Recent Enforcement Problems under the New York and ICSID Conventions

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I. INTRODUCTION

THE effectiveness of international arbitration depends ultimately on the question whether the arbitral award can be enforced against the losing party. That is not to say that most arbitrations lead to enforcement proceedings before the courts of some State. Quite the contrary, arbitral awards are complied with voluntarily in a large number of cases. But this large degree of voluntary compliance is, for a significant part, probably due to the fact that effective international enforcement measures are generally available to the winning party.

Enforcement of awards resulting from international arbitration in general is now basically assured in more than 82 States that are Party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[1] Enforcement of awards resulting from international arbitration in the specific field of investments is especially catered for in the Washington Convention on the Settlement of Investment Disputes (the ICSID Convention).[2]

The New York Convention has been interpreted and applied in over 375 court decisions from 25 countries. These decisions are reported and commented upon in the *Yearbook Commercial Arbitration,* which has devoted since 1976 a separate section to these decisions.[3] The courts generally display a favourable attitude towards the Convention. In fact, enforcement of an award has been

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1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (the New York Convention).

2 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (the ICSID Convention).

3 See also A. J. van den Berg, *The New York Arbitration Convention of 1958* (1981).

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refused in only a very few cases. This does not mean, however, that the Convention's provisions and its mechanism are trouble-free.

Although the ICSID Convention is adhered to by more than 90 States, only some 25 arbitrations have taken place within its framework. It is therefore not surprising that the court decisions on this Convention are scant. Insofar as enforcement of awards is concerned, two decisions are reported below. The ICSID Convention is also not trouble-free.

Before examining the problems, which are similar to a certain degree under both Conventions, it may be useful to outline the enforcement provisions contained in these instruments.

(a) The New York Convention

The New York Convention applies to foreign arbitral awards, that is to say awards made in the territory of any State other than the one in which enforcement is sought (Article I (1)). If a State has availed itself of the first reservation set out in Article I(3) (the so-called 'reciprocity reservation'), such State will only apply the Convention to arbitral awards made in another *Contracting* State.

The general obligation for Contracting States to recognise such awards as binding and to enforce them in accordance with their rules of procedure is laid down in Article III. A party seeking enforcement of a foreign award needs to supply to the court (a) the arbitral award and (b) the arbitration agreement (Article IV). Compliance with these simple conditions *prima facie* entitles that party to leave for enforcement.

The opposing party can object to the request for enforcement by submitting proof of one of the limited grounds for refusal of enforcement which are limitatively listed in Article V(1). These grounds are in short:

(a) invalidity of the arbitration agreement;
(b) violation of due process;
(c) excess by arbitrator of his authority;
(d) irregularity in the composition of the arbitral tribunal or in the arbitral procedure;
(e) award not binding, suspended or set aside in the country of origin.

Furthermore, a court may of its own motion refuse enforcement for reasons of public policy as provided in Article V(2).

(b) The ICSID Convention

The scheme of the ICSID Convention is quite different from that of the New York Convention. The New York Convention is limited to facilitating the international enforcement of awards made on the basis of a national arbitration law. Consequently, the procedural legal regime governing arbitration leading to an award to be enforced under the New York Convention is, as a rule, rooted in a national law on arbitration. The ICSID Convention, on the other hand, provides for a comprehensive, self-sufficient system of truly international

arbitration in the area of investment disputes. Arbitration under this Convention is administered by the International Centre for the Settlement of Investment Disputes (ICSID), solely on the basis of the provisions of the Convention and the Rules and Regulations issued thereunder, excluding the application of any national arbitration law. In an ICSID arbitration, the place of arbitration is, therfore, legally irrelevant since it does not trigger the application of the national law on arbitration of that place.

According to Article 25(1), arbitration will be governed by the Convention (i) if there is a legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, and (ii) if the parties to the dispute have consented in writing to the jurisdiction of ICSID.

By virtue of Article 53(1) of the ICSID Convention, the award is to be binding on the parties and is not to be subject to any appeal or any other remedy except those provided for in the Convention (ie, interpretation (Article 50), revision (Article 51), and annulment by an *ad hoc* committee appointed from the panel of ICSID arbitrators (Article 52)).[4]

Enforcement of an ICSID award in a Contracting State is quite simple (Article 54).[5] A party seeking enforcement merely needs to supply a copy of the award certified by the Secretary-General of ICSID to the court. This entitles him to leave for enforcement. There is no ground for refusal of enforcement, not even a public policy defence. Article 54(1) provides in this respect:

> Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

Having described briefly the enforcement mechanism under both Conventions, I can now turn to the problems of which I have selected three.[6]

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4 To date, annulment of an ICSID award by an *ad hoc* Committee occurred in two (out of 23) cases. The first annulment decision, in the case of *Klöckner Industrie-Anlagen GmbH, Klöckner Belge, S.A. and Klöckner Handelmaatschappij B.V. v. Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2) is reproduced in English translation in 1 ICSID Rev.-FILJ 89 (1986) and in 11 Y.B. Com. Arb. 162 (1986). The second such decision, annulling the award of 28 November 1984 in *Amco Asia Corp., Pan American Development/Ltd and P.T. Amco Indonesia v. Indonesia* (ICSID Case No. ARB/81/1), was issued on 16 May 1986 and is reproduced in 12 Y.B. Com. Arb. 129 (1987).

5 Insofar as enforcement of the award is concerned, a rather theoretical question is the relationship between the ICSID and New York Conventions. The New York Convention does not exclude from its field of application an arbitral award between a State and a foreign national relating to an investment. However, it must be assumed that the ICSID Convention applies once the parties have fulfilled its jurisdictional requirements, including the written consent to submit to ICSID. Consequently, no conflict exists in practice between both Conventions. Even assuming that the New York Convention is concurrently applicable, no sensible claimant would rely on the New York Convention, since an award rendered pursuant to the ICSID Convention is enforceable within the Contracting States with no resistance to the enforcement possible.

6 For other questions to which the New York Convention has given rise, reference may be made to the annual 'Commentary on the Court Decisions' in the *Yearbook Commercial Arbitration.*

II. THE ANATIONAL AWARD

An 'anational' award – sometimes called 'transnational', 'stateless' or 'floating' award – is an award resulting from an arbitration which is detached from the ambit of a national arbitration law by means of a specific agreement of the parties. Such arbitration is also called 'denationalised' arbitration.

In the context of the New York Convention, this type of arbitration and award is rather exceptional in practice, because in almost all cases an arbitration appears to be governed by the arbitration law of the place of arbitration (which is also the place of rendition of the award). This practice is confirmed by the more than 375 court decisions concerning the Convention reported thus far.

Yet, practice will now be confronted with the question as to whether an 'anational' award falls under the New York Convention. The question arises with respect to arbitral awards rendered by the Iran-U.S. Claims Tribunal which are in favour of Iranian parties (and those which will be in favour of American parties, if the Escrow Account is not replenished by Iran). According to one school of thought, awards of the Iran-U.S. Claims Tribunal are to be considered 'anational' awards as they would not be governed by Dutch arbitration law (The Hague is the place of arbitration). If the New York Convention does not apply to 'anational' awards, the consequence of this school of thought would be that an Iranian (or American) party, seeking enforcement of a Tribunal award, cannot rely on the New York Convention.

It is submitted that (i) the New York Convention does not apply to 'anational' awards, and that (ii) there are good arguments for *not* considering Iran-U.S. Claims Tribunal awares as 'anational', but rather as being governed by Dutch arbitration law.[7] It is beyond the scope of this paper to deal here with the second proposition.[8]

(a) The Legal Framework

With respect to the first proposition that the New York Convention does not apply to 'anational' awards, I have no doubt that the concept of 'denationalised' arbitration is attractive. Parties may arrange the arbitration themselves, or authorise the arbitrator to do so, as they deem fit, without having regard to national arbitration laws. National arbitration laws may contain domestically influenced particularities which the parties may want to avoid. The arbitration can take place anywhere as the place of arbitration would not entail the application of the arbitration law of the country involved. The

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[7] See *Mark Dallal v. Bank Mellat*, Judgment of 26 July, 1985, High Court of Justice, [1986] 1 All E.R. 239, *reported in* 11 Y.B. Com. Arb. 547 (1986) (question left undecided). See also Commentary, *ibid.*, pp. 412-13.

[8] For specific references on the issue and more generally on the work and activities of the Tribunal, see Ziadé, Selective Bibliography on the Iran-United States Claims Tribunal, 2 ICSID Rev.-FILJ 534 (1987).

exclusion of the applicability of a national arbitration law may also have the effect that it excludes, in principle, the supervision or interference of national courts over the arbitration.

'Denationalised' arbitration is attractive, but can it legally be accomplished? The legal status of 'denationalised' arbitration is uncertain. It may encounter difficulties if the agreement on the composition of the arbitral tribunal and on the arbitral procedure fails to provide in sufficient detail for the various aspects of these matters. These gaps cannot be filled by falling back on a national arbitration law because the parties have excluded its applicability.

Furthermore, arbitration, international as it may be, needs at least a supporting judicial authority *(autorité d'appui)*, which is, in the absence of an international authority competent in this respect, necessarily a national court. For example, the assistance of a national court may be needed for the appointment, replacement or challenge of an arbitrator. It is a generally accepted principle of the international division of judicial competence that the court of the country under whose arbitration law the arbitration is to take place, is the competent judicial authority in relation to arbitration. If the applicability of an arbitration law is excluded, it will be difficult to find such a court.

This problem is even greater when it comes to setting aside an 'anational' award. Before which country's court should the setting aside of an 'anational' award be initiated? Yet, if serious procedural violations have been committed in a 'denationalised' arbitration, the aggrieved party should have the right to have such award set aside.

A 'denationalised' arbitration must be clearly distinguished from an arbitration which is 'internationalised' within the limits imposed by a national arbitration law. Arbitration rules of an arbitral institution specialised in international arbitration may well make allowance for the international aspects of the arbitrations administered by it. For example, it can be provided that the nationality of the sole or presiding arbitrator may not be that of either party involved. Such 'internationalisation' can be effectuated only to the extent that the mandatory provisions of the applicable arbitration law are not violated. In fact, when reference is made to 'international (commercial) arbitration', it is in the sense of an arbitration 'internationalised' within the limits of an applicable national arbitration law, that this term is commonly used. The difference from the exceptional 'denationalised' arbitration is that this concept relates to an arbitration which is conducted in disregard of any arbitration law, including its mandatory provisions.

(b) SEEE v. Yugoslavia

Until now, two courts have taken the view that the New York Convention also applies to 'anational' awards. These courts had to consider the same award in the famous case, *SEEE v. Yugoslavia.* The fact that the enforcement proceedings concerning this award are now celebrating their 30th anniversary indicates that the concept of an 'anational' award is not free from difficulties in practice. The award was made by two arbitrators in the Canton of Vaud in Switzerland.

Cantonal law at the time required an odd number of arbitrators. Instead of setting the award aside, the Cantonal Court 'gave back' the award, which was deposited with it, declaring that it was not an arbitral award within the meaning of Vaud arbitration law. Probably much to the surprise of the parties and arbitrators involved, doctrine subsequently described the award as an 'anational' award.

The Dutch Supreme Court accepted this theory in a decision rendered in 1973, thereby viewing the New York Convention as applicable to such awards.[9] In a second decision (1975), the Dutch Supreme Court maintained its position that the Convention applies to 'anational' awards, but then discovered that the parties could not have contemplated 'denationalised' arbitration when concluding the agreement back in 1932. It refused enforcement on the grounds that the 'giving back' of the award by the Vaud Court was to be equated to a setting aside of the award within the meaning of Article V(1)(e) of the Convention.[10]

The French Court of Appeal of Rouen found in a decision rendered in 1984 that 'in this case the arbitration clause excludes the application of national laws of procedure and regulates the procedure itself'.[11] The Rouen Court held that, according to the procedure applicable to the arbitration, the decision of the two arbitrators was binding on the parties in the sense of the New York Convention.[12]

It is interesting to note that the same award was considered by the Dutch Supreme Court in its second decision as not being 'anational', while it was seen as such by the Rouen Court of Appeal.

(c) The New York Convention

The question whether the New York Convention provides a legal basis for enforcement of 'anational' awards can be formulated as follows: does the Convention require an award to be governed by a national arbitration law in order for the Convention to be applied?[13]

The definition of the Convention's scope in Article I(1) and (3) does not expressly state that the award made in another (Contracting) State must be subject to a national arbitration law. However, this requirement must be deemed to be implied when Article I is read in conjunction with the other provisions of the Convention. According to Article V(1)(a), enforcement of an

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9 Judgment of 26 October 1973, Hoge Raad, Nederlandse Jurisprudentie, No. 361 (1974), reported in 1 Y.B. Com. Arb. 197 (1976).

10 Judgment of 7 November, 1975, Hoge Raad, Nederlandse Jurisprudentie, No. 174 (1976), reported in 1 Y.B. Com. Arb. 198 (1976).

11 *SEEE v. Banque Mondiale, République de Yougoslavie, Etat Francais*, Judgment of 13 November 1984, Cour d'appel, Rouen, 1985 Revue de l'Arbitrage 115, reported in 11 Y.B. Com. Arb. 491 (1986).

12 Appeal against this decision was dismissed on other grounds by the French Court of Cassation on 18 November 1986, reported in 26 ILM 377 (1987).

13 See also, *supra* note 3, at pp. 28–43.

award may be refused if the respondent can prove that the arbitration agreement is invalid '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.' Even more significant is Article V(1)(e) under which enforcement of an award may be refused if the respondent can prove that the award has been set aside by a court of 'the country in which, or under the law of which, that award was made'. The latter provision in particular indicates that the Convention is built on the presumption that the award is governed by a national arbitration law since the setting aside of an award belongs to the exclusive jurisdiction of the court under whose arbitration law the award is made. The argument that for the 'anational' award the aforementioned provisions of Article V(1)(a) and (e) do not apply, would go against the text of the Convention.

(d) Article V(1)(d) of the New York Convention

It is also argued that Article V(1)(d) would provide a basis for applying the Convention to the enforcement of an award which is not governed by a national arbitration law. That provision declares that the enforcement of an award may be refused if the respondent can prove that:

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

According to the above-quoted text, the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure ranks first; only in the absence of such agreement, the law of the country where the arbitration took place would have to be taken into account.

The drafting history of Article V(1)(d) of the New York Convention could shed some light on this troublesome provision.[14] Under the New York Convention's predecessor, the Geneva Convention of 1927, enforcement of a foreign award could be refused if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with *both* the agreement of the parties *and* the arbitration law of the country where the aribitration took place. The ICC, which took the initiative in establishing the New York Convention, considered one of the main defects of the Geneva Convention of 1927 to be that it provided for enforcement only of those awards that were strictly in accordance with the prodedural law of the country where the arbitration took place. The ICC therefore proposed a Draft Convention in 1953 for the enforcement of truly international awards, ie, arbitral awards which are not governed by any national arbitration law. In the Draft Convention, the present text of Article V(1) (d) was inserted. The concept of truly international arbitration, however,

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14 See also on the construction of Article V(1)(d) in connection with court ordered consolidation of arbitrations my *réplique* to Sigvard Jarvin's comments in *3 Arbitration International* 257 (1987).

was subsequently rejected by the drafters of the Convention. They substituted 'foreign awards' for the wording 'international awards', thereby making references in other provisions of Article V(1) to an applicable national arbitration law. Thereafter, long discussions regarding the text of Article V(1)(d) evolved as to whether enforcement should be refused in cases where the composition of the arbitral tribunal and the arbitral procedure agreed upon by the parties did not follow in all details the requirements of a national arbitration law. As no adequate solution could be found, the Convention's drafters retained the ICC text.

This non-solution inevitably gave rise to problems in practice. This has happened in particular with respect to arbitral awards made in London. Various standard forms for charter-parties provide that each party is to appoint one arbitrator and that the two arbitrators so chosen shall appoint a third arbitrator. Notwithstanding such agreement on the composition of the arbitral tribunal, some respondents decline to appoint an arbitrator. What then happens under English arbitration law may be surprising to foreign practitioners. According to section 7(b) of the English Arbitration Act 1950, if there is a reference to two arbitrators and the respondent does not appoint an arbitrator, the claimant may appoint his nominee as *sole* arbitrator. This provision, which appears to remain good law after the Arbitration Act 1979, is held to apply also to the case where there is a reference to three arbitrators, one to be appointed by the claimant, one to be appointed by the respondent, and the third by the two so chosen, and the respondent does not appoint his arbitrator.[15]

Should enforcement abroad of an English award made by a sole arbitrator appointed by the claimant only in the circumstances described above, be refused on the basis of Article V(1)(d) of the New York Convention? A literal reading of the text of Article V(1)(d) would indeed lead to an affirmative answer as two Italian courts have decided. Without reference to English arbitration law, the Italian courts refused to enforce the English award reasoning that the agreement of the parties on the composition of the arbitral tribunal was not complied with.[16] The Spanish Supreme Court and the U.S. District Court in New York reached an opposite conclusion. Notwithstanding the agreement of the parties on the composition of the arbitral tribunal, these courts upheld the appointment of the sole arbitrator with specific reference to English arbitration law.[17]

It seems to me that the Spanish and U.S. courts represent the better view, *ie,*

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15 See R. Mustill and S. Boyd, *The Law and Practice of Commercial Arbitration in England,* pp. 146–50 (1982).

16 *Rederi Aktiebolaget Sally v. S.r.l. Termarea,* Judgment of 13 April 1978, Corte di Appello, Firenze, reported in 4 Y.B. Com. Arb. 294 (1979); *Efxinos Shipping Co Ltd v. Rawi Shipping Lines, Ltd,* Judgment of 2 May 1980, Corte di Appello, Genova, reported in 8 Y.B. Com. Arb. 381 (1983).

17 *X v. Naviera Y S.A.,* Judgment of 3 June 1982, Tribunal Supremo, Spain, reported in 11 Y.B. Com. Arb. 527 (1986); *Associated Bulk Carriers of Bermuda v. Mineral Import Export of Bucharest,* Judgment of 30 January 1980, U.S. District Court, S.D.N.Y., reported in 9 Y.B. Com. Arb. 462 (1984).

the mandatory rules of the arbitration law of the place of arbitration override an agreement of the parties on the composition of the arbitral tribunal (and the arbitral procedure) under Article V(1)(d) of the Convention as well. If the Italian view were followed, a Scylla and Charybdis situation could arise. In case the agreement of the parties on the composition of the arbitral tribunal is not adhered to, but the mandatory rules of the arbitration law of the place of arbitration are followed, enforcement abroad of the award can, by virtue of the Italian interpretation, be refused under Article V(1)(d). Conversely, if the agreement of the parties on the composition of the arbitral tribunal is adhered to and hence the arbitration law of the place of arbitration is not complied with, the award can be set aside at the place of arbitration. The setting aside at the place of arbitration will have as a consequence that enforcement abroad can be refused under Article V(1)(e) of the Convention ('the award . . . has been set aside . . . by a competent authority of the country in which . . . that award was made'.).

The Italian view could place international arbitration in a no-win situation: whether the agreement of the parties on the composition of the arbitral tribunal or the mandatory provisions of the arbitration law of the place of arbitration are followed, ultimately enforcement can be refused under the New York Convention. Such an unsatisfactory result – which is at odds with the system and purpose of the Convention – will not ensue if the interpretation of the Spanish and U.S. courts is accepted, *ie,* that under Article V(1)(d) of the Convention the mandatory provisions of the arbitration law of the place of arbitration also prevail over an agreement of the parties on the composition of the arbitral trubunal and the arbitral procedure. When the parties and the arbitrators observe these mandatory provisions which deviate from the parties' agreement, enforcement will, according to this interpretaion, not be frustrated in other countries under Article V(1)(d) of the Convention.

(e) Conclusion

The concept of a 'denationalised' arbitration and the ensuing 'anational' award is undoubtedly attractive and deserves more support than it has received thus far. However, the insufficient legal basis and the absence of recognition by most national courts make the agreement for 'denationalised' arbitration a hazardous undertaking full of legal pitfalls. It is therefore not surprising that only in rare instances are such agreements made. In most cases of denationalised' arbitration, the determination as such appears to be made *ex post* by certain commentators favouring this type of arbitration. The parties at the time of concluding the agreement usually had no idea that they were entering into such a daring undertaking. In practice, it is virtually always the understanding of the parties that, if they have provided for arbitration in a certain country, the arbitration law of that country is to govern their arbitration.

The sole realistic approach to providing the 'denationalised' arbitration and hence the 'anational' award with an adequate legal basis seems to be

international conventions. Such a convention is the ICSID Convention which contains a self-sufficient legal regime for a truly international arbitration. As we have seen, such a regime cannot be deemed to have been laid down in the New York Convention which is confined to an enhancement of enforcement of foreign arbitral awards made on the basis of a national arbitration law.

III. EXECUTION AGAINST A STATE

Arbitration under the ICSID Convention necessarily involves a State as a party. What happens if a State is the losing party and is not willing to pay the award? The same question can be asked with respect to non-ICSID awards to which a State is a party and which fall under the New York Convention.

Although the New York Convention does not contain any express provision with respect to awards to which a State is a party, the Convention has invariably been applied to such awards.[18] The ICSID Convention does contain specific provisions to this effect. It was already observed that Article 54(1)-(2) contains provisions on the recognition and enforcement of ICSID awards. Article 54(3) adds:

> Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

The specific provisions with respect to execution aganst a State are set forth in the subsequent Article 55, reading:

> Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

Two aspects need to be emphasised in this connection. First, a distinction must be made between enforcement and execution. Second, a distinction must be made between immunity from jurisdiction and immunity from execution.

(a) Enforcement and Execution

The first aspect is well illustrated by the two court decisions relating to an ICSID award which have been reported thus far. The first case involved a project between the Italian company Benvenuti & Bonfant and the Government of the Congo concerning a plastic bottles manufacturing plant. The project gave rise to disputes between the parties and on the basis of the arbitration clause in the contract, Benvenuti commenced ICSID arbitration. The award was in favour of Benvenuti, but the Congo refused to pay. Benvenuti then located assets of the Congo in France and attempted to have the award enforced and executed there.

At the request of Benvenuti, the President of the *Tribunal de grande instance*

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[18] See *supra* note 3, at pp. 277-82. See also Section (E) of Commentary on Article 1 in *Yearbook Commercial Arbitration*.

(Court of First Instance) of Paris granted recognition of the award, adding, however, the qualification that 'no measure of execution, or even a conservatory measure, can be taken pursuant to said award on any assets located in France without our prior authorisation'. Benvenuti lodged an appeal against this qualification which is common for French courts in cases for recognition and enforcement against foreign States. The Court of Appeal of Paris deleted the qualification in connection with the ICSID award.[19] It argued correctly that a distinction must be made between Article 54 (recognition and enforcement) and Article 55 (execution) of the ICSID Convention, and held that 'the order granting recognition and enforcement to an arbitral award does not constitute a measure of execution but is only a decision preceding possible measures of execution.'[20] According to the Court, Article 54 offers a simplified procedure for recognition and enforcement and restricts the function of a court to ascertaining the authenticity of the award certifed by the Secretary-General of ICSID.

The second case concerns an attempt by the Liberian Eastern Timber Corporation (LECTO) to enforce an ICSID award against the Government of Liberia in New York.[21] In that case, Liberia moved to vacate the judgment entered by the District Court on the award or, in the alternative, to vacate the execution of that judgment on its property located in New York (ie, Liberian registration fees and other taxes due by shipowners and levied by agents appointed by Liberia in New York). The District Court in New York denied the motion to vacate the judgment on the award, but granted the alternative motion to vacate the execution order. With respect to the motion to vacate the judgment, the Court referred to Article 54 'which obligates the United States, as a signatory [to the Convention], to recognise and enforce the pecuniary obligation of the award as if it were a final judgment of a court of the United States.'[22] The court further held with respect to the motion to vacate the judgment that 'Liberia, as a signatory to the Convention, waived its sovereign immunity in the United States with respect to the enforcement of any arbitration award entered pursuant to the Convention'[23] because, having regard to Article 54, 'Liberia clearly contemplated the involvement of the courts of any of the Contracting States, including the United States as a signatory to the Convention, in enforcing the pecuniary obligations of the award.'[24]

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19 *S.A.R.L. Benvenuti et Bonfant v. Government of the People's Republic of the Congo (Benvenuti et Bonfant v. Congo)*, Judgment of 26 June 1981, Cour d'appel, Paris, reported in 20 ILM 878 (1981) and 7 Y.B. Com. Arb. 159 (1982).

20 *Benvenuti et Bonfant v. Congo, supra*, note 19, 20 ILM at p. 881.

21 *Liberian Eastern Timber Co v. Government of the Republic of Liberia (Letco v. Liberia)*, 650 F.Supp. 73 (S.D.N.Y. 1986), reported in 2 ICSID Rev.-FILJ 188 (1987).

22 *Letco v. Liberia, supra*, note 21, 2 ICSID Rev.-FILJ at p. 190.

23 *Ibid* at pp. 190–91.

24 *Ibid* at p. 191. See 22 U.S.C. sec. 1650(a).

(b) Immunity from Execution

The *LETCO* case leads us also to the second aspect mentioned above which concerns the distinction between immunity from jurisdiction and immunity from execution. Enforcement of an award against a State falls under immunity from jurisdiction. Immunity from execution comes into play when actual execution measures are sought against a State.

Theories on restricted immunity and waiver of immunity are now well accepted in a large number of countries with respect to jurisdiction. However, when it comes to actual execution, most States continue to apply absolute immunity. The rather shocking result in practice can be that a private party, after having put all efforts in an arbitration against a State and having obtained a judgment or leave for enforcement on the award in his favour, finds himself unable to collect the money to which he is entitled under the award.[25]

It is submitted that it is rather illogical that in matters of arbitration a waiver of immunity is accepted with respect to jurisdiction but not with respect to execution. If a State agrees to arbitration, it must be deemed to have accepted all its consequences, including compliance with an unfavourable award. If in the latter case it does not carry out the award, the State's assets, like assets of a private person, should be capable of execution. In other words, waiver of immunity from jurisdiction should imply waiver of immunity from execution. This rule is nothing other than an application of the principle of *pacta sunt servanda*.

One can only surmise which are the reasons for this incongruity. The continued absolute immunity from execution is apparently based on political and economic considerations. Execution is commonly felt to be a 'more intensive interference with the rights of a State.'[26] From the ecomomic point of view, restrictive immunity principles applied to execution could result in foreign States refraining from investment in countries in which they know their property could be subject to execution.

In those states where the doctrine of restrictive immunity is applied to execution, different tests are either cumulatively or alternatively used for determining whether immunity from execution can be invoked, ie, the 'nature-of-funds' test (used for sovereign or commercial purposes) and the 'nature-of-activity' test (sovereign or commercial activity). In my view, these tests should not be applied to the question of immunity from execution in the case of arbitration. Once a State has accepted arbitration, it must be deemed to have waived immunity, including immunity from execution (with the possible exception of military and similar objects).

Even if one accepts the use of these tests, in practice it appears to be difficult

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[25] See generally Bernini and van den Berg, *The Enforcement of Arbitral Awards Against a State: The Problem of Immunity from Execution, Contemporary Problems in International Arbitration* 359 (J. Lew ed. 1986).

[26] K. H. Böckstiegel, *Arbitration and State Enterprises* 50 (1984).

to satisfy them. An example is the above-mentioned *LETCO* case.[27] The U.S. District Court in New York granted Liberia's alternative motion to vacate the execution upon the registration fees and taxes due from ships flying the Liberian flag because they are 'intended to serve as revenues for the support and maintenance of governmental functions [which] are an exercise of powers particular to a sovereign'.[28] Another example is the English *Alcom* case.[29] Alcom sought execution against the Colombian Embassy's accounts in London. The House of Lords held that attachment can be made if it is shown that the funds on the account are earmarked solely for discharge of liabilities under commercial transactions. This will not be easy to prove, certainly not when the Ambassador's certificate was held to constitute conclusive evidence on this question.

Switzerland is one of the few countries where the theory of immunity from jurisdiction is extended to immunity from execution. LIAMCO therefore believed that it could execute its award against Libya on the latter's assets in Switzerland. Yet the Swiss *Tribunal Fédéral* refused to grant execution, reasoning that the legal relationship in respect of which the award was rendered was not connected with Switzerland. The fact that the sole arbitrator had been sitting in Geneva did not fulfill the requirement of what is called by the Swiss highest court a *Binnenbeziehung* (inner connection).[30]

The ICSID Convention unfortunately does not solve the question of immunity from execution since, as noted above, Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution. As a practitioner acting for foreign private parties, one is therefore left with almost no choice but to insist on including a clause explicitly waiving immunity from execution in a contract with a State. ICSID recommends for this purpose the following model clause:

> The [name of Contracting State] hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a Tribunal constituted pursuant to this Agreement, including, without limitation, immunity from service of process, immunity from jurisdiction of any court, and immunity of any of its property from execution.[31]

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27 See, *supra* note 21.

28 *Letco v. Liberia, supra,* note 21, 2 ICSID Rev.-FILJ at p. 192. See also *Liberian Eastern Timber Co v. Government of the Republic of Liberia,* 659 F. Supp. 606 (D.D.C. 1987) where the court quashed writs of attachment to bank accounts of the Republic of Liberia, holding that under both the Vienna Conventions and the Foreign Sovereign Immunities Act bank accounts used for the diplomatic mission were immune from attachment.

29 *Alcom Ltd v. Republic of Colombia,* [1984] A.C.580

30 *Socialist People's Libyan Arab Republic Jamahiriya v. Libyan American Oil Co,* Judgment of 19 June 1980, Tribunal fédéral, Switz., reported in 6 Y.B. Com. Arb. 151 (1981).

31 ICSID Model Clauses, Doc. ICSID 5/Rev. 1, at cl. XIX, reprinted in 9 Y.B. Com. Arb. 173 (1984).

IV. PRE-AWARD ATTACHMENT

Attachment of the assets of the debtor before or during an arbitration can be important for a creditor to ensure future enforcement of the award if it is favourable to him or to enhance possible settlement of the dispute. A pre-award attachment usually results in the provision of a bank guarantee for compliance with the award on account of the debtor. If no pre-award attachment is available, an award in favour of a creditor may turn out to be a Pyrrhic victory. At that time the debtor may well have 'sheltered' his assets in another jurisdiction. It is, therefore, with concern that practitioners view certain case law under both the New York and ICSID Conventions which tends to thwart pre-award attachment.

(a) The New York Convention

The New York Convention does not contain express provisions on the matter of attachment. Thus, the availability and procedure depend on the law of the court before which the attachment is requested.

No court has doubted that an attachment in connection with the enforcement of an arbitral *award* is compatible with the New York Convention in order to secure payment under the award.

There also seems to be no doubt as to the possibility of a *pre-award* attachment. However, doubts have arisen in the United States in a fairly large number of cases as to the compatibility of pre-award attachment with the New York Convention. The doubts originate in an unfortunate decision by the U.S. Court of Appeals for the Third Circuit in *CEAT SpA v. McCreary Tire & Rubber Co.*[32] The Court of Appeals was of the view that:

> Resort to a Praecipe and Complaint in Foreign Attachment in the Court of Common Pleas of Pennsylvania is a violation of McCreary's agreement to submit the underlying disputes to arbitration . . . The Convention obliges the District Court to recognise and enforce the agreement to arbitrate. Quite possibly foreign attachment may be available for the enforcement of an arbitration award. This complaint does not seek to enforce an arbitration award by foreign attachment. It seeks to bypass the agreed upon method of settling disputes. Such a bypass is prohibited by the Convention if one party to the agreement objects. Unlike sect. 3 of the federal Act, article II(3) of the Convention provides that the court of a contracting state shall 'refer the parties to arbitration' rather than 'stay the trial of the action.' The Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate. Thus the contention that arbitration is merely another method of trial, to which state provisional remedies should equally apply, is unavailable. . . . The obvious purpose of the enactment of Pub.L. 91-368 [*ie,* the law implementing the Convention in the United States], permitting removal of all cases falling within the terms of the treaty, was to prevent the vagaries of state law from impeding its full implementation. Permitting a continued resort to foreign attachment in breach of the agreement is inconsistent with that purpose.[33]

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[32] *McCreary Tire & Rubber Co v. CEA T*, 501 F.2d 1032 (1974), reported in 1 Y.B. Com. Arb. 204 (1976).

[33] *McCreary Tire & Rubber Co v. CEA T, supra,* note 32, 501 F.2d at p. 1038.

It is submitted that the *McCreary* decision is based on the wrong presumption that Article II(3) of the Convention completely divests the courts of the Contracting States of their jurisdiction.[34] The effect of Article II(3) is merely that the courts have no jurisdiction to hear the *merits* of a dispute. The Convention has only the limited purpose of facilitating the enforcement of the arbitration agreement and award on the international level. It does not provide for a self-sufficient system of settling disputes beyond the reach of domestic law. To the contrary, the Convention only applies to arbitration and awards which are governed by a domestic law on arbitration. It means that, as in domestic arbitration cases, the courts retain their auxiliary powers in cases falling under the Convention to assist arbitration, eg, for the appointment and challenge of the arbitrator, the summoning of unwilling witnesses and the ordering of provisional remedies including attachment.

No contrary inference can be drawn from the use of the word 'refer' in Article II(3) of the New York Convention rather than 'stay the court action'. The word 'refer' is used for historical reasons and its technical procedural sense must be deemed as a court directive staying the court proceedings on the merits.[35]

The *McCreary* decision is apparently inspired by the general 'pro-enforcement-bias' of the U.S. courts in the United States towards the Convention. The Third Circuit attempted in that decision to eliminate the 'vagaries of state law from impeding [the Convention's] full implementation'. However, this understandable concern overlooks the distinction between procedural and substantive law. As mentioned, the courts must be deemed to retain their jurisdiction in respect of procedural measures in aid of arbitration.

In another U.S. decision *(Cooper v. Ateliers de la Motobécane)*[36] the court said that attachment may be unnecessary in the arbitration context because '[a]rbitration, as part of the contracting process, is subject to the same implicit assumptions of good faith and honesty that permeate the entire relationship.'[37] This opinion is, with due respect, contrary to practice. Practice shows that by the time the award is rendered, the assets of the debtor may well have disappeared to some jurisdiction where the award cannot be enforced under the Convention or have been transferred to a third party.

Some courts in the United States make a distinction between maritime cases, in which pre-award attachment is permitted, and other cases in which it would not be available. Other courts in the United States do not share the restricted

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34 Article II(3) of the New York Convention provides: 'The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed'.

35 See van den Berg, *supra,* note 3, at pp. 128–32.

36 *Robert R. Cooper v. Ateliers de la Motobécane S.A.,* Judgment of 18 November, 1982, 456 N.Y.S. 2d 728 (1982), reported in 9 Y.B. Com. Arb. 482 (1984).

37 *Cooper v. Ateliers de la Motobécane, supra,* note 36, 9 Y.B. Com. Arb. at p. 483. See also Drexel Bornham Lambert, Inc. v. H and W Ruebsaman. New York Law Journal, 28 July 1988, p. 17

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interpretation and allow pre-award attachment in all cases falling under the Convention.[38]

The United States courts are divided over the question of pre-award attachment.[39] If this situation continues, it may backfire on the general 'pro-enforcement-bias' of the courts in the United States because the unavailability of pre-award attachment may deter parties from agreeing to international arbitration. It is regrettable that the U.S. Supreme Court denied *certiorari* in the *Cooper* case. The question has caused concern inside and outside the United States as it may seriously set back the achievement of the U.S. courts favouring international arbitration. In view of the divergent decisions, the question seems ripe for a Supreme Court decision that will put an end to the present uncertainty.

(b) The ICSID Convention

Turning to provisional measures and the ICSID Convention, this Convention provides in Article 47:

> Except as the parties otherwise agree, the [Arbitral] Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

Does this provision confer the power on ICSID arbitrators to deal with provisional or conservatory measures to the exclusion of a national court? One is inclined to think that the answer is negative in view of the word 'recommend' (rather than 'order' or words to the same effect).

It is argued that an affirmative answer can be inferred from Article 26 of the ICSID Convention. That article reads:

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration *to the exclusion of any other remedy* . . . (Emphasis added).

The word 'remedy', in my view, means in this context that no court proceedings on the *merits* can take place if ICSID arbitration is agreed to. It does not mean that a State court may not assist an ICSID arbitration. If it were otherwise, enforcement by a State court of an ICSID award would not be possible either – which is clearly not in accordance with the text of the Convention (see Article 54). In any case, if the drafters of the ICSID Convention wished to exclude conservatory or provisional measures by a State court, they should have provided so in unambiguous terms since these measures

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[38] See *eg, Carolina Power & Light Co v. G.I.E. URANEX,* 451 F.Supp. 1044 (N.D. Cal. 1977), reported in 4 Y.B. Com. Arb. p. 336 (1979).

[39] See for an index on all reported U.S. decisions concerning pre-award attachment, International Council for Commercial Arbitration, Yearbook Key 1987 at 92 (Yearbook Key accompanying volume 12 of Yearbook Commercial Arbitration).

in aid of arbitration are generally world-wide recognised measures that can be ordered by the courts.[40]

The Belgian and Swiss courts in the *MINE v. Guinea* case[41] held that in case of ICSID arbitration only the arbitrators can decide on provisional measures to the exclusion of national courts. The courts of these countries based their reason primarily on the above-mentioned Article 26 of the Convention.

In these decisions reference is also made to an article by Georges Delaume[42] in which he observes that 'when a State accepts to submit a dispute to ICSID arbitration and accordingly provides an investor the possiblity of access to an international forum, this State should not be exposed to other measures of pressure or to other recourse.'[43] Delaume further argues that, 'having regard to the exclusive nature of ICSID, the Convention thus implies that if the parties wish to retain the possibility to apply to local or judicial authorities with the purpose of obtaining [conservatory] measures, they should do so by means of an appropriate agreement.'[44] He concludes that in the absence of such an agreement, ICSID arbitrators are exclusively competent for ordering provisional or conservatory measures.

With due respect, one fails to see why a State should be treated differently from a private party in this respect. Leaving aside that Delaume's view does not find explicit support in the text of the Convention itself, if a State participates in international arbitration, it should be deemed to have assumed the same responsibilities as a private party.

Furthermore, if ICSID arbitrators were to be exclusively competent for ordering provisional measures, the ordering of these measures may prove to be illusory. A threshold question is whether an order of ICSID arbitrators to this effect is enforceable through State courts in the same manner as an arbitral award under Articles 53–55 of the ICSID Convention. Even assuming that the order can be enforced on the basis of these provisions, the exclusivity may defeat effectiveness in many cases in practice. Attachment is a matter of days or even

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40 See, *eg*, art. 1074 (2) of the Netherlands Arbitration Act 1986 in regard of an agreement providing for arbitration outside the Netherlands: 'The agreement mentioned in paragraph (1) shall not preclude a party from requesting a court in the Netherlands to grant interim measures of protection, or from applying to the President of the District Court for a decision in summary proceedings in accordance with the provisions of art. 289. (Translation taken from P. Sanders and A. J. van den Berg, *The Netherlands Arbitration Act 1986 (1987)*).

41 *Republic of Guinea and its Public Institutions v. Maritime International Nominees Establishment*, Judgment of 27 September 1985, Tribunal of First Instance, Antwerp, English translation in 1 ICSID Rev.-FILJ 380 (1986) and in 12 Y.B. Com. Arb. 181 (1987); *Maritime International Nominees Establishment v. The Republic of Guinea*, Judgment of 13 March 1986, Tribunal of First Instance, Geneva, English translation in 1 ICSID Rev.-FILJ 383 (1986) and in 12 Y.B. Com. Arb. 514 (1987) and Judgment of 7 October 1986, Autorité de Surveillance des Offices de Poursuite, Geneva, 2 ICSID Rev.-FILJ 170 (1987) and 26 ILM 382 (1987).

42 Delaume, *Le CIRDI et l'immunité des Etats*, 1983 Revue de l'Arbitrage 143.

43 *Ibid*, at p. 145.

44 *Ibid*, at p. 157.

hours. If a party applies to arbitrators for an order for conservatory attachment, the other party will be notified. It takes some time to convene arbitrators who live in different countries around the world and to render the order, and even more time to have the award enforced through a State court. In the interval, the debtor may have taken steps to safeguard his assets from the attachment.

Arbitration practitioners acting for private parties may find some comfort in the decision of the French Court of Cassation in *Atlantic Triton Company v. Guinea*.[45] The French Supreme Court held that the ICSID Convention does not exclude the power of a State Court to order conservatory measures in connection with an ICSID arbitration unless such measures by State courts are excluded by express agreement of the parties. The Court of Cassation explicitly rejected the argument based on Article 26, reasoning that its text does not expressly exclude the power of a State court to order conservatory measures.

Nevertheless, on 26 September 1984, the Administrative Council of ICSID decided to amend the ICSID Arbitration Rules by adding a new paragraph 5 to Rule 39, reading:

> Nothing in this Rule shall prevent the parties, *provided that they have so stipulated in the agreement recording their consent,* from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding, for the preservation of their respective rights and interests. (Emphasis added).

The revised Rules apply only to consent given after 26 September, 1984, unless the parties agree otherwise (Article 44, ICSID Convention). This amendment means that parties must specifically agree on the jurisdiction of State courts to order provisional or conservatory measures. ICSID recommends for this purpose the following model clause:

> The consent to arbitration recorded in [identify the Basic Clause] shall not preclude any party hereto from taking, or requesting any judicial or other authority to order, any provisional or conservatory measure, including attachment, prior to the institution of the proceeding or during the proceeding, for the preservation of its rights and interests.[46]

V. CONCLUDING REMARKS

Although the majority of international arbitrations are concluded successfully, some practical problems are encountered at the enforcement stage. The three problems discussed above may, however, be avoided through forethought and appropriate action.

'Anational' awards, in the author's view, do not fall within the ambit of the New York Convention. It is, therefore, not advisable to agree to

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[45] *Atlantic Triton Co v. Republic of Guinea and Soguipêche*, Judgment of 18 November 1986, Cour de Cassation, France, reported in 12 Y.B. Com. Arb. 183 (1987) and 2 ICSID Rev.-FILJ 182 (1987).

[46] See ICSID, *supra*, note 31, at cl. XVI.

'denationalised' arbitration, unless such arbitration is based on an international convention such as the ICSID Convention for investment disputes.

The question of execution of arbitral awards against a State is a common problem under both the New York and ICSID Conventions. This difficulty can be overcome if legislation or case law in various countries evolves to extend the currently recognised waiver of immunity from jurisdiction to encompass as well a waiver of immunity from execution for arbitral awards. For the time being, it is recommended to include in a contract with a State a clause explicitly waiving immunity from execution.

The third question of pre-award attachment is, insofar as the New York Convention is concerned, a false problem. It is limited to certain courts in the United States which misconceive the Convention in this one respect. It may be that a decision of the U.S. Supreme Court is needed to put an end to the unnecessary confusion.

The question of pre-award attachment is more troublesome for ICSID arbitration. The 1984 amendment of Article 39 of the ICSID Arbitration Rules suggests that the problem can now be solved only on the basis of a specific agreement of the parties authorising pre-award attachment by a State court. When agreeing to ICSID arbitration, parties are, therefore, advised to consider a clause to this effect. □