violation of due process, non-arbitrability, and breach

of public policy, to the law of the country where enforcement is sought. This has led to uncertainty and diversity in interpretation of these grounds, which in turn reduces the scope of uniformity of enforcement under the NYC. Yet, such diversity tends to be more theoretical than practical, and has not created any serious mischief in the actual enforcement of foreign awards.

Finally, the defence of state or sovereign immunity was found to be the only serious barrier to enforcement under the NYC. While an agreement of a state or a state entity to arbitrate disputes related to its commercial acts (*acta jure gestionis*) is generally held to be a waiver of immunity from the jurisdiction of an arbitral tribunal, it would be not held to be a waiver of immunity from execution. The plea of state immunity is a common obstacle to enforcement of international provisions, and the NYC contains no explicit provisions to assure enforcement against a state or a state agency. However, several courts have allowed enforcement of a foreign award against the commercial assets of a foreign sovereign.

To sum up then, most of the problems associated with Art. V have proved to be theoretical rather than practical. Moreover, they are more often associated with the bare text of NYC than with its judicial interpretation and application. Thus perceived shortcomings in the text and structure of the NYC have been overcome by liberal interpretation and application in the light of the general policy of pro-enforcement bias.

11.4 The NYC in Saudi Arabia

This thesis has paid particular attention to the operation of the NYC in Saudi Arabia and has shown that any fears that it might operate in a restrictive way in Saudi Arabia, and in particular that its operation might encounter difficulties with the Islamic Shari'ah are not well founded. On the contrary, the rules of the Islamic *Shari'ah*, especially the Hanbali School officially adopted in Saudi Arabia, were found to be consistent with most principles of international arbitration and to support the enforcement of foreign awards. For example, the *Shari'ah* upholds the following principles; a very expansive definition of what constitutes a valid arbitral agreement, the binding and final nature of arbitral awards, party autonomy, and the requirements

of a fair trial. At the same time the Saudi courts have also supported the NYC, confirming that the enforcement of foreign awards may be opposed only on the limited grounds listed under Art. V, and that re-examination of the merits of foreign awards is not permissible. Moreover, they have insisted that the party opposing enforcement bears the onus of proving the existence of the grounds for refusal, and have construed the grounds for challenging enforcement narrowly.

This thesis reached the conclusion that foreign arbitral awards are, as a rule, enforceable in Saudi Arabia under the NYC, even if they have been rendered by female arbitrators, non-Muslim arbitrators, or governed by non-Islamic laws. The last two issues can be taken as examples of the distinction between Saudi national and international public policy.

However, it is evident that the Saudi courts would not enforce the interest contained in a foreign award because this violates the general principles of Shari'ah that strongly forbid interest. Yet the rest of the award would still be enforceable. Finally, it is unclear whether an award would be enforced against Saudi state agencies. It was seen that the Saudi Arbitration law of 1983 Art. 3 requires a Saudi state agency to obtain the consent of the President of the Council of Ministers in order to resort to arbitration. Although it was suggested that such a requirement appeared to be applicable to domestic more than international arbitration, it is still not clear in practice whether an arbitral award is enforceable if it was made against a Saudi state agency which resorted to arbitration without having obtained such authorization. In the only case to address the issue an inferior Saudi court held that although the enforcement of such an award would violate Art. 3, enforcement should be granted according to the general principles of Shari'ah that place significant emphasis on the moral obligation to fulfil one's contracts and undertakings. This brave and extraordinary approach can be taken as a practical example of relying on more liberal provision in favour of enforcement.

Finally, the numbers of cases in which enforcement of foreign arbitral awards have been sought before the Saudi enforcing courts are notably not many. This probably because Saudi losing parties have often implemented the awards against them voluntarily, or the winning parties often seek enforcement against Saudi losing parties'

assets out side Saudi Arabia, or the awards that rendered against Saudi parties are themselves not many.

11.5 General Recommendations

Suggestions to resolve the shortcomings in the NYC by amending its text or even by a new convention are definitely not appropriate at the present time. This is because the Convention is very simple and continues to be extraordinarily successful in achieving its main task of promoting enforcement of both arbitral agreements and foreign arbitral awards, especially as most apparent shortcomings have been overcome by appropriate judicial interpretation. Moreover, there are very considerable practical difficulties involved in changing any part of the Convention, one of which is achieving the consent of the 137 ratifying states.

It is very important that the courts and laws of the contracting states should continue to promote a liberal and harmonized interpretation of the NYC, especially Art. V, in the light of both the original objective of the Convention and the needs of modern business practice. This would significantly contribute to the alleviation of any shortcomings in the text.

In order to make the NYC more effective and reduce diversity in judicial applications, UNCITRAL should reconsider the creation of an international committee to provide guidance of how the NYC should be interpreted by the courts. This committee should issue an annual report regarding developments in the application and interpretation of the NYC. It is also highly desirable to produce a possible Model Law on the implementation of the Convention. Such a Model Law could harmonize the interpretation of the NYC and ensure a uniform enforcement procedure.

The Yearbook of Commercial Arbitration is quite efficient in monitoring judicial decisions applying the NYC and providing important commentaries to promote uniform judicial interpretation of the NYC. Nonetheless this work cannot of itself achieve harmonisation for several reasons. It has failed to report court decisions in many contracting countries such as Saudi Arabia. It is accessible only to those who understand the English language because it produced only in English. Its comments

reflect only the personal opinions of the editor, rather than those of an official international committee. Besides, it is available only for an expensive fee.

Therefore, UNCITRAL, with the participation of all contracting States, should seek to collect and analyze all court decisions applying the NYC. Although such a compilation would have no binding authority on national courts, it would certainly provide them with useful guidelines and a persuasive source for more harmonized interpretation of the Convention. It would also be important to publish the above compilation in the six official languages of the UN, and make them easily accessible online. These would certainly be extremely helpful for judges, academics, and practitioners dealing with international arbitration and the enforcement of foreign arbitral awards.

The NYC should be regularly included on the agenda of national and international arbitration conferences and workshops.

It would be particularly beneficial to raise judicial awareness regarding developments in the operation of the NYC. This could be achieved by UNCITRAL establishing an international association to regularly bring together judges from across the world who specialise in the area, or at least organizing a regular programme for them so that they might discuss how a more uniform and friendly application of the NYC might be achieved, exchanging views and sharing experiences. Moreover, information about international commercial arbitration in general and the Convention's functioning in particular should be included as apart of the judicial educational programme institute of each adherent state. The opportunity offered by Art. VII(1) to utilise domestic provisions which are more favourable to enforcement than the NYC has perhaps been under utilised in practice. Thus, efforts should be made to encourage courts to take advantage of this possibility, and to encourage legislators in states which do not have provisions more favourable to enforcement than the NYC, to produce such provisions. This might be achieved by the creation of a model law by UNCITRAL, in order to ensure consistency of application.

11.6 Recommendations concerning Saudi Arabia

Saudi Arabia should update its implementing legislation, which dates back to 1985, whereas Saudi Arabia adhered to the NYC in 1994. It is important for the Saudi government to overcome the irrational fear of international arbitration practice. The Saudi System must clarify its position concerning the capacity of a state agency to enter into international arbitration without having obtained the consent of the President of the Council of Ministers. That requirement should be limited to state agencies that deal with sensitive and vital public issues, such as the state security or the main source of national income (i.e. oil). It is also recommended that Saudi Arabia enact a modern international arbitration law consistent with both the principles of Shari'ah and modern standards in international arbitration, such as represented by the UNCITRAL Model Law on International Commercial Arbitration. Such a law would be helpful in creating a pro-business environment, seizing the benefits of the increase in international commercial activities, achieving rapid economic growth in Saudi Arabia, and capitalizing on the Kingdom's competitive strengths as the global capital of energy and a major hub between East and West.

It is crucial that the competent authority (i.e. the Board of Grievances) and the Ministry of Justice start publishing judicial decisions as soon as possible, making them easily accessible online, in order to advance the knowledge of the judiciary, lawyers and legal scholars regarding relevant precedents, thus helping to clarify many vague legal issues. Many misconceptions about enforcement of foreign awards in Saudi Arabia have been enhanced because the decisions of the Saudi courts have not been published so far.

The Organization of the Islamic Conference (OIC), or the like, should establish an international commercial arbitration centre with arbitration rules based on Shari'ah. Such a centre would provide an alternative dispute resolution forum for Muslims who would rather arbitrate before Muslim arbitrators who are very knowledgeable about the Shari'ah laws.

Muslim scholars and judges who are specialists in Shari'ah should make every effort to explain the rules and theories of Shari'ah regarding international commercial law including arbitration. UNCITRAL must also include such Shari'ah scholars in the membership of each working group. These are vital steps towards better understanding and the resolution of differences between the Islamic and non-Islamic

world which are a legacy of misconceptions, misapprehensions and lack of knowledge about Shari'ah rules.

It is recommended that Saudi judges, academic and arbitrators, especially the Saudi Arbitration Group, participate in international commercial arbitration conferences and seminars held all over the world. This is a momentous opportunity for them and their counterparts from other countries to achieve a mutual understanding by listening to what each other has to say on the issues of international trade in general and international arbitration in particular.

The Higher Judicial Institute in Riyadh should take the leading role in organizing regular workshops and symposiums for Saudi judges to focus on issues relating to the developments in national and international arbitration, making them fully aware of the obligations involved in applying the NYC. It is recommended that the Institute issues a quarterly journal on comparative research on national and international arbitration under Shari'ah and other modern national and international arbitration laws. It is also recommended that the Institute should include national and international arbitration as a part of the curriculum of a masters degree designed for junior judges.

Currently, jurisdiction over the enforcement foreign awards is given to the subsidiary courts, whereas jurisdiction over national arbitration and the enforcement of domestic arbitral awards is given to the commercial courts. The latter appear to be more familiar with arbitration issues and therefore should also be the competent courts for enforcing foreign awards under the NYC. The Saudi courts should continue to support and liberalize enforcement of foreign arbitral awards wherever it is possible to achieve the following favourable goals: to improve the reputation of the position Saudi Arabia takes towards international arbitration; to reduce attempts to enforce awards against Saudi parties' assets in foreign countries; and above all to provide adequate security and encouragement for foreign parties to do business with Saudi parties.

It is hoped that the thesis will provide a useful guide for interpreting the grounds for refusing enforcement set out in Art. V of the NYC, especially in Saudi Arabia. It is also hoped that the recommendations of the thesis will be deemed as a modest contribution towards making the NYC operate more efficiently and more uniformly,

as well as allowing Saudi Arabia to become a friendly forum for the enforcement of foreign arbitral awards.

Table of Cases

Includes: (A) General Cases;

(B) Saudi Cases.

(A) General Cases

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- *Bomar Oil NV v Entreprise Tunisienne d'Activites Petrolieres* (1988) XIII YBCA 466 (France Court of Appeal 1987)
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Appendices

Include;

Appendix A: the New York Convention of 1958

Appendix B: the Saudi Arbitration Law (SAL) of 1983

Appendix C: the Implementation Rules of the Saudi Arbitration Law (IRSAL) of 1985

Appendix A: the New York Convention of 1958

**The United Nation Convention on the Recognition and Enforcement
of Foreign Arbitral Awards of 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 where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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

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

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

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

Article VI

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.

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 and to the extent that they become 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 by 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 or 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.

Appendix B: The Saudi Arbitration Law (SAL) of 1983

Article 1

The parties may agree to arbitrate a specific existing dispute; a prior agreement to arbitrate may also be made in respect of any dispute resulting from the performance of a specific contract.

Article 2

Arbitration shall not be permitted in cases where a settlement (Arabic: sulh) is not allowed. An agreement to arbitrate (Arabic: al-ittifaq ala al-tahkim) may not be made except by those who have capacity to act.

Article 3

Government Agencies are not allowed to resort to arbitration for settlement of their disputes with third parties except after having obtained the consent of the President of the Council of Ministers. This ruling may be amended by resolution of the Council of Ministers.

Article 4

The arbitrator shall have expertise and be of good conduct and behaviour, and shall have full legal capacity. If there are several arbitrators, their number shall be uneven.

Article 5

The parties to the dispute shall file the arbitration instrument (Arabic: wathiqat al-tahkim) with the Authority originally competent to hear the dispute. The instrument shall be signed by the parties or their authorized attorneys, and by the arbitrators, and it must state the details of the dispute, the names of the arbitrators and their acceptance to hear the dispute. Copies of the documents relating to the dispute shall be attached.

Article 6

The Authority originally competent to hear the dispute shall record the applications for arbitration submitted to it, and take a decision approving the arbitration instrument (Arabic: wathiqat al-tahkim).

Article 7

If the parties have agreed to arbitrate before the occurrence of the dispute, or if the arbitration instrument relating to a specific existing dispute has been approved, then the subject matter of the dispute shall be heard only according to the provisions of this Regulation.

Article 8

The clerk of the Authority originally competent to hear the dispute shall be in charge of all the notifications and notices provided for in this Regulation.

Article 9

The arbitrators' decision shall be taken within the time limit specified in the arbitration instrument (Arabic: *wathiqat al-tahkim*), unless it is agreed to extend it. If the parties have not fixed in the arbitration instrument a time limit for the decision, the arbitrators shall take their decision within ninety days from the date on which the arbitration instrument was approved; otherwise any of the parties may, if he so desires, appeal to the Authority originally competent to hear the dispute which shall decide either hearing the subject matter or extending the time limit for another period.

Article 10

If the parties have not appointed the arbitrators, or if either of them fails to appoint his arbitrator(s), or if one or more of the arbitrators refuses to assume his task or withdraws, or something prevents him from carrying out his tasks, or if he is dismissed, and there is no special agreement between the parties, the Authority originally competent to hear the dispute shall appoint the required arbitrators upon request of the party who is interested in expediting the arbitration, in the presence of the other party or in his absence after being summoned to a meeting to be held for this purpose. The Authority shall appoint as many arbitrators as are necessary to complete the total number of arbitrators agreed to by the parties; the decision taken in this respect shall be final.

Article 11

The arbitrator may not be removed except with the mutual consent of the parties, and the arbitrator so removed may claim compensation if he had already proceeded and if he had not been the cause of such removal. Furthermore, he cannot be removed except for reasons that occur or appear after the filing of the arbitration instrument (Arabic: *wathiqat al-tahkim*).

Article 12

The arbitrator may be challenged for the same reasons for which a judge may be challenged. The request for challenge shall be submitted to the Authority originally competent to hear the dispute within five days from the day on which the party was notified of the appointment of the arbitrator, or the day on which one of the reasons for challenge appeared or occurred. The decision on the request for challenge shall be taken in a meeting to be held for this purpose and attended by the parties and the arbitrator whose challenge is requested.

Article 13

The arbitration shall not terminate because of the death of one of the parties, but the time fixed for award shall be extended by thirty days unless the arbitrators decide on a further extension.

Article 14

If an arbitrator is appointed in place of the removed arbitrator or the one who has withdrawn, the date fixed for the award shall be extended by thirty days.

Article 15

The arbitrators, by the majority by which the award shall be made, may, through a justified decision, extend the periods fixed for the award on account of circumstances pertaining to the subject matter of the dispute.

Article 16

The decision of the arbitrators shall be taken by a majority vote and if they are authorized to reach a compromise solution (Arabic: *sullh*), their decision shall be by unanimity.

Article 17

The award document shall especially include the arbitration instrument (Arabic: *wathiqat al-tahkim*), a résumé of the depositions of the parties and their documents, reasons for the award and its text and date, and the signatures of the arbitrators. If one or more of them refuse to sign the award, such refusal shall be stated in the award document.

Article 18

All awards issued by the arbitrators, even if they are issued in relation to one of the procedures of investigation, shall be filed within five days with the Authority originally competent to hear the dispute and the parties shall be notified by copies of them. The parties may submit their objections against what is issued by the arbitrators to the Authority with whom the awards were filed, within fifteen days from the date on which they were notified of the arbitrators' awards; otherwise such awards shall be final.

Article 19

If the parties or one of them submitted an objection against the award of the arbitrators within the period provided for in the preceding Article, the Authority originally competent to hear the dispute shall consider the dispute and shall either dismiss the objection and issue an order for execution of the award, or accept the objection and decide the case.

Article 20

The award of the arbitrators shall be due for execution, when it becomes final, by an order from the Authority originally competent to hear the dispute. This order shall be issued upon request of one of the concerned parties after confirming that there is nothing to prevent its execution legally.

Article 21

The award made by the arbitrators shall be considered, after issuance of the order of execution in accordance with the previous Article, as effective as a judgment made by the Authority which issued the order of execution.

Article 22

Fees of arbitrators shall be determined by agreement between the parties and unpaid sums of such fees shall be deposited with the Authority originally competent to hear the dispute within five days after approval of the arbitration instrument (Arabic: wathiqat al-tahkim), and shall be paid within a week from the date on which the order for execution of award is issued.

Article 23

If there is no agreement on the fees of arbitrators, and a dispute ensues, the matter shall be settled by the Authority originally competent to hear the dispute, which decision shall be final.

Article 24

The decisions required for the execution of this Regulation shall be issued by the President of the Council of Ministers, on the basis of a proposal made by the Minister of Justice after agreement with the Minister of Commerce and the President of the Board of Grievances.

Article 25

This Regulation shall be published in the Official Gazette, and shall be effective thirty days after the date of its publication.

Appendix C: the Implementation Rules of the Saudi Arbitration Law (IRSAL) of 1985

Chapter 1. Arbitration, Arbitrators and Parties

Section 1

Arbitration in matters wherein conciliation is not permitted, such as hudoud laan between spouses, and all matters relating to the public order, shall not be accepted.

Section 2

An agreement to arbitrate shall only be valid if entered into by persons of full legal capacity. A guardian of minors, appointed guardian or endowment administrator may not resort to arbitration unless being authorized to do so by the competent court.

Section 3

The arbitrator shall be a Saudi national or Muslim expatriate from the free profession section or others. The arbitrator may also be an employee of the state, provided approval of the department to which he belongs is obtained. In the case of more than one arbitrator, the umpire shall have a knowledge of sharia rules, commercial regulations, customs and traditions applicable in Saudi Arabia.

Section 4

Any person having an interest in the dispute or having been sentenced to a hud or penalty in a crime of dishonour, or being dismissed from a public position following a disciplinary order, or being adjudicated as bankrupt, unless being relieved, shall not act as arbitrator.

Section 5

Subject to the provisions of Sections 2 and 3 above, a list containing the names of arbitrators shall be prepared by agreement between the minister of justice, the minister of commerce and the chairman of the Grievance Board. The courts, judicial committees, and chambers of commerce and industry shall be informed of such lists and the respective parties may select arbitrators from these lists or from others.

Section 6

The appointment of an arbitrator or arbitrators shall be completed by agreement between the disputing parties in an arbitration instrument which shall sufficiently outline the dispute and the names of the arbitrators. Agreement to arbitration may be concluded by a condition in a contract in respect of disputes that may arise from the execution of such a contract.

Section 7

The authority originally competent to decide in the dispute shall issue a decision for approval of the arbitration instrument within 15 days and shall notify the arbitration panel of the same.

Section 8

In disputes where a government authority is a party with others, such a government authority shall prepare a memorandum with respect to arbitration in such a dispute, stating its subject matter, the reasons for arbitration and the names of parties. Such a memorandum shall be submitted to the council of ministers for approval of arbitration. The prime minister may, by a prior resolution, authorize a government authority to settle the disputes arising from a particular contract, through arbitration. In all cases, the council of ministers shall be notified of the arbitration awards adopted.

Section 9

The clerk of the authority originally competent to decide on the dispute shall act as secretary for the arbitration panel, establish the necessary records for registration or arbitration application and shall submit the same to the concerned authority for approval of the arbitration instrument. Such clerk shall also be in charge of the summons and notices provided for in the arbitration regulations and by any other assignments as may be decided by the relevant minister. The concerned authorities shall make the necessary arrangements regarding the above.

Section 10

The arbitration panel shall fix the date of the hearing for consideration of the dispute within a period not exceeding five days from the date in which approval of the arbitration document had been notified to the arbitration panel, and shall notify the disputing parties of the same through the clerk of the authority originally competent to decide on the dispute.

Chapter II. Notification of Parties, Appearance, Default and Proxies in Arbitration

Section 11

Every summons or notice relating to the subject matter of arbitration made through the clerk of the authority originally competent to decide on the dispute, shall be made through the messenger or the official authorities, whether the said proceeding is requested by the disputing parties or initiated by the arbitrators. Police or mayors are required to assist the relevant authority in performing its duties within their prescribed jurisdiction.

Section 12

The summons or notice shall be written in the Arabic language and shall consist of two or more copies - according to the number of disputing parties - and shall contain the following:

- a) The date, day, month and year in which the summons or notice was made.
- b) The first name, surname, title, profession and domicile of the party requesting the summons or notice, and the first name, surname, title, profession and domicile of his representative, if he is working for another person.
- c) The name of the messenger who forwarded the summons or notice, his employer and his signature on the original and copy of the summons or notice.
- d) The first name, surname, profession and domicile of the person to be summoned or notified, and if his domicile is not known at the time of issuance of the summons, then his latest domicile.
- e) Title of the person to whom copy of the summons has been served, and his signature on the original indicating receipt, or indication of his refusal to take receipt of the summons when returned to the concerned authority.
- f) Name and place of the arbitration panel, the subject matter of procedures, and the date specified therefor.

Section 13

1. The papers to be served on summons shall be delivered to the respective person, or to his place of domicile, and may be delivered to a chosen place of domicile determined by the concerned parties.
2. In case such person is not present in his place of domicile, the summons papers shall be delivered to any person who declares that he is an agent or responsible for the business of the person to be summoned, or his employee, or that he or she is living with him - such as spouse, relative or other.

Section 14

If the messenger did not find the proper person to whom the papers are to be delivered pursuant to the preceding section, or if the person mentioned therein refrained from accepting the papers, the messenger shall state that in the original copy and deliver the same that day to the police commissioner or mayor or the representative of any of them, if the residence of the person summoned falls within their authority. Also, the messenger shall within 24 hours send the person summoned at his original or chosen domicile a registered letter, informing that the copy had been delivered to the administration and stating all such details in the original copy of the summons. The summons or notice shall be valid and effective from the time of delivery thereof as aforementioned.

Section 15

Except as provided for in special regulations, the copy of summons or notice shall be delivered in the following manner:

- a) In matters relating to the state, it shall be delivered to the ministers, district governors, directors of government departments or their representatives.
- b) In matters relating to public persons, it shall be delivered to the person acting on his behalf according to the law, or his representative.
- c) In matters relating to companies, societies and private establishments, it shall be delivered to the head offices, as indicated in the commercial registration, to the chairman, managing director or his representative from among the employees. With respect to foreign companies having branches or agents in Saudi Arabia, the papers shall be delivered to the branch or the agent.

Section 16

The official in charge shall submit the arbitration file to the authority responsible for trial of the dispute, for approval of the arbitration instrument. The clerk of such authority shall notify the parties and the arbitrators of the decision taken with respect to approval of the arbitration instrument within one week from the date of adoption of such decision.

Section 17

On the day fixed for arbitration, the parties shall appear by themselves or through their representatives, by virtue of a notarized power of attorney, or by a proxy issued by any official authority or certified by one of the chambers of commerce and industry. A copy of the power of attorney shall be kept in the file of the claim after the original has been reviewed by the arbitrator, without prejudice to the right of the arbitrator or arbitrators to require the personal appearance of the respective party if the circumstances so require.

Section 18

1. In the event of default by one of the parties in appearing at the first hearing, and if the arbitration panel is satisfied that such defaulting party had been properly served notice, the arbitration panel may decide on the dispute as long as the respective parties have filed their statements of claim, defences and documentation. The award adopted shall, in such case, be considered a decision made in the presence of the parties. However, if the defaulting party was not properly served a summons, the hearing shall be adjourned to another hearing so that the defaulting party is properly notified. If the defendant parties are many and are only partially served a personal summons, and if they have all, or those who are not served notice, defaulted to appear, the arbitration panel in other than urgent matters shall adjourn the hearing so that the defaulting parties are properly served notice, and the award adopted in such other hearing shall be deemed as if made in the presence of all defaulting parties.

2. Also, the award of arbitration shall constructively be deemed made in the presence of the party who appears personally or by proxy in any of the hearings, or filed his statement of defence in the claim or in document relating thereto. However, if the defaulting party appeared prior to the end of the hearing, any award or decision adopted therein shall be deemed null and void.

Section 19

If the arbitration panel discovers that a summons published to a defaulting party in a newspaper is not proper, it shall adjourn arbitration of the dispute to another hearing and such defaulting party shall be properly served a summons in respect thereto.

Chapter III. Hearings, Trial and Recordings of Claim

Section 20

The claim shall be tried openly unless the arbitration panel decides by its own motion, or if one of the parties so requests, that the hearing be held in camera for reasons appreciated by the arbitration panel.

Section 21

The arbitration of the claim shall not, without an acceptable reason, be adjourned more than once for a reason attributed to one of the parties.

Section 22

The arbitration panel shall reasonably allow each party to make his remarks and defences either orally or in writing in the times specified by the arbitration panel. The defendant party shall be the last to make submission and the panel shall complete the case and prepare the award.

Section 23

The umpire shall control and manage the hearings, direct questions to the parties or witnesses, and shall have the right to dismiss from the hearing anyone in contempt of the hearing. However, if anyone present commits a violation, the umpire shall record the incident and transfer it to the concerned authority. Each arbitrator shall have the right to direct questions and examine the parties or witnesses through the umpire.

Section 24

The parties may request the arbitration panel at any stage of the claim to record their agreement in the minutes of the hearing as related to admission, conciliation, assignment or otherwise, and the arbitration panel shall make an award of the same.

Section 25

The Arabic language shall be the official language to be used before the arbitration panel, whether in the discussions or in correspondence. The arbitration panel and the parties may not speak other than the Arabic language and any party who does not speak Arabic shall be accompanied by an accredited translator, who shall sign with him the minutes of the hearing, approving the statements made.

Section 26

Any party may request adjournment of the proceedings for a reasonable period, that period to be decided by the arbitration panel, so that such a party can submit any documents, papers, or remarks which may be productive or have a material effect on the case. The arbitration panel may allow further adjournments if there is justification therefor.

Section 27

The arbitration panel shall record the facts and proceedings which take place in the hearing, in minutes written by the secretary of the arbitration panel under its supervision. The minutes shall contain the date and place of the hearing, names of arbitrators, the secretary and the parties. It shall also contain statements of the respective parties, the minutes shall be signed by the umpire, arbitrators and the secretary.

Section 28

1. The arbitration panel may, by its own motion, or pursuant to a request from one of the parties, require the other party to produce any document which he may possess and which may have material effect on the proceedings, in the following cases:

a) If such document is a joint document between the parties. Such document will be deemed joint if, in particular, it is in favour of both parties or if it proves their mutual rights and obligations.

b) If one of the parties invoked such a document in any phase of the claim.

c) If the regulations permit demand for delivery or release of such a document.

2. The application must state the following:

a) description of the document requested

b) contents of the document, with as much detail as possible

c) the fact in issue for which such document is called

d) the evidence and circumstances proving that the document is under the possession of the other party

e) the reason for obligating the other party to present the said document.

Section 29

The arbitration panel may designate the effective means of inquiry in the claim whenever the facts to be proven are proximate to the dispute and are admissible.

Section 30

The arbitration panel may disregard the evidentiary procedures it has ordered, provided that reasons for such disregard shall be stated in the minutes of the hearing. The arbitration panel may not consider the result of such procedures and shall state its reasons in the award.

Section 31

The party requesting testimony of witnesses shall specify the facts to be proved in the testimony, either orally or in writing, and shall accompany his witnesses in the specified hearing. Admission of witnesses and hearing of their statements shall be conducted before the arbitration panel pursuant to the shariatic rules, and the other party may refute such testimony in the same manner.

Section 32

The arbitration panel may cross-examine the parties at the request of either party or on its own motion.

Section 33

The arbitration panel may, if necessary, seek the assistance of one or more experts to provide a technical report regarding a technical or material matter which may have effect on the claim. The arbitration panel shall mention in its award an accurate statement of the expert's mission and the urgent arrangements which he is permitted to take. The arbitration panel shall estimate the fees of the said expert, the party who shall pay them, and the deposit to be made to the account of the expert. In case such deposit is not made by the party required to do so, or by the other parties to the arbitration, the expert will not be bound to perform his duty, and the right to adhere to the decision made for the appointment of the expert shall be void, if the arbitration panel finds that the reasons given are unacceptable. In performing his duty, the expert may hear the statements of both parties or others and shall submit a report of his opinion on the specified date. The arbitration panel may cross-examine the expert in the hearing concerning the result of his report. If there is more than one expert, the panel shall specify the manner of their performance, whether severally or collectively.

Section 34

The arbitration panel may request the expert to provide a complementary report to overcome any default or omissions in his previous report and the parties may submit advisory reports to the panel. However, in all cases the arbitration panel shall not be bound by the expert's opinions.

Section 35

The arbitration panel may, on its own motion or at the request of either party, decide to move for inspection of some facts or matters which were disputed and have a material effect on the claim and shall make a report of the inspection proceedings.

Section 36

The arbitration panel shall observe the principles of litigation, so as to include confrontation in proceedings, and to permit either party to take cognizance of the claim proceedings, to have access to its material papers and documents in reasonable periods of time, and to give him a sufficient opportunity to present his documentation, defences and contents in the hearing, either orally or in writing and to record them in the minutes.

Section 37

If a preliminary issue of a matter falling outside the jurisdiction of the arbitration panel arose during the process of arbitration, or if a document had been claimed to have been forged, or if criminal proceedings had been instituted for the forgery or for any other criminal act, the arbitration panel shall suspend proceedings and the date fixed for the award until a final decision is issued from the concerned authority in relation to that matter which had arisen.

Chapter IV. Awards, Objections and Execution

Section 38

When the arbitration panel is ready to render a decision, the panel shall close the case for review and deliberations. Deliberations shall be held in camera and shall only be attended collectively by the arbitration panel who attended the hearings. The panel shall fix, at the time the case is closed or in another hearing, a date for issuance of the award, subject to the provisions of articles 9, 13, 14 and 15 of the arbitration regulations.

Section 39

The arbitrators shall issue their awards without being bound by legal procedures, except as provided for in the arbitration regulations and its rules of implementation. Awards shall follow the provisions of Islamic sharia and the applicable regulations.

Section 40

When the case is closed for review and deliberation, the arbitration panel may not hear further submissions from either of the parties or their representative except in the presence of the other party, and shall not accept any memorandum or document without the document being reviewed by the other party; if such explanation, memorandum or document is deemed material, the panel may extend the date fixed for the award and reopen the proceedings by virtue of a decision stating the reasons and justifications therefor, and shall notify the parties of the date fixed for continuation of the proceedings.

Section 41

Subject to articles 16 and 17 of the arbitration regulations, awards shall be adopted by the opinion of the majority of the arbitrators. The award shall be pronounced by the umpire in the specified hearing. The award shall contain the names of the members of the respective panel, the date, place, and subject matter of the award, first names, surnames, description, domicile, appearance and absence of the parties, a summary of the facts of the claim, requests of the parties, summary of their defences, substantial defences, and the reasons and text of the award. The arbitrators and the clerk shall, within seven days from the filing of the draft, sign the original copy of the award which comprises the above contents and which shall be kept in the file of the claim.

Section 42

Without prejudice to the provisions of articles 18 and 19 of the arbitration regulations, the arbitration panel shall rectify any material typing or arithmetical errors that may occur in its awards, by virtue of a decision to be issued on its own motion, or at the request of either party without pleading procedures. Such rectification shall be made on the original copy of the award and duly signed by the arbitrators. The decision for rectification of the award may be objected to by all possible means of objection if the arbitration panel exceeded its right of rectification as provided for in this section. The decision issued against a request for rectification may not be objected to independently.

Section 43

The parties may request the arbitration panel which has issued the award to interpret any ambiguity in the text of the award. The interpretation shall be deemed complementary in all respects to the original award and shall be subject as well to the rules relating to means of objection.

Section 44

Whenever an order is issued for execution of the arbitration award, the latter becomes an executionary instrument and the clerk of the authority originally competent to try the case shall give the winning party the execution copy of the arbitration award, containing the order for execution and ending with the following phrase:

"All concerned government authorities and departments shall cause this award to be executed with all legally applicable means even if such execution required application of force by the police."

Chapter V. Fees of Arbitrators

Section 45.

If both opponents fail to agree on the fees, a decision may be issued for division of fees between them at the discretion of the authority originally competent to try the case; a decision also may be issued for payment of all such fees by one of the parties in dispute.

Section 46

Any party may object to the estimate of the arbitrators' fees to the authority which issued the decision, the objection to be made within eight days from notification of the fees; the authority's decision on the said objection shall be final.

Section 47

The concerned authorities shall execute these rules.

Section 48

These rules shall be published in the Official Gazette and shall be effective from their date of publication.