the conduct of the proceedings, shall be deemed to have waived its right to object. All major arbitration rules contain similar provisions.[130]

25-77 These provisions record the clear dilemma that parties have when there is a ground to challenge jurisdiction or something the tribunal has done in the course of the arbitration. A party should always record an objection in case it wishes, at a later stage, to challenge the award. Failure to do so runs the risk of waiver of the particular irregularity. There may even be an issue whether the party should continue to participate in the arbitration, but refusing or failing to do so and allowing the tribunal to make an award in default of a party is a dangerous tactic.

[130] See, *e.g.*, UNCITRAL Rules Article 30; AAA ICDR Article 25; CRCICA Article 30; ICSID Rules Article 27; LCIA Article 32(1); NAI Article 63; WIPO Article 58.

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRATION AWARDS

26-1 The recognition and enforcement of awards is of paramount importance for the success of arbitration in the international arena. This is well evidenced by the fact that the enforceability of awards world wide is considered one of the primary advantages of arbitration. Unless parties can be sure that at the end of arbitration proceedings they will be able to enforce the award, if not complied with voluntarily, an award in their favour will be only a pyrrhic victory. Further, the high degree of voluntary compliance is due to there being an effective system for the enforcement of awards in case of non-compliance.

26-2 There is an international policy favouring enforcement of awards.[1] With exceptions, it is increasingly rare to find "horror stories" of non enforcement in published cases.[2] Indeed, according to one report,[3] as of 1996 more than 95% of cases where enforcement was sought the awards were enforced by the courts. In another survey the figure for voluntary enforcement or enforcement by state courts is 98%.[4] This is the result of harmonisation of the rules relating to recognition and enforcement in, and the extensive acceptance by so many states of, the New York Convention.[5]

[1] See, *e.g.*, Lamm and Hellbeck, "The Enforcement of Foreign Arbitral Awards under the New York Convention: Recent Developments", 5 *Int ALR* 137 (2002) 138.
[2] See Reed, "Experience of Practical Problems of Enforcement", *ICCA Congress Series no 9*, 557. It is also noted that only 2 out of 556 cases (reported in the Yearbook of Commercial Arbitration) successfully resisted enforcement.
[3] Van den Berg, "The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas", in Blessing (ed), *The New York Convention of 1958*, ASA Special Series no 9 (1996) 25.
[4] Kerr, "Concord and Conflict in International Arbitration", *Arb Int* 121 (1997) 129.
[5] See de Boisséson, "Enforcement in Action: Harmonization Versus Unification", *ICCA Congress Series no 9*, 593.

26-3 In limited instances it may be possible to enforce an award by exercising direct or indirect commercial or other pressures.[6] Examples can be seen in the practice of GAFTA where the Rules provide that if a party refuses to comply with a GAFTA arbitration award, the Council of the Association may circulate a notice informing the members of the Association about the refusal to abide by the award.[7]

26-4 In all other instances the enforcement of arbitration awards not complied with voluntarily is largely outside the sphere of the arbitration tribunal. Although the tribunal may make every effort to render an enforceable award (as is mandated by some arbitration rules[8]), the recognition and enforcement of awards is in the coercive power of the courts. Most arbitration rules provide that the parties by submitting their dispute to arbitration undertake to carry out the award without delay.[9] However, neither the tribunal nor the arbitration institutions have any means to secure enforcement.

26-5 As a consequence, at the recognition and enforcement stage, arbitration and the parties often leave the private sphere in which they were operating. The successful party requests the assistance of national courts in the same way as the unsuccessful party may seek the courts' assistance to resist enforcement. Recognition and enforcement of foreign awards may be essential in practical terms especially when the compulsive power of state courts is required for the performance of the award by the unsuccessful party (award debtor). If the award debtor does not comply with the award there can be no enforcement without recourse to a state power which would normally be exercised by the courts.

26-6 Theoretically recognition and enforcement are important as they provide official recognition of the arbitration process and confirm its product. A private act is being empowered by a public act, a judgment of a state court.

26-7 For the purposes of recognition and enforcement one has to distinguish between foreign awards and domestic awards. While the enforcement of domestic awards is solely regulated by the national arbitration laws, foreign awards are primarily enforced under the New York Convention. In general there are no great differences between the enforcement regimes for national and

[6] See, *e.g.*, Redfern and Hunter, *International Commercial Arbitration*, para 10-04.
[7] GAFTA Rules Article 23(1).
[8] See, *e.g.*, ICC Rules Article 35 and LCIA Article 32(2).
[9] See, *e.g.*, UNCITRAL Rules Article 32(2); AAA ICDR Article 27(1); CRCICA Article 32(2); ICC Article 28(6); LCIA Article 26(9); ICAC paragraph 44; NAI Article 51; Stockholm Institute Article 36; WIPO Article 64.

international awards. The Model law and some other laws actually adopted a unified system for the enforcement of foreign and domestic awards.

26-8 This chapter reviews (1) the distinction between recognition and enforcement, (2) the regime for the enforcement of domestic awards, (3) regimes for recognition and enforcement of foreign awards, (4) the sphere of application of the New York Convention, (5) the prerequisites for applications to have a foreign award enforced, (6) the grounds to refuse enforcement and (7) an analysis of different approaches.

1. Distinction between Recognition and Enforcement

26-9 In most cases the enforcement of awards assumes their recognition and the two terms appear as if they were intertwined. This is partly so because the New York Convention and other relevant provisions refer to "recognition and enforcement."[10] Generally, when an award is enforced it is also recognised. There may, however, be instances where an award is recognised but not enforced.[11] As a consequence a distinction may be made between recognition and enforcement.[12]

26-10 Recognition is the national court proceedings which amount to a judicial decision, often called an exequatur. In many cases these proceedings are not full-fledged, but summary proceedings confirming the award. The exequatur acknowledges the existence of the arbitration and recognises the decision of the tribunal. Recognition has been described as a defensive process which acts as a shield.[13]

26-11 Recognition may be useful when the unsuccessful party initiates court proceedings for any or all of the issues dealt with in the arbitration award. Recognition of the award will prevent court proceedings from being held in respect of decided matters. Recognition may be useful for tax or financial

[10] However, the Geneva Convention 1927 refers to recognition or enforcement in Article IV. Distinctions are made also, *e.g.*, in the English Arbitration Act sections 101 and 102. See also Redfern and Hunter, *International Commercial Arbitration*, para 10-09.

[11] See, *e.g.*, *Mark Dallal v Bank Mellat* [1986] QB 411, (1986) XI YBCA 547, 553, where an Iran-US Claims Tribunal award was recognised but not enforced.

[12] See, *e.g.*, Taniguchi, "Enforcement in Action: Theoretical and Practical Problems", *ICCA Congress Series no 9*, 589.

[13] Redfern and Hunter, *International Commercial Arbitration*, paras 10-10, 10-12.

reasons; a party may wish to have the award recognised so that there is evidence of a debt or receivables.

26-12 Enforcement is normally a judicial process which either follows or is simultaneous to recognition and gives effect to the mandate of the award.[14] Enforcement may function as a sword[15] in that the successful party requests the assistance of the court to enforce the award by exercising its power and applying legal sanctions should the other party fail or refuse to comply voluntarily. The type of sanctions available will vary from country to country and may include seizure of the award debtor's property, freezing of bank accounts or even custodial sentences in extreme cases.

2. The Regime for the Enforcement of Domestic Awards

26-13 The national provisions for the enforcement of domestic awards are of considerable importance to international arbitration. Often awards arising out of international arbitration proceedings are actually enforced under the regime for domestic awards. Though each state is generally free to determine which awards it considers to be domestic, the relevant criterion is normally the place of arbitration. As a consequence, recognition and enforcement of award rendered within a country is usually governed by the provisions on domestic awards irrespective of the national or international character of the underlying arbitration.[16]

26-14 The national legislature is generally free to regulate the recognition and enforcement of domestic awards. There are no international conventions imposing a minimum standard as exist for foreign awards. In general, however, national arbitration laws have adopted a pro-enforcement approach also for domestic awards. The relevant provisions normally stipulate that domestic awards should be recognised and enforced like a judgment subject to very few

[14] See Taniguchi, "Enforcement in Action: Theoretical and Practical Problems", *ICCA Congress Series no 9*, 589.

[15] Redfern and Hunter, *International Commercial Arbitration*, para 10-12.

[16] Only in countries such as France, where the relevant criterion for distinguishing the different enforcement regimes is the implications of the interests of international commerce (NCPC Article 1492 and Title VI), will the rule on enforcement of domestic awards play no role for international arbitrations.

reasons allowing refusal.[17] In fact, domestic awards are often recognised automatically so that any decision on recognition has only declaratory character. In these cases proceedings are only necessary for the enforcement of the award.

26-15 Apart from this difference the provisions on recognition and enforcement often mirror those for foreign awards. Certain differences may exist in relation to the formal requirements to be submitted for recognition and enforcement. The laws sometimes impose more lenient requirements for domestic than for foreign awards. This is, for example, the case under German law where section 1064(1) ZPO requires for the enforcement only the submission of a copy of the award. [18]

26-16 There are also slight deviations in relations to the grounds upon which recognition and enforcement can be refused. Provisions for domestic awards may be more lenient. For example, in the Netherlands enforcement can only be resisted for public policy reasons.[19] Often they are also stricter. For example under Italian law, domestic awards may be challenged because they were rendered after the expiry of the relevant time limit, or the award does not state reasons or does not indicate the seat of arbitration.[20] No such ground exists with respect to the enforcement of a foreign award. [21]

26-17 Where recognition and enforcement of a domestic award is refused this may automatically lead to the setting aside of the award.[22] This is the logical consequence of the fact that the grounds for refusing recognition and enforcement are often identical to those justifying a challenge and the same courts have jurisdiction for challenge and enforcement proceedings.

26-18 Despite these differences the regime for the enforcement of domestic awards is in general largely comparable to that of foreign awards. At least in Contracting States of the New York Convention this is often the position as

[17] See, *e.g.*, England, Arbitration Act section 66; India, Arbitration Act section 36; China, Arbitration Law Articles 62-3 and Civil Procedure Law Article 217; Netherlands, CCP Articles 1062-3.

[18] In fact the courts are divided as to what extent these more lenient provisions are also applicable to the enforcement of foreign awards; see Kröll, "Recognition and Enforcement of Foreign Arbitral Awards in Germany", 5 *Int ALR* 160 (2002) 160-161.

[19] See, *e.g.*, Netherlands, CCP Article 1063 which limits the grounds basically to public policy.

[20] Italy, CCP Articles 829 and 823.

[21] See also the various grounds which exist in England to challenge an award and which may also be raised in proceedings to have an award declared enforceable: Arbitration Act sections 67 *et seq.*

[22] See Germany, ZPO section 1060; England, Arbitration Act section 66.

Article III stipulates an obligation that provisions for the enforcement of foreign awards may not be substantially stricter than those for national awards.

3. Recognition and Enforcement of Foreign Awards

26-19 One might assume that a foreign state would be more willing to recognise and enforce a court judgment of another state than an award made by private arbitrators whose authority is derived from an agreement of the parties. However, in reality it is far easier to enforce an arbitration award than a foreign judgment. This is due to the uniqueness of the New York Convention and its dual rationale to make the enforcement of foreign awards simpler and harmonise the national rules on enforcement. In contrast, there is no comparable international instrument on the enforcement of foreign judgments. While several regional and bilateral conventions exist, the complex web of conventions does not cover many jurisdictions; most notably the US is not party to any multilateral agreement on the enforcement of foreign judgments.

26-20 The New York Convention constitutes the backbone of the international regime for the enforcement of foreign awards. In addition, a number of other international conventions[23] and bilateral treaties provide for the enforcement of foreign awards. Frequently these public international law obligations are supplemented by autonomous provisions of the national arbitration law which provide for the enforcement of foreign awards.

3.1. The New York Convention

26-21 *The 1958 New York Convention*[24] is one of the most widely accepted international conventions and a major improvement of the regime created by the 1927 Geneva Convention.[25] It significantly simplified the enforcement of foreign awards and harmonised the national rules for the enforcement of foreign awards.

[23] See, *e.g.*, Giardina, "The Practical Application of Multilateral Conventions", *ICCA Congress Series no 9*, 440.

[24] Published in 330 *UNTS* 38 (1959), no 4739. The text is also available in <www.uncitral.org>.

[25] The 1927 Geneva Convention, 92 *LNTS* 302 (1929-1930), is now only of historic interest. The Convention was an early attempt to deal with enforcement of awards. One of the problematic provisions was the requirement that the award had become final in the country in which it was made, Article I(d). This led to the problem known as "double exequatur": the award had to be recognised at the courts of the country where it was made before a second exequatur could be obtained in the enforcing state. Another problematic provision was Article I(e) requiring that the award not be contrary to the public policy or the principles of law of the enforcing state.

The New York Convention has received praise as the "pillar on which the edifice of international arbitration rests"[26] and also for being the "most effective instance of international legislation in the history of commercial law."[27] The number of countries party to the New York Convention has increased dramatically within the last twenty-five years. The number of state parties stood at 133 in January 2003, ranging from Albania to Zimbabwe.[28] Consequently, the number of parties seeking enforcement under its terms has also increased.

26-22 Article III New York Convention is unambiguous in providing that "each contracting state shall recognise arbitration awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied on." In addition Article III mandates that a foreign award must be enforceable without unnecessary inconvenience or excessive fees, and the conditions[29] must not be more onerous than those for domestic awards.

3.2. Other Multilateral Conventions

26-23 *The 1961 European Convention*[30] deals with the enforcement of foreign awards indirectly. Indeed the Convention only sought to supplement the New York Convention.[31] As pointed out in an Italian case the European Convention does not repeal, but merely restricts the grounds to refuse enforcement of awards to those provided for in the New York Convention.[32] It provides that an award set aside at the seat of arbitration may be recognised by the courts of states applying the Convention.[33] The relevant provisions have been used in few cases.[34] In fact

[26] Wetter, "The Present Status of the International Court of Arbitration in the ICC: An Appraisal", 1 *Am Rev Int'l Arb* 91 (1990).

[27] Mustill, "Arbitration: History and Background", 6(2) *J Int'l Arb* 43 (1989) 49.

[28] For a complete list of ratifications see <www.uncitral.org/english/status/status-e.htm>. See also van den Berg, *New York Convention*; Blessing (ed), *The New York Convention of 1958*, A Collection of Reports and Materials Delivered at the ASA Conference Held in Zurich on 2 February 1996, ASA Special Series no 9 (1996); Di Pietro & Platte, *Enforcement of International Arbitration Awards*.

[29] Set out in New York Convention Article IV.

[30] Published in 484 *UNTS* 364 (1963-64) no 704.

[31] See Fouchard Gaillard Goldman *on International Commercial Arbitration*, para 1714.

[32] See Italy, Corte di Appello Florence, 22 October 1976, *Tradax Export SA v Carapelli SpA*, III YBCA 279 (1978).

[33] European Convention Article IX(1) provides that the setting aside of an award covered by the Convention at the seat of arbitration shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made for one of the reasons listed in New York Convention Article V(1)(a) – V(1)(d).

it is not the grounds for refusing enforcement which are restricted but the impact of a decision to set aside an award in the country of origin.[35]

26-24 *The 1965 Washington Convention*[36] ratified by more than 130 countries, provides its own enforcement procedures in Articles 53 and 54. Pursuant to these procedures each party must comply with the terms of the award[37] while each member state is under a public international law obligation to recognised an award rendered pursuant to the Convention and enforce the pecuniary obligations imposed by the award, as if it were a final judgment of the court in that state.[38] However, awards made under the ICSID Additional Facility but not under the Washington Convention can only be enforced under the New York Convention.

26-25 *The 1972 Moscow Convention* promulgated by the Council for Mutual Economic Assistance is no longer used as most of its member states have either withdrawn their membership[39] or ceased to exist.[40] Although the Convention is still in force in relation to a few countries, the Secretariat under which it operates has ceased to function. According to the Moscow Convention arbitration awards are to be enforced voluntarily[41] and failing that as if they were court judgments of the enforcing state.[42] The grounds on which enforcement may be resisted[43] are modelled after the New York Convention.

26-26 *The 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention)*[44] is a regional convention ratified by more than 15 South American states and the US. According to the House Report of the Judiciary Committee accompanying the bill implementing the Panama Convention in the US as part of the Federal Arbitration Act, the Panama

[34] See, *e.g.*, Austria, Oberster Gerichtshof, 20 October 1993, *Radenska v Kajo*, XX YBCA 1051 (1995); Spain, Tribunal Supremo, 27 February 1991, *Nobulk Cargo Services Ltd v Compañía Española de Laminación SA*, XXI YBCA 678 (1996).

[35] See Fouchard Gaillard Goldman *on International Commercial Arbitration*, para 1715 with further references.

[36] Published in 575 *UNTS* 160 (1966), no 8359. See also <www.worldbank.org/icsid>.

[37] See Washington Convention Article 53(1).

[38] See Washington Convention Article 54(1).

[39] See, *e.g.*, Poland, Hungary and the Czech Republic.

[40] *E.g.*, the German Democratic Republic.

[41] Moscow Convention Article IV(1).

[42] Moscow Convention Article IV(2).

[43] Moscow Convention Article V.

[44] Published in 14 *ILM* 336 (1975).

Convention and the New York Convention "are intended to achieve the same results, and their key provisions adopt the same standards."[45]

26-27 *The 1987 Amman Arab Convention on Commercial Arbitration* provides that awards made under the auspices of the Arab Centre for Commercial Arbitration may only be refused enforcement by the supreme courts of Contracting States where the award violates the public policy of the enforcing state.[46]

3.3. Bilateral Conventions

26-28 In addition to the multilateral conventions there are many bilateral conventions[47] dealing with the enforcement of awards rendered in another contracting state. The first recorded example of a reference to arbitration awards in a bilateral convention appears to be the Treaty between the Grand-Duchy of Baden and the Canton of Aargau (28 September 1867).[48] Such bilateral conventions work normally on the basis of reciprocity. They are often conventions of judicial assistance and their general subject matter and title may be a treaty of commerce, friendship and navigation. Conflicts between such bilateral and multilateral conventions are normally easily resolved.[49] Bilateral conventions have been useful in the past but may have an adverse effect on the harmonisation and uniformity achieved by the New York Convention. However, some more recent bilateral conventions refer to the New York Convention in respect of enforcement so that there is no real danger of disunification.

3.4. National Laws and Model Laws

26-29 National arbitration laws also normally contain provisions relating to the enforcement of foreign awards. Few provide a truly autonomous national regime deviating more than marginally from that of the New York Convention. One example is France where the setting aside of an award in its country of origin does not constitute a ground for refusing enforcement.

[45] See *101st Cong, 2d Sess*, 5 *HR Rep* (1990) 101, reprinted in *US Code Congress & Administration News* (1990) 675, 678.
[46] Amman Convention Article 35.
[47] See, *e.g.*, Matscher, "Experience with Bilateral Treaties", *ICCA Congress Series no 9*, 452.
[48] *Ibid.*
[49] See, *e.g.*, Fouchard Gaillard Goldman *on International Commercial Arbitration*, paras 216-235.

26-30 Others usually incorporate verbatim the text of the relevant international conventions and add procedural rules of national implementation or merely provide that enforcement of foreign awards will be governed by the New York Convention.[50]

26-31 Article 36 Model Law, which lists the grounds on which a state court may refuse enforcement of an award, mirrors Article V New York Convention. Most importantly there is no reciprocity requirement;[51] the conditions are intended as maximum standards encouraging states to adopt even less onerous conditions.[52]

26-32 The OHADA[53] Uniform Arbitration Act also contains rules for the enforcement of awards. A party wishing to rely on an award must establish the existence of the award on the same conditions as in the New York Convention.[54] The recognition and enforcement of an award shall be refused where it is manifestly contrary to international public policy of the member states.[55] A judicial decision refusing enforcement of the award can only be set aside by the Common Court of Justice and Arbitration.[56] A judicial decision granting the enforcement of an award is not subject to any recourse.[57]

3.5. Relationship between the Different Regimes: Article VII New York Convention

26-33 The New York Convention sets minimum formal requirements for the enforcement of awards and maximum standards on which enforcement may be refused. It does not prevent the contracting states from restricting the grounds for refusal enumerated in Article V New York Convention and thereby create a more favourable law for enforcement. Accordingly, Article VII provides that the party

[50] See, *e.g.*, Belgium, Judicial Code Articles 1710-1723; Brazil, Arbitration Law Articles 34-40; China Arbitration Law Articles 62-64, 71-17 and Civil Procedure Law Articles 217 and 270; England, Arbitration Act sections 66, 99-104; France, NCPC Articles 1498-1503; Germany, ZPO sections 1061, 1064; India, Arbitration Act sections 36, 44-60; Netherlands, CCP Articles 1062-1063 and 1075-1076; Switzerland, PIL Article 194; US, FAA sections 201-208, 301-307.
[51] See Model Law Article 35(1).
[52] See Model Law Article 35(2)***.
[53] Organisation for the Harmonisation of Business Law in Africa. See also <www.ohada.com>; Mayer, *OHADA: Droit de l'arbitrage* (Bruyant 2002), 221 *et seq.*
[54] See OHADA Uniform Arbitration Act Article 31 and New York Convention Article IV.
[55] See OHADA Uniform Arbitration Act Article 31.
[56] This is an institution under the auspices of OHADA.
[57] See OHADA Uniform Arbitration Act Article 32.

that wants to uphold the award may rely on any more favourable right to enforcement. Examples of more favourable regimes on enforcement may be found in multi-lateral conventions, bilateral treaties and autonomous national laws on enforcement.[58]

26-34 Different views exist as to the application of Article VII. One view suggests that Article VII allows the parties a choice between different regimes but not "cherry picking" between the various regimes.[59] Another view is that Article VII allows the parties to rely on more favourable provisions even where enforcement is sought under the New York Convention.[60] This second view is in accordance with the undisputed pro-enforcement policy in the Convention and allows for its co-existence with the more favourable provisions in national laws or international instruments.

26-35 More favourable provisions exist in particular in relation to awards set aside in their country of origin. In France,[61] for example, this is not recognised as a separate ground to refuse enforcement. The European Convention also has limited this ground of refusal.[62]

26-36 Despite its wording, only the party seeking enforcement may rely on Article VII New York Convention. The aim of the Convention is to facilitate enforcement of awards by allowing only a limited number of exceptions to enforcement. If the respondent was allowed to seek a basis for enforcement more favourable to him the minimum standard of the Convention could be circumvented easily.

4. Sphere of Application of New York Convention

26-37 The sphere of application of the New York Convention in relation to recognition and enforcement is defined in Article I. Generally the Convention applies to all foreign awards as defined in Article I(2). According to Article I(3) the contracting states may however declare certain reservations.

[58] See, *e.g.*, Article IX European Convention, France, NCPC 1502, Netherlands, CCP Article 1076.

[59] See, *e.g.*, van den Berg, *New York Convention*, 119; more recently, van den Berg, "The Application of New York Convention by Courts", *ICCA Congress series no 9*, 25, 33-4.

[60] See, *e.g.*, Di Pietro and Platte, Enforcement of International Arbitration Awards, 171-2.

[61] France, NCPC Article 1502. See also France, Cour de cassation, 23 March 1994, *Hilmarton v Omnium de Traitement et de Valorisation (OTV)*, XX YBCA 663 (1995).

[62] Article IX European Convention.

4.1. Meaning of Foreign Award

(a) Award

26-38 The New York Convention relates only to awards but offers no definition of an award.[63] Only decisions of a tribunal which determine finally a specific issue and have *res judicata* effect may be enforced. They may be jurisdictional decisions,[64] and will normally be final decisions. *Arbitrato irrituale* decisions as well as price appraisals and expert determinations cannot be enforced as awards.[65] Procedural or other orders rendered by a tribunal although binding are not enforceable under the New York Convention unless they can be functionally characterised as awards.[66] The New York Convention does not specifically refer to interim awards or orders. Many institutional rules give arbitrators power to grant interim relief but these decisions are rarely final awards.

26-39 In *Resort Condominiums International Inc v Bolwell*[67] the Supreme Court of Queensland had to consider whether an interim award was enforceable in Australia. The applicants had obtained an "Interim Arbitration Order and Award" in the US ordering the respondent not to operate or enter into any agreements relating to a time-share contract until a final award was issued. The applicant applied to have the interim award enforced in Australia. The Supreme Court of Queensland refused enforcement. It held that, though it would be unduly restrictive to apply the New York Convention only to final awards terminating the whole proceedings, to fall within the ambit of the Convention a decision "must determine finally at least some of the matters in dispute before the parties."[68] The mere fact that the decision was called an "Interim Arbitration Order and Award" did not imply it takes "on that character simply because it is said to be so."[69] The finality of the award, partial or otherwise, therefore seems to

[63] Article I(2) provides that "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.

[64] See, *e.g.*, Di Pietro and Platte, *Enforcement of International Arbitration Awards*, 31-56.

[65] See van den Berg, *New York Convention*, 44-51; Kröll, "Recognition and Enforcement of Foreign Arbitral Awards in Germany", 5 *Int ALR* 160 (2002) 164.

[66] See, *e.g.*, *Publicis Communication and Publicis SA v True North Communications Inc*, 206 F 3d 725, XXV YBCA 1152 (2000) (7th Cir, 14 March 2000).

[67] XX *YBCA* 628 (1995).

[68] *Ibid*, 641, para 37. In the decision the court used the term "interim award" to describe a partial final award in the sense of the terminology used here. Consequently it came to the conclusion that "interim awards" (partial final awards) are enforceable under the Convention but that the award for interim relief did not constitute such an "interim award" (partial final award).

[69] XX *YBCA* 628 (1995) 642, para 40.

have been the determining factor as to whether the award should be upheld by the courts.

26-40 Despite US cases to the contrary and support in the literature,[70] the prevailing position in practice is that finality is the defining factor. This has prompted the UNCITRAL Working Group on Arbitration to discuss the inclusion of rules for enforcement of interim awards into the Model Law. These rules it is suggested should follow as closely as possible the provisions of the New York Convention.

(b) Foreign

26-41 An award is foreign if it is considered "non domestic" by the enforcing court. The Convention employs two criteria to determine when awards are foreign. This characterization may be the result of a territorial criterion or a functional criterion.

26-42 The territorial criterion is codified in the first sentence of Article I(1) New York Convention according to which the Convention applies to

> ... 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.

26-43 It is irrelevant whether the subject matter of the arbitration is international, or the law applied is a foreign one, or what nationality the parties are.[71] The "location" of the arbitration is the dominant criterion. This is a predictable and certain way of establishing the scope of the Convention.

26-44 Award "made in the territory other than the state" where enforcement is sought can normally be easily ascertained. The award is made in the country of the legal seat of arbitration, not the place of the hearings or the place where the award was signed.[72] However, failing an indication in the award, it is ultimately for the enforcing court to determine whether the award was made within or outside its jurisdiction.

[70] See, *e.g.*, van den Berg, "The Application of the New York Convention by the Courts", *ICCA Congress Series no 9*, 25, 28-29. The UNCITRAL Working Group is working on the adoption of provisions dealing with the enforceability of provisional measures granted by the tribunal. See UN Document A/CN.9/523 of 11 November 2002, paras 78-80.

[71] See, *e.g.*, van den Berg, *New York Convention*, 15-19.

[72] See England, Arbitration Act section 100(2)(b) which effectively overruled *Hiscox v Outhwaite* [1991] 3 All ER 641.

26-45 The last sentence of Article I(1), however, qualifies the territorial criterion. It states that the Convention will also apply to

> ... arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

26-46 This sentence affords the contracting states a great deal of autonomy to broaden the scope of application of the Convention. Although this functional criterion may be criticised as less certain it has the advantage of allowing ratifying states discretion to decide which awards may be enforced under the Convention, in addition to awards rendered outside their territory or jurisdiction. For instance, under this functional criterion state courts may enforce anational awards[73] or awards which, although rendered within their territorial jurisdiction are deemed foreign. To the extent that there is no Convention definition of non domestic awards it is for the state courts to decide.

26-47 The rationale underlying this unspecified reference is well expressed by the US Court of Appeal for the Second Circuit in *Bergesen v Joseph Muller.*[74] It also offers a useful and contemporary definition of non-domestic awards

> The definition appears to have been left out deliberately in order to cover as wide a variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of 'non-domestic' in conformity with its own national law. Omitting the definition made it easier for those States championing the territorial concept to ratify the Convention while at the same time making the Convention more palatable in those States which espoused the view that the nationality of the award was to be determined by the law governing the arbitral procedure. We adopt the view that awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, *e.g.*, pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.[75]

26-48 The US implementation of the New York Convention in section 202 FAA departs from the Convention and specifies that an award

[73] See, *e.g.*, van den Berg, *New York Convention*, 28-43; van den Berg, "The Application of the New York Convention by the Courts", *ICCA Congress Series no 9*, 25, 27-28.

[74] See *Sigval Bergesen v Joseph Muller AG*, 701 F 2d 928, IX YBCA 487 (1984) (2d Cir, 1983), affirming 548 F Supp 650 (SDNY 1982).

[75] *Ibid*, IX YBCA 487 (1984) 492. See also to the same effect *Yusuf Ahmed Alghanim & Sons WLL v Toys "R" Us Inc*, 126 F 3d 15, XXIII YBCA 1057 (1998) (2d Cir, 1997).

> ... arising out of such a [commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

26-49 Section 202 not only incorporates the commercial reservation in the implementing Act but also adds a further requirement. Only awards arising out of disputes with an international element will be enforced under the Convention. While this may be legitimate it is uncertain how US courts will determine whether a legal relationship has a "reasonable" connection with one or more foreign states.

4.2. Reservations

26-50 To facilitate the widest possible ratification Article I(3) New York Convention allows contracting states to make two reservations: that the Convention applies only on the basis of reciprocity, *i.e.* only to arbitration awards made in another contracting state, and to awards rendered in commercial matters.

(a) Reciprocity

26-51 The reciprocity reservation was introduced as some contracting states did not subscribe to the principle of universality,[76] *i.e.* they were not willing for the Convention to apply to all awards irrespective of where they were made and only wished to recognise awards made in the jurisdiction of another contracting state.[77] More than half of the contracting states have used the reciprocity reservation.[78] Consequently, the reciprocity reservation should be taken into account when choosing the place of arbitration.

[76] See, *e.g.*, van den Berg, *New York Convention*, 12-15

[77] See, *e.g.*, the implementation in US, FAA section 201. See also Born, *International Commercial Arbitration*, 730 *et seq* for a review of case law.

[78] In 2002 some 70 states had done so. As most of the major international trade nations have ratified the Convention some states have withdrawn this reservation. See, *e.g.*, the withdrawal by Austria in 1988, by the Swiss Federal Council on 23 April 1993 and by Germany on 31 August 1998. Also, in some states such as France where the national law is more favourable than the New York Convention the reciprocity reservation has effectively no application.

(b) Commercial matters

26-52 More than 40 states have used the "commercial" reservation. The US has reflected it in its implementing act.[79] The rationale for this reservation was to enable states which only allow arbitration of commercial disputes to ratify the convention albeit with limited scope. There is no Convention concept of what is commercial: this is determined by the law of the enforcing court.[80]

26-53 The High Court of India held that consulting services by a company promoting a commercial deal should not be regarded as a commercial transaction. This decision was rightly reversed by the Supreme Court which suggested that the expression commercial should be construed widely having regards to the manifold activities which are integral to contemporary international trade.[81]

26-54 This approach of wide teleological interpretation was not followed by the Tunisian Cour de cassation.[82] It held that a contract between a company and two architects for the drawing up of an urbanisation plan for a resort in Tunisia could not be classified as commercial under Tunisian law.

26-55 A uniform concept of "commercial" should be adopted for international trade and international commercial arbitration. The Model Law offers a wide and permissive definition[83]

5. Pre-requisites for Enforcement

5.1. Jurisdiction of the Enforcement Court

26-56 Applications to have foreign awards declared enforceable require the court to have jurisdiction over the respondent. In general the existence of assets within a country is sufficient to establish jurisdiction for enforcement actions. The award creditor will have to investigate where assets of the unsuccessful party are located and where enforcement proceedings will be simpler.

[79] See US, FAA section 202.

[80] See van den Berg, *New York Convention*, 51-54, 54.

[81] India, *RM Investment & Trading Co Pvt Ltd v Boeing Company*, [1994] 1 Supreme Court Journal 657, (1997) XXII YBCA 710 (Supreme Court, 10 February 1994).

[82] Tunisia, Cour de cassation, 10 November 1993, *Société d'Investissement Kal v Taieb Haddad and Hans Barett*, XXIII YBCA 770 (1998).

[83] Model Law Article 1(1)**.

26-57 Unlike challenge proceedings, which can only be held at the place of arbitration, enforcement proceedings are possible more or less everywhere assets are located. This fact that enforcement is possible and effective wherever the award debtor has assets, allows for forum shopping. Such discretion in relation to choosing a forum for enforcement proceedings is generally welcome. In the US, however, courts have exercised their discretion not to enforce an award where they considered that they were not the appropriate forum (*forum non conveniens*) normally due for lack of personal jurisdiction.[84]

5.2. Required Documents

26-58 Article IV New York Convention imposes minimum formal conditions. The rationale is to make the formal requirements for enforcement as simple as possible. Article IV prevails over stricter national law in respect of foreign awards. The party seeking recognition or enforcement must submit to the court

- an authenticated award or certified copy and, if necessary, translations and
- the original or a copy of the arbitration agreement and, if necessary, translations.

26-59 An authenticated award or a certified copy is essential as it is evidence of the entitlement of the party seeking enforcement. The fact that Article IV requires additionally the submission of the arbitration agreement referred to in Article II does not imply any obligation on the party seeking enforcement to establish the formal validity of the arbitration agreements.[85] In an English decision the court held that the presentation of a *prima facie* valid arbitration agreement is required. This shifts the burden of proof to the respondent wishing to resist enforcement.[86]

[84] See, *e.g.*, *Monegasque de Reassurances SAM (Monde Re) v NAK Naftogaz of Ukraine and State of Ukraine* (2d Cir, 15 November 2002): the award was made is Moscow, Ukraine was the natural forum for enforcement; the state of Ukraine invoked the Foreign Sovereign Immunity Act. See also *Base Metal Trading Ltd v OJSC "Novokuznetsky Aluminium Factory"*, 6 March 2002, XXVII YBCA 902 (2002) (4th Cir, 6 March 2002); *Glencore Grain Rotterdam BV v Shivnath Rai Harnarain Co*, 284 F 3d 1114, XXVII YBCA 922 (2002) (9th Cir, 2002); *Dardana Ltd v Yuganskneftegaz*, 2003 WL 122257 (2d Cir, 2003).

[85] See Di Pietro and Platte, *Enforcement of International Arbitration Awards*, 125 van den Berg, *New York Convention*, 250.

[86] See, *e.g.*, *Dardana Ltd v Yukos Oil Co* and *Petroalliance Services Co Ltd v Same*, [2002] 2 Lloyd's Rep 326 (CA). But see the less orthodox Norway, Hålogaland Court of Appeal, 16 August 1999, *Charterer (Norway) v Shipowner (Russian Federation)*, XXVII YBCA 519 (2002) where enforcement was refused due to lack of an arbitration agreement; the correspondence was contained in emails and the court held that under New York Convention the party had not submitted a valid arbitration clause for enforcement. In several Spanish cases it was held that a letter of confirmation not signed by the buyer is not a valid arbitration agreement: Tribunal Supremo, 16 September 1996, *Actival International SA v Conservas El Pilas SA*, XXVII YBCA 528 (2002); Tribunal Supremo, 7 July 1998, *Union de Cooperativas Agricolas Epis Centre (France) v Agricersa SL (Spain)*, XXVII YBCA 546 (2002).

26-60 The submission of the two documents may be at the same time as the application for enforcement. If this is not the case it can be rectified by subsequent submission of the arbitration agreement and such "delay" cannot be a ground to deny enforcement.[87]

26-61 The required authentication refers generally to the signing of the award by the tribunal and that the document is genuine. Certification is an assurance that the submitted documents are a true copy of the original. The Convention is silent as to how this certification should be effected, in terms of form or legal requirements. As a general rule it is the law of the place of enforcement which stipulates how the award should be authenticated and certified, *e.g.*, by a notary, consular or judicial authorities of the place where the award was made.

26-62 The few reported cases suggest that the enforcing courts have taken a rather liberal attitude in respect of authentication and certification.[88] This is evidenced by a decision of the German Federal Court.[89] The arbitration proceedings were based on an undertaking to arbitrate contained in the Treaty of Friendship between Germany and Poland so that it was impossible to submit a copy of an arbitration agreement. The respondent alleged that the copy of the award submitted was not duly certified. The Federal Court considered Article IV to be a rule establishing a standard of proof. As long as the authenticity of the award was not challenged the non-fulfilment of the form requirements does not constitute a ground to refuse enforcement. International conventions regarding the recognition of international documents for civil procedure may also be of use.[90]

26-63 The party seeking enforcement also must produce a translation of the award and the agreement if they are in a language other than the official language of the court in which enforcement is sought. The translation must be certified by

[87] See, *e.g.*, Austria, Oberster Gerichtshof, 17 November 1965, *German party v Austrian party*, 3 Ob 128/65; 9 ZfRV 123 (1968), I YBCA 182 (1976); *Imperial Ethiopian Government v Baruch Foster Corporation*, 535 F 2d 334, II YBCA 252 (1977) (5th Cir 1976).

[88] See, *e.g.*, van den Berg, *New York Convention*, 250-258.

[89] Bundesgerichtshof, 17 August 2000, 53 *NJW* 3650 (2001) 3651.

[90] See, *e.g.*, the Hague Convention Abolishing the Requirement of Legalisation of Foreign Public Documents, 5 October 1961.

an official translator or by a diplomatic or consular authority. Courts normally accept a translation made in the country where the award was made or in the country where enforcement is sought.[91]

26-64 It is important to note that no permission for enforcement is needed in the country where the award was made. This was different under the 1927 Geneva Convention which required that the award had become final in the country in which the award was made.[92] Under the New York Convention it is sufficient that the award is "binding" in the country of origin.[93]

6. Grounds to Refuse Enforcement

26-65 The obligation on a national court to recognise and enforce arbitration awards as provided in Article III New York Convention is subject to limited exceptions. Recognition and enforcement may be refused *only* if the party against whom enforcement is sought can show that one of the exclusive grounds[94] for refusal enumerated in Article V(1) New York Convention has occurred. The court may refuse enforcement *ex officio* if the award violates that state's public policy.[95]

26-66 All grounds for refusal of enforcement must be construed *narrowly*; they are exceptions to the general rule that foreign awards must be recognised and enforced. The Convention sets *maximum* standards so that Contracting States cannot adopt legislation which adds grounds for resisting recognition and enforcement. Except for the public policy defence the second look at the award during the enforcement stage is confined to the procedural issues listed in Article V(1). A re-examination of the merits of the award is not allowed by the Convention.

[91] See also the discussion in van den Berg, *New York Convention*, 258-262.

[92] As a proof for the finality many courts required a leave for enforcement (exequatur) of a court in the country of origin. As another leave for enforcement was needed in the country of enforcement the party seeking enforcement needed a "double exequatur". See also footnote 19 above and accompanying text as well as Craig, "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration", 30 *Texas Int'l L J* 1 (1995) 9.

[93] New York Convention Article V(1)(e).

[94] See, *e.g.*, *Parsons and Whittemore Overseas Co, Inc v Société générale de l'industrie du papier (RAKTA)*, 508 F 2d 969 (2d Cir, 1974). See also van den Berg, *New York Convention*, 265.

[95] New York Convention Article V(2)(a) and V(2)(b).

26-67 Finally, it is important to stress the permissive language in Articles V(1) and V(2). A court *may* but is not obliged to refuse enforcement if one of the exceptions is satisfied.

26-68 Accordingly, even if one of the grounds listed which would justify refusal of enforcement is proven by the resisting party, the court has a residual discretion to enforce the award. This has been eloquently stated by the Hong Kong Supreme Court in a 1994 decision which confirmed 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.[96]

26-69 In some countries, however, the "may" in Article V is interpreted as a "shall" leaving no discretion to the courts if one of the grounds to refuse enforcement exists.[97]

26-70 The first group of exceptions "further the loser's right to a fair arbitration."[98] These are set out exhaustively in Article V(1) New York Convention and grant to national courts the discretion to reject or annul an award tainted with procedural irregularity. The courts even have the discretion to partially enforce an award if the decisions on matters submitted to arbitration can be separated from those not so submitted.[99]

6.1. Invalidity of Arbitration Agreement

26-71 Article V(1)(a) effectively provides two different defences to enforcement: incapacity of a party and invalidity of the arbitration agreement. A court may refuse enforcement if it is shown proof that

> 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. [Emphasis added.]

[96] See Hong Kong, Supreme Court, 13 July 1994, *China Nanhai Oil Joint Service Corp v Gee Tai Holdings Co Ltd*, (1995) XX YBCA 671, 677.

[97] See, *e.g.*, Germany, Bundesgerichtshof, 2 November 2000, ZIP 2270 (2000) 2271.

[98] Park, "Duty and Discretion in International Law", 93 *Am J Int'l L* 805 (1999) 810.

[99] New York Convention Article V(1)(c).

(a) Incapacity

26-72 One type of incapacity relates to arbitrations involving a state party which invokes the defence of sovereign immunity (though this may be more a question of subjective arbitrability). Sovereign immunity is restricted to cases in which a state acts in its governmental capacity (*acta iure imperii*). It is not applicable if the state participates in commercial life (*acta iure gestionis*).[100] Further a state may always waive its immunity. This has been clearly stipulated by the Italian Supreme Court (quoting the arbitration tribunal) in a case dealing with enforcement

> ... we consider that, under the law applicable to international commerce, which necessarily governs the arbitration clause in the 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. [101]

26-73 This Italian decision is arguably the most advanced position in this area and the concept of international capacity contemplated is particularly suitable for international commercial disputes. Despite this modern view state parties may still in certain parts of the world be successful in resisting enforcement by invoking the lack of capacity to enter into an arbitration agreement.[102]

26-74 The capacity of a party to enter into an arbitration agreement may also be restricted by the necessity of special permissions for foreign trade transactions[103] or the lack of authority of the person signing the arbitration agreement.[104]

[100] See Tunisia, Court of First Instance of Tunis, 22 March 1976, *Société Tunisienne d'Electricité et de Gaz (STEG) v Société Entrepose (France)*, III YBCA 283 (1978). According to the case which did not deal with enforcement directly, prohibitions in national law in respect of the capacity of state bodies to refer disputes to arbitration should not apply in the case of international commercial arbitration.

[101] See Italy, Corte di cassazione, 9 March 1996, no 4342, *Société Arabe des Engrais Phosphates et Azotes - SAEPA (Tunisia) and Société Industrielle d'Acide Phosphorique et d'Engrais - SIAPE (Tunisia) v Gemanco srl (Italy)*, XXII YBCA 737 (1997) 742.

[102] An example of an extremely conservative case can be seen in a case before the Syrian Administrative Tribunal Damascus, 31 March 1988, *Fougerolle SA v Ministry of Defence of the Syrian Arab Republic*, XV YBCA 515 (1990). The Administrative Tribunal found that the ICC awards were "non-existent" because the Syrian Council of State had not advised on the arbitration clause. Enforcement was, therefore, refused.

[103] See, *e.g.*, Bundesgerichtshof, 23 April 1998, XXIVb *YBCA* 928 (1999) where a Yugoslav party lacked the necessary export trade license and therefore could not validly enter into an arbitration agreement with a foreign party.

[104] See, *e.g.*, ICC case no 6850, XXIII *YBCA* 37 (1998); Court of Cassation Dubai, 25 June 1994, 1 *Int ALR* N-62 (1998), where the person agreeing on the arbitration clause was acting under a power of attorney which according to the view of the Court did not cover the submission to arbitration; for an unsuccessful reliance on this ground see Corte di cassazione, 23 April 1997, *Dalmine SpA v M & M Sheet Metal Forming Machinery AG*, XXIVa YBCA 709 (1999); Spain, Tribunal Supremo, 17 February 1998, *Union de Cooperativas Agricolas Epis Centre (France) v La Palentina SA (Spain)*, XXVII YBCA 533(2002); see also Greece, Areios Pagos, decision no 88 of 14 December 1977, *Agrimpex SA v J F Braun & Sons Inc*, IV YBCA 269 (1979): enforcement was refused due to lack of written power of attorney to conclude the arbitration agreement.

(b) Invalidity

26-75 The defence of the invalidity of the arbitration agreement has given rise to considerable case law. Enforcement has been refused where the arbitration agreement was ambiguous,[105] or not validly assigned.[106] While it is obvious that substantive validity must be determined according to the law chosen by the parties or, in the absence of a choice by the law of the place of arbitration, different views exist as to the relevant form requirements.

26-76 There is support for the view which considers that the reference in Article V(1)(a) to "the agreement referred to in Article II" requires that formal validity, which is often inseparably linked to the question of consent, be determined on the basis of Article II.[107] Reliance on more favourable national form requirements is excluded where recognition is sought under the New York Convention.[108] It can then only be relied upon where enforcement is sought under a more favourable national regime.[109]

26-77 The alternative view is that formal validity is governed by the law chosen by the parties or the law of the place of arbitration. The reference to Article II is considered a superfluous additional description of the arbitration agreement. This has the advantage that form requirements which are more lenient than Article II can be taken into account within the framework of the Convention. Article II is only considered to be a maximum standard above which the national legislator

[105] Corte di Appello Florence, 27 January 1988, *Eastern Mediterranean Maritime Ltd v SpA Cerealtoscana*, XV YBCA 496 (1990).

[106] District Court Moscow, 21 April 1997, *IMP Group (Cyprus) Ltd v Aeroimp*, XXIII YBCA 745 (1998).

[107] See, *e.g.*, *Harry L Reynolds Jr v International Amateur Athletic Federation*, XXI YBCA 715 (1996): no written agreement in the meaning of the New York Convention.

[108] See, *e.g.*, Oberlandesgericht Schleswig, *RIW* 706 (2000); Turkey, Supreme Court of Appeals, 8 April 1999, *Ozsoy Tarim Sanayi Ve Ticaret Ltd (Izmir) v All Foods SA (Buenos Aires)*, 4 Int ALR N-33 (2001): arbitration agreement contained in unsigned NAFTA contract does not meet the New York Convention writing requirement; the award was refused enforcement.

[109] This view, however, seems to unduly limit the application of Article VII New York Convention.

cannot go.[110] This difference in views has considerable influence on the validity of arbitration agreements contained in letters of confirmation.[111] They will not be formally valid under Article II but are valid under many national laws.

26-78 Generally under the national regimes for enforcement of awards no such difficulties exist, since they all lack a similar reference to Article II. Therefore, when the validity of the arbitration is an issue, it might be easier to rely on national rules rather than enforcing under the Convention.[112] If the Convention is to be relied on a dynamic interpretation of its provisions should be adopted.[113]

(c) More favourable other provisions

26-79 Under Article 1076 Dutch Arbitration Law, the respondent may only rely on the invalidity of the arbitration agreement or on a failure in the composition of the tribunal if the party who invokes this ground as a defence to enforcement has raised a respective plea in the arbitration proceedings.

6.2. Violation of Due Process

26-80 According to Article V(1)(b) recognition and enforcement of the award may also be refused if the party resisting enforcement furnishes proof that he

> ... was *not given proper notice* of the appointment of the arbitrator or of the arbitration proceedings or was otherwise *unable to present his case*. [Emphasis added.]

[110] See Di Pietro and Platte, *Enforcing International Arbitration Awards*, 143; Kröll, "Recognition and Enforcement of Foreign Arbitral Awards in Germany", 5 *Int ALR* 160 (2002) 166; Fouchard Gaillard Goldman *on International Commercial Arbitration*, para 271; Oberlandesgericht Dresden, 12 January 1999, 11 Sch 6/98, unreported.

[111] See, *e.g*, Oberlandesgericht Rostock, 22 November 2001, 1 Sch 3/2000, unreported, note Kröll, 5 *Int ALR* N-31 (2002): award refused enforcement because no existence of arbitration agreement was demonstrated, the only document was a letter of confirmation of one party. See also Tribunal Supremo, 16 September 1996, *Actival International SA v Conservas El Pilas SA*, XXVII YBCA 528 (2002); Tribunal Supremo, 7 July 1998, *Union de Cooperativas Agricolas Epis Centre (France) v Agricersa SL (Spain)*, XXVII YBCA 546 (2002).

[112] See, *e.g.*, Gerechtshof The Hague, 4 August 1993, *Owerri Commercial Inc v Dielle Srl*, XIX YBCA 703 (1994) where enforcement was based on the Dutch regime rather than on the New York Convention.

[113] In this way, *e.g.*, modern electronic communications will be accommodated and the problem of invalidity of an arbitration agreement because of use of e-mail as in Norway, Hålogaland Court of Appeal, 16 August 1999, XXVII YBCA 519 (2002), will be avoided.

26-81 This is a due process defence and the paragraph particularly contemplates the right to be heard. The rationale of this defence is to ensure that certain standards of fairness are observed by the arbitration tribunal. Article V(1)(b) provides for two dimensions in relation to fairness of proceedings. First, a proper notice must be given; second, each party must be able to present his case. The Convention is not specific enough as to the benchmark of fairness; apparently observance of standards set by the law chosen by the parties to govern the arbitration, or alternatively by the law at the place of arbitration, would suffice.[114] However the view that Article V(1)(b) is a genuinely international rule is also convincing.[115] Ultimately the question of violation of due process is a matter of fact which the parties will have to prove.

26-82 This ground to refuse enforcement may overlap with the international public policy defence of Article V(2)(b). This is so because fairness and observance of due process are often seen as international public policy of many states. However, according to Article V(2)(b) the only relevant public policy is that of the enforcing state.

(a) Proper notice

26-83 Proper notice always must be given. This covers lack of notice or where notice of proceedings was received after the award had been rendered. Such cases are rare.[116] Short time notices do not normally violate the requirement of proper notice as they are typical in certain industry and trade sectors.[117]

26-84 The most important issue is whether the notice was timely and appropriate.[118] This is a matter of fact and several of the formal requirements will

[114] See van den Berg, *New York Convention*, 298, with reference to case law in footnote 186.

[115] See, *e.g.*, Fouchard, *L'arbitrage*, para 526.

[116] See, *e.g.*, *Sesotris SAE v Transportes Navales*, 727 F Supp 737, XVI YBCA 640 (1991) (District Court, D Mass, 1989); Bayerisches Oberlandesgericht, 16 March 2000, RPS 2/2000, Beilage 12 zu Heft 50 *BetriebsBerater* 15 (2000), where the enforcement of a Russian award was refused because the respondent was actually only informed about the proceedings after the award was rendered as service was constructive rather than real.

[117] See, *e.g.*, Switzerland, Obergericht Basel, 3 June 1971, *Dutch seller v Swiss buyer*, IV YBCA 309 (1978).

[118] In Corte di Appello Naples, 18 May 1982, *Bauer & Grobmann OHG v Fratello Cerrone Alfredo e Raffaele*, X YBCA 461 (1985), the award was refused enforcement because one month's notice was deemed inadequate: the respondent's area had been hit by an earthquake. In *Guangdong New Technology Import & Export Corp Jiangmen Branch (PR China) v Chiu Shing Trading as BC Property & Trading Co*, (1993) XVIII YBCA 385 (Supreme Court Hong Kong, 23 August 1991), the award was recognised despite late notice because the party was not prejudiced.

be invoked by national laws. However, often a more liberal interpretation of national law requirements is needed. In a case before the Mexican Court of Appeal it was held that the Mexican law requirement was waived since the parties opted for arbitration. The award is enforceable since the parties complied with the requirements set by the applicable arbitration rules.[119] In order to avoid the objection that no letter was received important communications should be made by registered mail or courier with return receipt.

26-85 Not only must notice of proceedings be proper, but also other notices, such as disclosure of the names of arbitrators. In an exceptional case, the German Court of Appeal in Cologne refused to enforce an award made under the Arbitration Rules of the Copenhagen Committee for Grain and Food Stuff Trade which allowed non-disclosure of the arbitrators' names.[120]

(b) Unable to present his case

26-86 This defence has been clearly defined in a decision of the US Court of Appeal for the Seventh Circuit. The Court held that this defence

> ... 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 minimal requirements of fairness"- adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator'.[121] [References omitted]

26-87 Standards of fairness have been discussed in other US cases.[122] Normally reference is given to the national law standards of impartiality and independence of the tribunal. Some national laws afford parties a full opportunity[123] to present their case; other laws afford a reasonable opportunity.[124]

[119] See Mexico, Tribunal Superior de Justicia, 1 August 1977, *Malden Mills Inc (USA) v Hilaturas Lourdes SA (Mexico)*, IV YBCA 302 (1979).
[120] See Oberlandesgericht Cologne, 10 June 1976, IV YBCA 258 (1979).
[121] See *Generica Limited v Pharmaceuticals Basics Inc*, XXIII YBCA 1076 (1998) 1078-9 (7th Cir, 1997).
[122] See, *e.g.*, *Parsons and Whittemore Overseas Co, Inc v Société générale de l'industrie du papier (RAKTA)*, 508 F 2d 969, I YBCA 205 (1976) (2d Cir, 1974).
[123] See, *e.g.*, Model Law Article 18.
[124] See, *e.g.*, England, Arbitration Act section 33(1)(a).

26-88 Specific issues which can amount to a ground for challenge of an award include the fact that a party has not been able to participate in the taking of evidence or in discovery proceedings,[125] that a party had been denied the right to introduce certain evidence,[126] or to comment on an expert's report submitted to the tribunal[127] or that the standards of adversarial proceedings adopted by the tribunal deprived a party of its fundamental right to defence.[128] However, it is only required that the tribunal gives the parties the opportunity to present their case. Whether the party actually makes use of it or not, and in which way, does not generally affect the enforceability of the award.[129]

26-89 It is essential that there is a duty on the parties to raise an objection promptly. This implies that objection should be raised during the arbitration first if the relevant facts are known to the party objecting. Otherwise the party may be estopped from raising the objection before the enforcing court as this undermines the purpose of the New York Convention.[130]

6.3. Arbitrators have Acted Beyond their Jurisdiction

26-90 Recognition and enforcement of the award may be refused, under Article V(1)(c), if 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

[125] See, *e.g.*, *Polytek Engineering Co Ltd v Hebei Import and Export Corp*, (1998) XXII YBCA 666 (High Court Hong Kong, 16 January 1998).
[126] See, *e.g.*, US, *Iran Aircraft Industries v AVCO Corporation*, 980 F 2d 141, XVIII YBCA 596 (1993) (2d Cir, 1992); *Laminoirs-Trefileries-Cableries de Lens SA v Southwire Co*, 484 F Supp 1063 (ND Ga 1980): award nevertheless recognised.
[127] See, *e.g.*, *Paklito Investment Ltd v Klockner East Asia Ltd*, (1994) XIX YBCA 654 (Supreme Court of Hong Kong, 15 January 1993).
[128] See, *e.g.*, Germany, Oberlandesgericht Hamburg, 3 April 1975, *US firm v German firm*, II YBCA 241 (1977). In Bundesgerichtshof, 18 January 1990, XVII *YBCA* 503 (1992) the award was recognised despite the fact that the tribunal did not consider all arguments.
[129] See Oberlandesgericht Hamburg, 30 June 1998, 6 Sch 3/98, unreported; *Fitzroy Engineering Ltd v Flame Engineering Ltd*, 1994 US Dist LEXIS 17781 (ND Ill, 2 December 1994); Hong Kong, *Sam Ming Forestry Economic Co v Lam Pun Hing*, (2000) 15(1) Mealey's IAR 12 (HCHK): the award was enforced even though the beneficiary did not participate in the proceedings.
[130] See, *e.g.*, *Société Nationale pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures (Sonatrach) (Algeria) v Shaheen National Resources Inc (USA)*, 585 F Supp 57, X YBCA 540 (1985) (SDNY 1983).

> decisions on matters submitted to arbitration may be recognized and enforced. [Emphasis added.]

26-91 While the presumption is that the tribunal acted within its powers,[131] this provision covers two different issues. First, the case where the tribunal rendered a decision outside its jurisdiction or without jurisdiction (*extra petita*), and second, where the tribunal has exceeded its jurisdiction (*ultra petita*). In either case it is assumed there is an arbitration agreement which in principle confers jurisdiction on the tribunal, albeit not in respect of matters decided by it. This ground may cover the non enforcement of the award or a severable part of it.

(a) Extra petita

26-92 This defence has rarely been successfully invoked. The defence covers cases where the tribunal has decided matters outside the jurisdiction conferred upon it by the parties. This may be the case, for example, when the tribunal awards consequential damages while the contract between the parties expressly excluded this type of damages.[132] This is also the case when the tribunal awards remedies not specified in the contract despite the objection of one party.[133]

(b) Ultra petita

26-93 This defence has also rarely been successfully invoked; there is a strong presumption that arbitrators have not exceeded their authority. Courts have looked beyond the wording of the claims submitted to establish whether tribunals awarded more than requested. In this instance the Convention wishes to safeguard the part of the award which has not been tainted by the *ultra petita* objection. In an Italian case the court held that only the part of the award which is consistent with the mandate of the tribunal is enforceable but not the remaining part of the award which exceeded the tribunal's of jurisdiction.[134]

[131] See, e.g., *Sojuznefteexport (SNE) v Joc Oil Ltd,* (1990) XV YBCA 384 (Court of Appeal of Bermuda, 7 July 1989).

[132] See, *e.g., Fertilizer Corporation of India v IDI Management,* 517 F Supp 948, VII YBCA 382 (1982) (SD Ohio, 1981). The Court found the justification of the award of damages colourful and satisfactory and confirmed the award. See also *The Ministry of Defense and Support for the Armed Forces of The Islamic Republic of Iran v Cubic Defense Systems Inc (US),* 29 F 2d 1168, XXIVa YBCA 875 (1999) (SD Cal 1998).

[133] See, *e.g., In the Matter of the Arbitration between Millicom International v Motorola Inc and Proempres Panama SA,* 2002 WL 472042, XXVII YBCA 948 (2002) (SDNY 28 March 2002).

[134] See Italy, Corte di Appello Trento, 14 January 1981, *General Organisation of Commerce and Industrialisation of Cereals of the Arab Republic of Syria v SpA Simer,* VIII YBCA 352 (1983).

6.4. Irregular Procedure or Composition of Tribunal

26-94 Article V(1)(d) introduces two grounds on which enforcement may be refused. It establishes the supremacy of party autonomy over the law of the place of arbitration and allows a national court to refuse recognition and enforcement where

> 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.]

26-95 Article V(1)(d) has rarely been invoked before courts. One notable exception is a decision of the Supreme Court of Hong Kong. The dispute was whether the composition of the tribunal was in accordance with the agreement of the parties.[135] The arbitrators were supposed to be on the Beijing list while they were on the Shenzhen list. The court rejected the request to refuse enforcement as the arbitrators were on CIETAC list and the parties had agreed to CIETAC arbitration. Further the court held that as the objection was not raised during the arbitration the party was estopped from raising this ground at the enforcement stage.[136]

26-96 In another unsuccessful attempt to invoke this defence, a party argued that the arbitrators had acted as *amiables compositeurs.* The Belgian court held that this was not the case and enforced the award.[137]

26-97 In another case an award was refused enforcement because the proceedings were bifurcated into liability and damages phases contrary to the

[135] See *Al Haddad Bros Enterprises Inc v MS Agapi,* 635 F Supp 205 (D Del, 1986), aff'd (3d Cir, 1987): award enforced despite the fact that it was made by a sole arbitrator rather than three arbitrators as provided in the arbitration agreement. In Corte di Appello Florence, 13 April 1978, *Rederi Aktiebolaget Sally v Termarea srl,* IV YBCA 294 (1979), the award was refused enforcement because the award was made by two arbitrators while the arbitration agreement provided for three arbitrators.

[136] See *China Nanhai Oil Joint Service Corp v Gee Tai Holdings Co Ltd,* (1995) XX YBCA 671 (Hong Kong Supreme Court, 13 July 1994). See also Oberlandesgericht Dresden, 20 October 1998, 11 Sch 4/98, unreported, where the court refused an application to resist enforcement of a Russian award. The background was relating to the appointment of an arbitrator by the Russian Chamber of Commerce as the German party failed to appoint an arbitrator within the time limit. The German Court held that the fact that the arbitrator did not speak German, as the German party had requested, did not amount to an irregular composition of the tribunal.

[137] See Belgium, Cour d'appel Brussels, 24 January 1997, *Inter-Arab Investment Guarantee Corporation v Banque Arabe et Internationale d'Investissements,* XXII YBCA 643 (1997).

applicable arbitration rules.[138] Further, a number of court decisions confirm the view that if the procedure adopted by the tribunal conforms with the applicable arbitration rules or with the law governing the arbitration there can be no ground to refuse enforcement.[139]

6.5. Award is Not Binding, or Has Been Suspended or Set Aside

26-98 The fifth ground to refuse recognition and enforcement is, under Article V(1)(e), where 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. [Emphasis added.]

26-99 This provision has been criticised as it allows for "local standards of enforcement."[140] It has been omitted by some national laws.[141] Here again there are two separate reasons: the award is not yet "binding", and the award has been set aside or suspended.

(a) Not binding

26-100 The drafters of the Convention intentionally chose the expression "not binding" and not the word "final" (as was the case with the 1927 Convention). The reason was simply to avoid the problem of the party seeking enforcement having to request leave for enforcement by the courts at the place of arbitration.[142]

26-101 However, the meaning of the term "binding" has generated debate. The main issue is whether the term "binding" is an autonomous term or is subject to national law determination. As the drafters of the New York Convention wanted

[138] See Appelationsgericht Basel, 6 September 1968, *Swiss Corp X AG v German firm Y*, I YBCA 200 (1976); the Hamburg Commodity Association Arbitration Rules were applicable.

[139] See, *e.g.*, *Industrial Risk Insurers and Barnard & Burk Group Inc and Barnard and Burk Engineers and Constructors Inc v MAN Gutehoffnungshütte GmbH*, 141 F 3d 1434, XXIVa YBCA 819 (1999) (11th Cir 1998): no irregularity of procedure as the AAA Rules were complied with; Oberlandesgericht Hamburg, *Charterer v Shipowner*, XXV YBCA 714 (2000): lack of reasons in the award or absence of oral hearing no procedural irregularity.

[140] See, *e.g.*, Paulsson, "The Case for Disregarding LSAS (Local Standard Annulments) Under the New York Convention", 7 *Am Rev Int'l Arb* 99 (1996); van den Berg, *New York Convention*, 355.

[141] See, *e.g.*, France, NCPC Article 1502.

[142] See van den Berg, *New York Convention*, 333-337.

to depart from the national characterisation envisaged by the Geneva Convention an autonomous interpretation of "binding" is preferred.

26-102 An award can be binding notwithstanding the fact that some additional formalities are required to make it enforceable where it was made.[143] Consequently an award may not be refused enforcement because, *inter alia*,[144] formal time limits imposed by the law of the place of arbitration have not yet expired, or confirmation of the award is required in court at the place of arbitration and this has not yet been given,[145] or the award needs to be deposited with the court at the place of arbitration.[146] Further, if the award is not subject to a genuine appeal on the merits to a second arbitration tribunal or court, it must be considered "binding."[147] Partial awards are binding and hence enforceable.

(b) Award set aside or suspended

26-103 If the party resisting enforcement has successfully applied for a suspension or setting aside of the award the enforcement court may adjourn its decision.[148] To the extent that the New York Convention does not harmonise the rules on which challenge of awards may be effected the local standard for annulment of awards has been referred to as the "anathema of local particularities."[149]

26-104 The enforcing court has discretion to enforce the award despite the fact that it was successfully challenged at the place of arbitration. Awards annulled at the place of arbitration have been enforced in the US, France and Austria.

[143] See, *e.g.*, Australia, *Resort Condominiums International Inc v Ray Bolwell and Resort Condominiums Pty Ltd*, (1994) 9(4) Mealey's IAR A1, (1995) XX YBCA 628 (Supreme Court Queensland, 29 October 1993).

[144] *Ibid*, 337-346.

[145] See, *e.g.*, *Fertilizer Corporation of India v IDI Management*, 517 F Supp 948, VII YBCA 382 (1982) (SD Ohio 1981).

[146] See, *e.g.*, France, Cour d'appel Paris, 10 May 1971, *Compagnie de Saint Gobain-Pont à Mousson v The Fertilizer Corporation of India Ltd*, I YBCA 184 (1976).

[147] Van den Berg, *New York Convention*, 342; Redfern and Hunter, *International Commercial Arbitration*, para 10-40.

[148] New York Convention Article VI.

[149] Paulsson, "The Case for Disregarding LSAS (Local Standard Annulments) Under the New York Convention", 7 *Am Rev Int'l Arb* 99 (1996).

(c) More favourable provisions

26-105 Pursuant to Article IX European Convention the annulment of the award in the country of origin is a ground to refuse enforcement only if the award was annulled for one of the reasons listed in Article V(1)(a)–(d) New York Convention. Accordingly, an annulment because the award contravenes the public policy of the country of origin does not hinder enforcement in another contracting state.[150]

26-106 French courts are by law under an obligation to enforce a foreign award even if it was set aside in the country of origin. The nullification of the award is not recognised as a ground to refuse enforcement.[151] Courts in Austria[152] and the US[153] have also recognised awards set aside at the place of arbitration.

26-107 In *Hilmarton* the dispute dealt with a consultancy fee payable by a French firm (OTV) to an English firm (Hilmarton) in relation to a contract in Algeria. The award was made in 1988 in Switzerland and held that the payment was not due as the use of intermediaries was prohibited in Algeria in respect of public contracts, although Algerian law was not chosen by the parties. It was alleged that corrupt practices were involved, possibly violating international public policy in Algeria and Switzerland. The award was successfully challenged in Switzerland in 1990[154] but was recognised by the Court of Appeal in Paris and the Cour de cassation in 1994.[155] A second award was rendered in Geneva in 1992 and this was initially recognised in France in 1995 by the Versailles Court of Appeal.[156] The Cour de cassation, however, reversed the judgment of the

[150] *Ibid.*

[151] France, NCPC Article 1502. See also France, Cour de cassation, 23 March 1994, *Hilmarton v Omnium de Traitement et de Valorisation (OTV)*, XX YBCA 663 (1995).

[152] Austria, Oberster Gerichtshof, 20 October 1993 / 23 February 1998, *Kajo-Erzeugnisse Essenzen GmbH (Austria) v DO Zdravilisce Radenska (Slovenia)*, XXIVa YBCA 919 (1999). The Court applied the European Convention as more favourable law.

[153] See, *e.g.*, *Chromalloy Aeroservices Inc (US) v The Arab Republic of Egypt*, 939 F Supp 907, XXII YBCA 1001 (1997) (DDC 1996).

[154] Switzerland, Tribunal Fédéral, 17 April 1990, *Omnium de Traitement et de Valorisation (OTV) v Hilmarton (UK)*, Rev Arb 315 (1993), with note Heuzé, "La morale, l'arbitre et le juge", 179; Rivista dell'Arbitrato 735 (1992), with note Giardina, "Norme imperative contro le intermediazioni nei contratti ed arbitrato internazionale", 784. English text in XIX YBCA 214 (1994).

[155] France, Cour de cassation, 23 March 1994, *Hilmarton v Omnium de Traitement et de Valorisation (OTV)*, XX YBCA 663 (1995).

[156] France, Cour d'appel Versailles, 29 June 1995, *Omnium de Traitement et de Valorisation (OTV) v Hilmarton*, XXI YBCA 524 (1996).

Court of Appeal in Versailles as it violated the *res judicata* of the recognised first award.[157] The second award was enforced in England.[158]

26-108 An award made and set aside in Egypt was enforced in the US. In *Chromalloy* the dispute relating to the procurement of a military equipment contract between a US firm and the Egyptian state was decided by a tribunal in Cairo in 1994.[159] Chromalloy was the successful party and sought enforcement in the US before the District Court for the District of Columbia. Before the US court could decide the matter the award was challenged successfully at the Cairo Court of Appeal.[160] Despite the challenge the US court recognised the award.[161] This award was also enforced in France by the Paris Court of Appeal.[162] Chromalloy has not been followed by other US courts.[163]

26-109 Similarly an award made and challenged in Slovenia was enforceable in Austria,[164] and an award made in Austria but partly set aside there was enforceable in France.[165]

26-110 The discretion exercised by courts in recognising and enforcing awards set aside at the place of arbitration has been welcomed by many writers[166] and

[157] France, Cour de cassation, 10 June 1997, *Omnium de Traitement et de Valorisation (OTV) v Hilmarton*, XXII YBCA 696 (1997).

[158] *Hilmarton v Omnium de Traitement et de Valorisation (OTV)*, (1999) 14(6) Mealey's IAR A1, (1999) XXIVa YBCA 777 (QBD, 24 March 1999).

[159] Reported in 11(8) *Mealey's IAR* C1 (1996).

[160] Egypt, Court of Appeal Cairo, 5 December 1995, *Ministry of Defense of the Republic of Egypt v Chromalloy Aeroservices Inc*, XXIVa YBCA 265 (1999).

[161] US, *Chromalloy Aeroservices Inc (US) v The Arab Republic of Egypt*, 939 F Supp 907 XXII YBCA 1001 (1997) (DDC, 1996).

[162] France, Cour d'appel Paris, 14 January 1997, *The Arab Republic of Egypt v Chromalloy Aeroservices Inc (US)*, 12(4) Mealey's IAR B1 (1997).

[163] See *Baker Marine (Nigeria) Ltd v Chevron (Nigeria) Ltd*, 191 F 3d 194 (2d Cir 1999) where the Court of Appeal for the Second Circuit refused to enforce two awards set aside by a Nigerian court. Similarly the District Court for the Southern District of New York following Baker Marine refused to enforce an award set aside in Italy: *Martin Spier v Calzaturifico Tecnica SpA*, 71 F 2d 279, 14(11) Mealey's IAR E1 (1999) (SDNY, 1999). See also the discussion in Gaillard and Edelstein, "Baker Marine and Spier Strike A Blow to the Enforceability in the United States of Awards Set Aside at the Seat", 3 *Int ALR* 37 (2000).

[164] Austria, Oberster Gerichtshof, 20 October 1993 / 23 February 1998, *Kajo-Erzeugnisse Essenzen GmbH (Austria) v DO Zdravilisce Radenska (Slovenia)*, XXIVa YBCA 919 (1999).

[165] See France, Cour de cassation, 9 October 1984, *Pabalk Ticaret Limited Sirketi (Turkey) v Norsolor SA (France)*, 24 ILM 360 (1985) with introductory note by Gaillard, XI YBCA 486 (1984).

[166] See, *e.g.*, Chan, "The Enforceability of Annulled Foreign Awards in the United States: A Critique of Chromalloy", 17 *Boston U Int'l L J* 141 (1999); Gaillard, "Enforcement of Awards Set Aside in the Country of Origin: The French Experience", *ICCA Congress Series no 9*, 505;

criticised by others.[167] In any event the practice is justified as a matter of Article VII New York Convention and more favourable positions in national law or international conventions. The problem can only be eliminated by establishing international standards for annulment of awards.

6.6. Violation of Public Policy of Country of Enforcement

26-111 Article V(2) of the New York Convention provides further grounds on which recognition and enforcement of an award may be resisted. Both grounds listed in sub-paragraphs (a) and (b) fall under the heading public policy defence. In relation to this paragraph the court may *ex officio* raise the issue of public policy; no request of a party is necessary. Article 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:
> (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.

26-112 The two aspects of public policy[168] envisaged relate to whether the subject matter of the dispute is capable of settlement by arbitration in the enforcing state (arbitrability) and whether the recognition and enforcement of the award would violate the international public policy of the enforcing state. There are as many shades of international public policy as there are national attitudes towards arbitration.

Paulsson, "The Case for Disregarding LSAS (Local Standard Annulments) Under the New York Convention", 7 *Am Rev Int'l Arb* 99 (1996); Paulsson, "May or Must Under the New York Convention An Exercise in Syntax and Linguistics", 14 *Arb Int* 227 (1998); Petrochilos, "Enforcing Awards Annulled in the State of Origin under New York Convention:", 48 *ICLQ* 856 (1999); Rivkin, "The Enforcement of Awards Nullified in the Country of Origin; The American Experience", *ICCA Congress Series no 9*, 528.

[167] See, *e.g.*, Bajons, "Enforcing Annulled Arbitral Awards – A Comparative View", 7 *Croat Arbit Yearb* 55 (2000); Giarding, "The International Recognition and Enforcement of Arbitral Awards Nullified in the Country of Origin", in Briner, Fortier, Berger and Bredow (eds), *Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl-Heinz Böckstiegel* (2000), 205; Rogers, "The Enforcement of Awards Nullified in the Country of Origin", *ICCA Congress Series no 9*, 548; Schwartz, "A Comment on Chromalloy: Hilmarton à l'americaine", 14(2) *J Int'l Arb* 125 (1997).

[168] See, *e.g.*, Racine, *L'arbitrage commercial international et l'ordre public* (LGDJ, 1999).

(a) Arbitrability

26-113 A national court may refuse recognition and enforcement if the subject matter cannot be settled by arbitration on its own territory. The concept of arbitrability has expanded considerably in recent decades as a consequence of a general policy favouring arbitration. Consequently, in countries with a wide concept of arbitrability, such as the US, the courts have repeatedly noted this policy.[169] Ultimately they exercise their discretion not to refuse enforcement of awards on ground of non-arbitrability under the law of the US, if the case has an international element.[170] There are very few cases in which enforcement of an award has been refused for lack of arbitrability of the underlying dispute.[171]

(b) Enforcement violates public policy

26-114 Public policy "is never argued at all but where other points fail."[172] This ground to resist enforcement, as all other grounds in Article V, must be construed narrowly. In fact, only violation of the enforcement state's public policy with respect to international relations (international public policy or *ordre public international*) is a valid defence.[173] This defence is only available "where the enforcement would violate the forum state's most basic notions of morality and

[169] See, *e.g.*, *SONATRACH (Algeria) v Distrigas Corp*, XX YBCA 795 (1995) (D Mass 1987).

[170] See, *e.g.*, *Parsons & Whittemore Overseas Co v Societe Generale de l'Industrie du Papier*, 508 F 2d 969 (2d Cir, 1974); as there no US national interest, the award was enforced.

[171] See, *e.g.*, Belgium, Cour de cassation, 28 June 1979, *Audi-NSU Auto Union AG v Adelin Petit & Cie (Belgium)*, V YBCA 257 (1980). The case was not arbitrable under Belgian law as at the time of the case there was an exclusive jurisdiction of Belgian courts in respect of unilateral termination of concessions for exclusive distributorships for an indefinite time. US, *BV Bureau Wijsmuller v United States of America*, III YBCA 290 (1978) (SDNY, 1976), a case related to the US Public Vessels Act which rendered several disputes non-arbitrable. Italy, Corte di cassazione, 12 May 1977, *Sherk Enterprises AG v Société des Grandes Marques*, IV YBCA 286 (1979) where trade marks disputes were deemed non arbitrable and the award was refused enforcement.

[172] *Richardson v Melish* (1824) 2 Bing 229, 252, *per* Borrough J.

[173] Distinctions between domestic and international public policy have been recorded, *e.g.*, in Bundesgerichtshof, 18 January 1990, XVII *YBCA* 503 (1992), where the court held that New York Convention Article V(2)(b) requires violation of international public policy; and *General Electric Co (US) v Renusagar Power Co (India)*, (1990) XV YBCA 465 (High Court Bombay, 21 October 1988). References to international public policy are made in all laws which have been influenced by the French NCPC Articles 1498 and 1502. Followers of this model include Portugal, Algeria, and Lebanon. See also, *e.g.*, Tunisia, Arbitration Code 1993 Articles 78(2)(II) and 81(II); 1992 Romania, Law on Settlement of Private International Law Disputes Articles 168(2) and 174; US, FAA sections 201 (incorporation of New York Convention) and 301 (incorporation of the Panama Convention) and *Sherk v Alberto Curver*, 417 US 506 (1974) which distinguishes between domestic and international public policy.

justice."[174] The public policy exception set out in Article V(2)(b) is an acknowledgment "of the right of the State and its courts to exercise ultimate control over the arbitral process."[175]

26-115 It is difficult, if not impossible, to define the concept of public policy. In 1853 the House of Lords identified the public policy notion as "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good."[176] In the context of enforcement of foreign awards it has been just as difficult to define public policy. The Court of Appeal in *DST v Rakoil* observed 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 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.[177]

26-116 In a case in India where a party sought enforcement of an ICC award the Supreme Court observed that the concept of public policy was incapable of precise definition. It did confirm that

> Public policy connotes some matter which concerns the public good and the public interest. 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.[178]

26-117 In 2000 and 2002 the International Law Association Committee on International Commercial Arbitration published a report and a resolution on

[174] See, *e.g.*, *Parsons and Whittemore Overseas Co, Inc v Société générale de l'industrie du papier (RAKTA)*, 508 F 2d 969, 974 (2d Cir, 1974). Hwang and Chan, "Enforcement and Setting Aside of International Arbitral Awards – The perspective of Common Law Countries", *ICCA Congress series no 10*, 145, 156.

[175] See ILA Committee on International Commercial Arbitration, *Public Policy as a Bar to the Enforcement of International Arbitral Awards*, London Conference Report (2000), 2. See also Mistelis, "Keeping the Unruly Horse in Control or Public Policy as a Bar to the Enforcement of Foreign Arbitral Awards", 2(4) *International Law FORUM du droit international* 248 (2000). The final Report of the ILA Committee was presented at the 2002 New Delhi conference and published in the 2002 Proceedings and at <www.ila-hq.org>.

[176] See *Egerton v Brownlow* (1853) 4 HLC 1.

[177] See *Deutsche Schachtbau-und Tiefbohrgesellscaft mbH v Ras Al Khaimah National Oil Company* [1987] 2 Lloyd's Rep 246, 254.

[178] See *Renusagar Power Co Ltd v General Electric Co*, (1995) XX YBCA 681, para 24.

public policy as a bar to the enforcement of foreign arbitration awards.[179] The report offers a guidance for the classification of public policy grounds as procedural or substantive. Accordingly, possible procedural public policy grounds include[180] fraud in the composition of the tribunal; breach of natural justice; lack of impartiality; lack of reasons in the award; manifest disregard of the law; manifest disregard of the facts; annulment at place of arbitration. The report further lists as substantive public policy grounds[181] mandatory rules / *lois de police*; fundamental principles of law; actions contrary to good morals; and national interests / foreign relations. This classification although it has merit may not be universally accepted as it emerges from case law in a limited number of countries. Further, 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.

26-118 Widely accepted examples of violations of international public policy include biased arbitrators, lack of reasons in the award, serious irregularities in the arbitration procedure, allegations of illegality,[182] corruption or fraud,[183] the award of punitive damages[184] and the breach of competition law.[185] It is generally rare that an award is successfully refused enforcement in a state because of violation of its international public policy.

26-119 One of the more intriguing cases to arise under the public policy defence in England is the case of *Soleimany v Soleimany*. An agreement was entered into

[179] ILA Committee on International Commercial Arbitration, *Public Policy as a Bar to the Enforcement of International Arbitral Awards*, London Conference Report (2000). The final Report of the ILA Committee was presented at the 2002 New Delhi conference and published in the 2002 Proceedings and at <www.ila-hq.org>.

[180] See *ibid*, ILA London Conference Report (2000), 24-30.

[181] *Ibid*, 17-24.

[182] See, *e.g.*, *Soleimany v Soleimany* [1998] 3 WLR 811, [1999] QB 785 (CA); Lalive, "Transnational (or Truly International) Public Policy and International Arbitration", *ICCA Congress series no 3*, 258-318, para 84.

[183] See, *e.g.*, *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd And Others* [1999] 2 Lloyd's Rep 65 (CA), [2000] QB 288 CA; Cour d'appel, Paris 30 September 1993, *European Gas Turbines SA v Westman International Ltd*, Rev Arb 359 (1994), XX *YBCA* 198 (1995).

[184] See, *e.g.*, Japan, Supreme Court, 11 July 1997, 5(o) *Heisei* 1762, 51 *Minshu* 2573, 1624 *Hanrei Jiho* 90, 958 *Hanrei Times* 93.

[185] See Hoge Raad, 21 March 1997, *Eco Swiss China Time Ltd (Hong Kong) v Benetton International NV (Netherlands)*, Ned Jur 207 1059 (1998); European Court of Justice, C-126/97, 1 June 1999, *Eco Swiss Time Ltd v Benetton International NV*, [1999] 2 All ER (Comm) 44, [1999] ECR I-3055. It was held that ex Article 85 (now 81) EC Treaty is part of the public policy of the EC and hence of each member state.

between a father and son, of Iranian Jewish origin, concerning valuable Persian carpets exported from Iran. The son had gone over to Iran to free a consignment of carpets that had been seized by the Iranian customs authorities. The export of the carpets was in contravention of the Iranian revenue and export controls laws. This was not disputed. The carpets were sold by the father in England and a dispute arose about the division of the proceeds of sale. When efforts at mediation failed the parties agreed to go to arbitration before the Beth Din (Court of Chief Rabbi, in London). The tribunal applied Jewish law and found in favour of the son. The award acknowledged the illegality of smuggling the carpets out of Iran but this was held not to undermine the contractual rights of the parties. The award ordered a payment by the father to the son. When the father refused to voluntarily comply with the award, the son sought enforcement in the English courts. The father argued that the illegality of the arrangement rendered the award unenforceable in England as it was contrary to public policy.

26-120 Although this case does not stem from a traditional international commercial arbitration it is illustrative of the approach taken by the English courts when questions of illegality are raised. It is the first ever case which refused enforcement of an award because of public policy considerations. The facts of the case highlight the illegality issue. The Court of Appeal confirmed that the English courts exercise control over enforcement proceedings of arbitration awards. It held

> where public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality which gave rise to it.[186]

26-121 The court ultimately held that the agreement was illegal and as such it was contrary to public policy to enforce such an English award. The court also concluded that it would also not enforce "a contract governed by the law of a foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country."[187] Smuggling is not an activity which the English courts would uphold even in a case where the governing law took a more relaxed view of the illegality.

26-122 This case was, in effect, a domestic matter as both father and son were resident in England where the contract was made, and English law was the putative applicable law but for their choice of the rabbinic courts to decide the issue. It is not clear if the outcome would have been different if the Court of

[186] *Soleimany v Soleimany* [1998] 3 WLR 811, [1999] QB 785 (CA), [1999] 3 All ER 847, 859.
[187] *Ibid*, 861.

Appeal had been deliberating on the enforcement of an award made outside England and where at least one of the parties was not resident nor carried on its business in England.

26-123 In *Westacre Investments Inc*[188] a foreign award was at issue. The parties had entered into an agreement, governed by Swiss law, for the sale of military equipment to Kuwait. The respondent repudiated the agreement and Westacre instituted an ICC arbitration in Switzerland. The respondent submitted that the contract was void as it involved Westacre having to bribe various Kuwaiti officials. The arbitrators rejected these allegations and made an award in favour of Westacre. After the Swiss Federal Court refused to set aside the award Westacre sought enforcement of the award against the respondent in England. The enforcement was challenged by the respondent on the grounds that the contract was essentially one for the purchase of personal influence and was therefore contrary to public policy in England. Alternatively, they sought to reopen the factual basis of the case alleging it had been obtained by perjury as the underlying agreement was in fact only used as a means to pay bribes through Westacre to a third party. These submissions were rejected by the Judge as grounds for challenging the enforcement of the award and the appellants took their claim to the Court of Appeal.

26-124 Waller LJ summarised the decision in the earlier case of *Lemenda*[189] in four main categories namely

> (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 of the former category; thus
> (3) contracts for the purchase of personal influence, if to be performed in England, would not be enforced as contrary to English domestic public policy; and
> (4) 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.[190]

[188] See *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and Others* [1999] 3 All ER 864.
[189] See *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] 1 All ER 513 (QBD).
[190] See *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and Others* [1999] 3 All ER 864, 876.

26-125 The Court of Appeal held that the award should be enforced. Although the underlying contract which involved the purchase of personal influence would have been contrary to the public policy of Kuwait, its enforcement was not contrary to the public policy of Switzerland. The parties had chosen Swiss law as the governing law and the arbitration was also held in Switzerland. There were, therefore, no international public policy objections that could be raised in England to prevent the enforcement of the award. The arbitrators had dealt with the alleged illegality and it was not now for the English courts to look behind the reasons for such a decision unless fresh and compelling evidence was available.

26-126 The international trend emerging from courts throughout the world is to take a robust view of the application of the New York Convention.[191] It has been largely applied to ensure that the foreign award is enforced and this seems to be consistent. Only in very limited circumstances will an award be refused enforcement. In Hilmarton, for example, it was held that the court was not adjudicating the underlying legality of the contract but merely had to decide whether the award was enforceable in England. The court did not think it was relevant that English law may have reached a different outcome in the arbitration award, noting

> the reason for the result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration. If anything, this consideration dictates (as a matter of policy of the upholding of international arbitration awards) that the award should be enforced.

adding that

> it would of course be quite wrong for this court to entertain any attempt to go behind this explicit and vital finding of fact.[192]

26-127 The Supreme Court of Korea also gave a narrow interpretation to the public policy principle in *Adviso NV (Netherlands Antilles) v Korea Overseas Construction Corp*.[193] The ICC award rendered in Zurich was granted in favour of Adviso under a know-how licence concerning a sewage treatment plant.[194] Adviso then sought enforcement of the award which the Korean Court of Appeal granted. The decision was appealed and the Supreme Court confirmed the earlier decision. The court accepted that Article V(2) gave the competent court power to

[191] See, *e.g.*, *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*, [1999] 2 All ER (Comm) 146.
[192] *Ibid*, 148 and 149.
[193] XXI YBCA 612 (1996).
[194] For the full decision see final award in ICC case no 6363 (1991), XVII *YBCA* 186 (1992).

refuse enforcement of a foreign award if the award would be contrary to the public policy of that country. The court stated

> The basic tenet of this provision is to protect the fundamental moral beliefs and social order of the country where recognition and enforcement is sought from being harmed...[195]

26-128 The Supreme Court felt, however, that regard should be given to international public order as well as domestic concerns. The exception in Article V(2) must therefore be interpreted narrowly. The mere fact that the particular foreign legal rules applied in an arbitration award violated mandatory provisions of Korean law did not of itself constitute a valid reason to refuse enforcement.

> Only when the concrete outcome of recognising such an award is contrary to the good morality and other social order of Korea, will its recognition and enforcement be refused.[196]

26-129 In a Swiss decision the court acknowledged that the Swiss public policy defence had a more restricted application when foreign arbitral awards were being considered. It noted

> From a formal point of view, we find that a procedural defect in the course of the foreign arbitration does not lead necessarily to refusing enforcement even if the same defect would have resulted in the annulment of a Swiss award (with the obvious exception of the violation of fundamental principles of our legal system, which would contrast in an unbearable manner with our feeling of justice)...[197]

26-130 Violation of regional public policy was found in the case of *Eco Swiss China Time Ltd v Benetton International NV*.[198] The Dutch Court of Appeal decided that Article 81 EC Treaty was a provision of public policy within the meaning of Article 1065(e) of The Netherlands CCP. The ECJ in its decision confirmed that Article 81 "constitutes a fundamental provision which is essential to the accomplishment of the tasks entrusted to the Community"[199] and for the proper functioning of the internal market. The ECJ concluded that

[195] XXI YBCA 612 (1996) 615, para 9.
[196] *Ibid.*
[197] See Camera di Esecuzione e Fallimenti Canton Tessin, 19 June 1990, *K S AG v CC SA*, XX YBCA 762 (1995).
[198] ECJ, 1 June 1999, C-126/97, [1999] 2 All ER (Comm) 44, [1999] ECR I-3055.
[199] *Ibid*, [1999] ECR I-3055, para 36.

the provisions of Article 81 EC may be regarded as a matter of public policy within the meaning of the New York Convention.[200]

26-131 The Hong Kong Special administrative region (SAR) Court enforced a mainland China arbitration award. A CIETAC tribunal had made an award in favour of Sunlink. An *ex parte* order was made by the Court granting leave to the claimant to enforce the award. Judge Burrell in the High Court of Hong Kong SAR did not find that there were any special grounds into which the case fell and held that the award should be enforced. In that case he referred to the recent decision in *Hebei*[201] case. The Hong Kong Court of Final Appeal confirmed that there must be compelling reasons before an award can be set aside in accordance with the public policy provisions of the New York Convention. The court said

that the reasons must be so extreme that the award falls to be cursed by bell, book and candle. But the reasons must go beyond the minimum which would satisfy setting aside a domestic judgement or award.[202]

26-132 All these cases illustrate how the courts make a distinction between the rules they may have applied in a domestic situation and those taken into account when enforcing a foreign award. A different standard being imposed on foreign as opposed to domestic awards. This distinction is expressed in the New French Code of Civil Procedure where it permits an international arbitration award to be set aside "if the recognition or execution is contrary to international public policy (*ordre public international*)."[203]

26-133 In an unreported decision of 30 September 1999 the *Oberlandesgericht* Bremen had to consider whether to enforce an arbitration award issued by the Istanbul Chamber of Commerce.[204] The dispute arose between two shareholders of the same company under a shareholders agreement. The respondent had tried to obtain a declaration of inadmissibility from the courts in Turkey. The respondent had also applied to have the award set aside on the grounds that the case had been decided before the court had ruled on the admissibility of arbitration. This application succeeded and a further arbitration was held at the Istanbul Chamber of Commerce which again found in favour of the applicant. The applicant sought recognition and a declaration of enforceability of this award

[200] *Ibid.* para 39.

[201] See *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552.

[202] *Ibid.*

[203] France, Decree Law no 81-500 of 12 May 1981 Article 1502(5).

[204] Oberlandesgericht Bremen, 2 Sch 4/99, 30 September 1999, unreported, see Kröll, 4(4) *Int ALR* N26-27 (2001).

in Germany under section 1061(1) Code of Civil Procedure in accordance with the New York Convention. The respondent challenged this request on a number of grounds including public policy.

26-134 The court rejected the argument that the award was contrary to public policy because the respondent had not been heard. The fact that the tribunal had not granted some of the respondent's motions to take evidence not produced in the first arbitration did not of itself constitute a breach of public policy. The court felt it was clear from the award that the panel had considered the motions to produce evidence. The refusal to grant the motions would only amount to

an infringement of the *ordre public* if it is shown that the evidence could have caused the case to be decided differently.

26-135 The court did not find a violation of the international *ordre public* even though the award did not expressly state why the tribunal had judged the respondent defences against the claim to be insufficient. The court acknowledged that it would be contrary to the principles of German internal *ordre public* for a tribunal to merely state that it had considered all the facts without giving any detailed reasoning. The court distinguished this from the international *ordre public* which would only be violated if the foreign decision was contrary to the German procedural law to such an extent that the result could not be fair or constitutional

because it contains substantial errors touching upon the very foundation of public and economic life.[205]

26-136 This very much echoes the US District Court's decision of 25 June 1999 where it concluded that enforcement of an arbitration award could only be found contrary to public policy if "it would violate our most basic notions of morality and justice."[206] Only in very extreme cases will the foreign award be set-aside on public policy considerations.

26-137 The *Cour Superieure de Justice* of Luxembourg had to consider a case involving allegations of fraudulent inducement. At the enforcement stage the public policy principle was raised as a defence by the loosing parties.[207] The dispute involved an investment in a plot in Marbella which was subject to receiving the appropriate building certificates. Payment under the contract was

[205] *Ibid.*

[206] See *Seven Seas Shipping (UK) Ltd v Tondo Limitada,* XXV YBCA 987 (2000) 989.

[207] See *Kersa Holding Company Luxembourg v Infancourtage and Famajuk Invesment and Isny,* XXI YBCA 617 (1996) 625, para 22.

by way of instalments. Financing for the project was not secured and the three respondent companies did not pay the contract price. Arbitration was commenced by Kersa. The arbitrators sitting in Brussels found against Kersa and the respondents sought enforcement of the award in Luxembourg which was granted by the Court of First Instance. Kersa appealed the decision relying on Article V(2)b of the New York Convention, among other grounds. Kersa submitted that it would be

> undoubtedly contrary to international public policy to execute a contract obtained by fraudulent manoeuvres and swindling.

26-138 The Court confirmed that it could only determine whether the enforcement of the Belgian award was of such a nature as to affect the public policy of Luxembourg

> a principle which is generally called 'attenuated public policy.'[208]

26-139 Thus the reference is to that country's international public policy. The *Cour Superieure de Justice* of Luxembourg continued to define this concept as being

> all that is considered 'as essential to the moral, political or economic order' and which *per se* must necessarily exclude the enforcement of an award incompatible with the public policy of that State where it is being invoked.[209]

26-140 When the court is considering whether to enforce an arbitral award it must do so on the basis of the fundamental convictions of the applicable law of international relationships. The court accepted that a contract based on fraud would not be enforceable in Luxembourg but did not find any evidence in this case of fraudulent representations.

7. Analysis of Different Approaches

26-141 The scope and extent of the enforcement provision of the New York Convention have been felt all over the world. The interpretation given to the exceptions to enforcement tends to vary from country to country. Courts have not always adopted a consistent approach to the enforcement of foreign awards despite the fact that they apply the same rules as courts in other countries. This is especially true when the public policy principle set out in Article V(2) is raised.

[208] *Ibid.*

[209] *Ibid,* 625, para 23.

26-142 It is this ongoing quest for uniformity in the application of the New York Convention balanced against the national courts discretion to set aside an award on public policy grounds that makes this a topical and pervasive issue. It highlights the tension between the international obligations to enforce an arbitration award and the interest of national courts to maintain certain standards, in particular not lending their support to fraudulent or criminal agreements.

26-143 The majority of the cases acknowledge that an award will only be set aside on overriding international public policy concerns. There is still, however, a certain latitude given to national courts to determine on a case by case basis the circumstances when an award cannot be enforced because of international public policy concerns. Furthermore, there is little guidance on the enforceability of interim awards even though it is anticipated that

> as international arbitration expands into new and complex areas such as intellectual property and environmental disputes, the need for interim measures of relief will accelerate.[210]

26-144 While Article V(1) New York Convention places significant emphasis on party autonomy and the ability to be able to settle their disputes as they choose, the public policy restriction in Article V(2) does place a significant limitation on that autonomy. Public policy is a key issue in international arbitration as

> each state has its own rules, which may be different from those of other States. At the same time public policy shifts with time, reflecting the changing values of society.[211]

26-145 The finality of awards is of paramount importance in international commercial arbitration. There is a recognised international policy in favour of enforcing awards.[212] This ensures a certain degree of certainty and predictability in the international arbitration process essential to international trade. The reluctance to refuse to enforce an award is especially obvious where the illegality or other grounds for challenging an award has already been considered by the tribunal in its award. It is also clear that many national courts apply a concept of international public policy which is usually more restrictive than its domestic public policy. Indeed national courts have acknowledged that although there may

[210] Wagoner, "Interim Relief in International Arbitration: Enforcement is a Substantial Problem", 51-Oct *Disp Resol J* 68 (1996) 72.

[211] Yu, "The Impact of National Law Elements on International Commercial Arbitration", 4(1) *Int ALR* 17 (2001) 19.

[212] See, *e.g.*, Lamm and Hellbeck, "The Enforcement of Foreign Arbitral Awards Under the New York Convention: Recent Developments", 5 *Int ALR* 137 (2002) 138.

be some inconsistency in the domestic rules or procedures applied in arbitration that in itself is not enough to refuse enforcement under international public policy.

26-146 Furthermore, in cases of criminal or illegal activities, consideration must be given to whose international public policy is relevant. Is it just the law of the country where enforcement is being sought or does it also include the law of the place of performance? It appears due regard will be given to the international public policy of the place where the award is being enforced,[213] but also to that of the governing law. Less emphasis seems to be placed on the law of the place of performance.[214]

26-147 The arguments in favour of upholding foreign awards are self apparent ensuring as they do a high degree of certainty in international trade. However, it would clearly be wrong if by carefully drafting an arbitration clause and choosing its governing law parties could by-pass fundamental and mandatory laws of an otherwise relevant foreign country. It is clear from a review of even a small number of cases that there is an uneasy tension between international public policy and considerations of domestic public policy. As has been aptly pointed out

> to expect court enforcement of arbitration agreements and awards without any encroachments of national legal particularities would be a logical impossibility, like both having and eating the proverbial cake.[215]

[213] See *Soleimany v Soleimany*, [1998] 3 WLR 811, [1999] QB 785 (CA).

[214] See *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and Others*, [1999] 2 Lloyd's Rep 65 (CA), [2000] QB 288 CA; *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*, [1999] 2 All ER (Comm) 146.

[215] Park, "Judicial Controls in the Arbitral Process", 5 *Arb Int* 230 (1989) 251.

ARBITRATION WITH GOVERNMENT AND STATE OWNED ENTITIES

27-1 States and state owned entities are major participants in national and international business transactions. This is equally true for socialist and former socialist countries, such as China or Russia, and market economies, such as the European Union. Often, the state is the largest consumer in the market.[1]

27-2 States enter into contracts for the purchase or the supply of goods or services, just as any other private entity would do. The state may either contract directly through a ministry or an agency of the state. Or it may use special purpose companies and other legal or formal entities which it controls directly or indirectly. These entities may be owned by the state, *i.e.*, nominally any profit belongs to the state, which in turn is liable for its losses; alternatively, whilst the entity may be legally independent of the state, the government may control the

[1] Reich, *International Public Procurement Law* (Kluwer 1999), 1; Somarajah, *The Settlement of Foreign Investment Disputes*, 86.