Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few

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Introduction

In approximately 10% of the reported cases involving the New York Convention, a court has refused enforcement of a foreign arbitral award. That is not a bad result for an international convention to which more than 120 states are party. However, the question may be asked whether any conclusion can be drawn from the 10% of refusals of enforcement. It is the purpose of this contribution to examine this question.

The review of the cases below is based on the court decisions reported in the Yearbook Commercial Arbitration in the Volumes I (1976) through to XXIII (1998). It does not include decisions by lower courts refusing enforcement that have been overturned on appeal. The review is divided into two parts: Part I concerns the grounds for refusal of enforcement listed in Article V of the Convention; Part II examines other reasons for which courts have refused enforcement of an arbitral award under the Convention.

The review is limited to the request for enforcement of the arbitral award. It does not include the request to refer parties to arbitration pursuant to Article II(3) of the Convention. That matter will be the subject of a future contribution. Suffice it to say that the general picture is not different with respect to the interpretation and application of Article II(3) and related provisions in the Convention.

The review may create the impression that there is something terribly wrong with the New York Convention. The contrary is true. The courts in the contracting states interpret and apply the Convention in a manner that is quite favourable for international arbitration. The review below concerns the "unfortunate few" of the 10% enforcement cases.

I – Grounds for refusal of enforcement listed in Article V

A. Grounds for refusal of enforcement under Article V in general

Article V is divided into two parts. The first paragraph of Article V lists the grounds for refusal of enforcement, which are to be proven by the respondent. The second paragraph of Article V, which concerns violation of public policy under the law of the forum, lists the grounds on which a court may refuse enforcement on its own motion.

The overall scheme of Articles IV-VI is the facilitation of the enforcement of the award. The scheme reflects a "pro-enforcement bias." The three main features of the grounds for refusal of enforcement of an award under Article V are:

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

These main features are universally endorsed by the courts, except for three which have ventured deviating views leading to a refusal of enforcement.

The Supreme Court of Queensland believed that the grounds for refusal of enforcement listed in Article V left it discretion to refuse enforcement on other grounds.[1] The Court based this view on the wording of section 8(2) of the International Commercial Arbitration Act 1974, which implements the New York Convention in Australia, providing: "Subject to this part, a foreign award may be enforced in a court of a State or territory as if the award has been made in the State or territory in accordance with the law of that State or territory." Further, section 8(5) of the Act omits the word "only" which, in contrast, appears in the opening words of Article V of the Convention ("Recognition and enforcement of the award may be refused at the request of the party against whom it is invoked only if that party furnishes..."). In so deciding, the Court in Queensland failed to take into account that the grounds for refusal of enforcement listed in the Convention are exhaustive. The problem seems to be caused by an Australian implementing act which is deficient in this respect.[2]

In a 1981 case, the Italian Supreme Court required the petitioner to prove the existence of the arbitral clause (ground (a)), thereby reversing the burden of proof under the Convention. The petitioner failed to do this and enforcement was refused.[3]

The Court of First Instance in Athens similarly refused enforcement. It decided in an interim decision in 1983 that it could not determine whether the arbitration agreement was valid under the law of the State of New York – the place where the award was made – since the party seeking enforcement had not produced the relevant statutory provisions together with a Greek translation (ground (a) of Article V(1)).[4]

1 Supreme Court of Queensland, 29 October 1993, *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums (Australasia) Pty Ltd.*, reported in *YB Comm. Arb.* XX (1995), pp. 628-50 (Australia No 11, sub 44-45, 59-60). See also note 59.

2 One of the other reasons that led the Supreme Court of Queensland to conclude that the Court had a residual discretion to refuse enforcement under the Convention was that "in the United States of America, it has been held that the 'defences' to an application to enforce a foreign award were not limited to specific matters referred to in the Convention," thereby referring to a decision of the District Court in New York of 1 September 1989, *Dworkin-Cosel Interair Courier Services v. Daniel Avraham*, reported in *YB Comm. Arb.* XVI (1991), pp. 624-29 (US No 105). That reference seems to be equally mistaken. The case concerned the setting aside of an arbitral award and the question whether the award, made in New York, was final and binding under federal arbitration law.

3 Corte di Cassazione, 26 May 1981, No 3456, *Vicere Livio v. Prodexport*, reported in *YB Comm. Arb.* VII (1982), pp. 345-6 (Italy No 47). See also note 77.

4 Court of First Instance, Athens, Decision No [illegible] of [illegible], *Charterer v. Shipowner*, reported in *YB Comm. Arb.* XIV (1989), pp. [illegible] (Greece No [illegible]).

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

On this ground, enforcement may be refused if the respondent asserts and proves that the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or if 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.

Most of the cases in which there was something wrong with the arbitration agreement are decided at the stage of enforcement of that agreement under Article II(3) of the Convention. When it comes to enforcement of the award, there are four cases only in which enforcement was refused.[5]

In one case the Greek Supreme Court denied enforcement, holding that the lack of a written power of attorney to conclude the arbitration agreement on the principal's behalf could have been remedied if the principal had appeared before the arbitrators and had participated in the proceedings without making any reservation.[6]

In two cases, the arbitration agreement itself was found to be lacking. The US District Court in Hawaii held that there was no arbitration agreement in writing within the meaning of the Convention between the International Amateur Athletic Federation (IAAF) and the sprinter Harry Reynolds in a drug-test case.[7]

In a second such case, the Court of Appeal in Florence considered the clause "eventual arbitration to be performed in London according to English law" to be ambiguous.[8] According to the Court, the clause only meant that the parties foresaw the possibility of referring a dispute to arbitration on the basis of a second agreement.

Finally, the Moscow District Court refused to enforce an ICC award because the arbitration agreement had not been validly assigned to the claimant in the arbitration (although the claimant belonged to the same group of companies).[9]

Article V(1)(a) has not been relied upon explicitly by the courts in relation to a defence of a state or its agencies that it lacked capacity to agree to arbitration (which defence is nowadays virtually never accepted). One of the few examples is offered by a decision of the Administrative Tribunal of Damascus of 31 March 1988.[10] The case concerned a contract for the construction of a military hospital in Syria between the French company Fougerolle and the Syrian Ministry of Defence. A dispute ensued and, according to the arbitration clause in the contract, ICC arbitration took place in Geneva. Two awards resulted therefrom. Both were in favour of Fougerolle. When it came to enforcement in Syria, enforcement was refused. The Administrative Tribunal held: "In the present case, the two awards for which enforcement is sought were rendered without the preliminary advice on the referral of the dispute to arbitration, which must be given by the competent Committee of the Council of State. Consequently, Article 44 of the Law No 55 of 1959 of the Council of State has been violated. This norm is mandatory and pertains to public policy. The consequence of this violation is that [the two ICC awards] are non-existent..."[11] However, cases like this one are becoming increasingly rare. Rather, national laws and courts distinguish between domestic and international transactions.

5 See also Section 6.

6 Areios Pagos [Supreme Court], 14 January 1977, Decision No 88, *Agrimpex SA v. J.F. Braun & Sons Inc.*, reported in *YB Comm. Arb.* IV (1979), p. 269 (Greece No 5).

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

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

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

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

11 Article 44 of the Law No 55 of 1955 of the Council of State reads: "No Ministry or State organization may conclude, accept or authorize a contract, a compromise or an arbitration or execute an arbitral award of more than Syrian £ 45,000 without the prior advice of the competent Committee."

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

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

When considering ground (b) of Article V(1), a US Court of Appeals (Second Circuit) stated: "[T]his provision essentially sanctions the application of the forum state's standards of due process."[12] This statement phrases concisely the object of ground (b). It concerns the fundamental principle of procedure – that of a fair hearing and adversary proceedings – also referred to as *audi alteram partem*. Although enjoying great popularity amongst respondents, Article V(1)(b) has seldom been found to be violated. An overview of the cases in which due process was held not to have been observed is the following.

In a case before the Court of Appeal in Cologne, the parties had referred to certain arbitration rules in the grain trade in Copenhagen that provided that the names of the arbitrators were not to be made known to the parties.[13] Not surprisingly, the Court found that such ghost arbitration violated the fundamental requirements of due process, and refused enforcement.

In a case before the Court of Appeal in Hamburg, the claimant had submitted a letter to the arbitrator, who had failed to communicate it to the defendant.[14] The Court of Appeal considered that a violation of due process exists if it cannot be excluded that the arbitrator would have reached a more favourable result for the defendant, if the event complained of had not occurred. In the case at issue, the Court found that a more favourable result could not be excluded, and refused enforcement.

A US case involved a bank which was a mortgagee in possession of a ship that had been arrested in Boston. The bank had agreed to deposit a security for the claims of the charterer against the owner. The bank was kept virtually uninformed of the subsequent arbitration proceedings in Madrid. When the charterer sought enforcement of the award against the security deposited by the bank, the District Court in Massachusetts refused enforcement, reasoning that the bank had not received proper notice of the arbitration proceedings.[15]

The Court of Appeal in Naples refused enforcement of an award made by the Arbitration Board of the Commodity Exchange in Vienna, finding that the notice period of one month given to the Italian respondent to attend the hearing in Vienna was insufficient, as during exactly that period the area where the respondent was located was hit by a major earthquake.[16]

The Court of First Instance in Bremen refused enforcement of an award made in London because the German party against whom enforcement was sought had not been informed of the arguments of the opposing party.[17] The reported facts of the case indicate that the German party submitted documents to the arbitral tribunal and had no further communication from the arbitrators until he received an award.

The Court of Appeal in Amsterdam denied enforcement of an award made in London under the Arbitration Rules of the Cocoa Association.[18] In that case, the French claimant had submitted to the arbitral tribunal a Statement of Claim without sending a copy thereof to the Dutch defendant, nor had the arbitral

12 US Court of Appeals for the Second Circuit, 23 December 1974, *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier (rakta)*, reported in *YB Comm. Arb.* I (1976), p. 205 (US No 7).

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

14 *Oberlandesgericht* [Court of Appeal], Hamburg, 3 April 1975, *US Firm P v. German Firm F*, reported in *YB Comm. Arb.* II (1977), p. 241 (Germany No 11). The Court held the Convention inapplicable for reasons of lack of retroactive applicability (see Section 0 of Part II), but the result would undoubtedly have been the same if the Convention had been applied.

15 US District Court, District of Massachusetts, 28 December 1989, *Sesostris SAE v. Transportes Navales SA and m/v unamuno*, reported in *YB Comm. Arb.* XVI (1991), pp. 640-45 (US No 108).

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

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

18 *Gerechtshof* [Court of Appeal], Amsterdam, 16 July 1992, *G.W.L. Kersten & Co. BV v. Société Commerciale Raoul-Duval et Cie.*, reported in *YB Comm. Arb.* XIX (1994), pp. 708-09 (Netherlands No 16).

tribunal forwarded a copy of that document to the Dutch defendant. The Court of Appeal held that this course of events constituted a violation of a fundamental procedural right. The Court of Appeal considered it irrelevant that, prior to the commencement of the arbitration, the French claimant had informed the Dutch defendant briefly by telex about his allegations.

The US Court of Appeals for the Second Circuit dealt with an eventful arbitration conducted before the Iran-US Claims Tribunal in The Hague (*Iran Aircraft Industries v. Avco*).[19] At the pre-hearing conference, the chairman of the Arbitral Tribunal specifically advised Avco not to burden the Tribunal by submitting "kilos and kilos of invoices" and, instead, approved the method of proof proposed by Avco, namely the submission of Avco's audited accounts receivable ledgers. Neither counsel for the Iranian party nor the Iranian arbitrator attended the pre-hearing conference. Thereupon, Avco submitted an *affidavit* which verified that the accounts receivable ledgers submitted by Avco tallied with Avco's original invoices. By the time the hearing on the merits took place, the chairman of the Arbitral Tribunal had resigned and had been replaced by another chairman, whilst at this stage the Iranian arbitrator was present. At that hearing, the Iranian arbitrator asked counsel for Avco what his position was with respect to the invoices. Counsel for Avco then recalled the pre-hearing conference. In the arbitral award, the Tribunal disallowed those of Avco's claims which were documented by its audited accounts receivable ledgers, stating: "[T]he tribunal cannot grant Avco's claims solely on the basis of an affidavit and a list of invoices, even if the existence of the invoices was certified by an independent audit" (American arbitrator dissenting). The US Court of Appeals observed: "Thus, Avco was not made aware that the Tribunal now required the actual invoices to substantiate Avco's claim. Having thus led Avco to believe it had used a proper method to substantiate its claim, the Tribunal then rejected Avco's claim for lack of proof. We believe that by so misleading Avco, however unwittingly, the Tribunal denied Avco the opportunity to present its claim in a meaningful manner." One of the judges of the Court of Appeals dissented, observing that in the face of the questioning by the Iranian arbitrator, Avco was placed on notice of the possible risk that the panel would choose not to rely on invoice summaries.[20]

Finally, the Supreme Court of Hong Kong (High Court) found that the China International Economic and Trade Arbitration Commission (CIETAC) had not given the respondent an opportunity to comment on the reports of the expert appointed by the tribunal.[21] As expressed in the legal opinion in support of respondent's position in the enforcement proceedings, the expert reports "were delivered too late, and the award was issued too soon."

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

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

Under this ground, enforcement may be refused if the respondent asserts and proves that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. Ground (c) contains the proviso that if the decisions on matters submitted to arbitration can be

19 US Court of Appeals, Second Circuit, 24 November 1992, *Iran Aircraft Industries and Iran Helicopter Support and Renewal Company v. Avco Corporation*, reported in *YB Comm. Arb.* XVIII (1993), pp. 596-605 (US No 143).

20 The Iran-US Claims Tribunal in turn censured the US Court of Appeals for this decision in a resulting case brought by Iran against the United States: "By virtue of the refusal by the United States Court of Appeals for the Second Circuit to enforce the *Avco* award, the United States has violated its obligation under the Algiers Declarations to ensure that a valid award of the Tribunal be treated as final and binding, valid, and enforceable in the jurisdiction of the United States" [emphasis added]. The Tribunal ordered the United States to pay Iran the amounts awarded against Avco. Award No 586-A27-FT dated 5 June 1998. It is submitted that, in reaching this decision, the Iran-US Claims Tribunal ventured some remarkable views regarding international arbitration in general and the New York Convention in particular. It believed that the US Court of Appeals was dealing with "a readjudication of the merits of Tribunal awards" (Decision para. 63). The US Court of Appeals, however, dealt with a matter of procedure, *i.e.*, how the Tribunal directed the claimant to proceed in the arbitration. The Tribunal also stated: "[I]t is difficult for the Tribunal to believe that any of its awards could fall within the scope of Article V of the New York Convention." (Decision para. 64). The Tribunal does not give any support for that statement other than that "... the New York Convention does not exempt the United States from liability if its courts deny enforcement of an award that should, by virtue of the Algiers Declarations, have been enforced." [emphasis added.] The authority for that proposition is an earlier decision of the Tribunal itself. In a footnote (No 6), it is observed: "The Tribunal recognizes that no tribunal can declare itself immune from procedural error or the possibility of fraud, forgery, or perjury that it may not detect. In such hypothetical cases, however, revision of the award could be done only by the Tribunal, if it concluded that it had the authority to do so, not any other court." [emphasis added.] Thus, the Tribunal adheres to the startling proposition that it can be the judge of its own procedural errors. Any other international arbitration has a control mechanism, be it Article V of the New York Convention, a possibility of setting aside in the country of origin, or in the case of international arbitration detached from any national arbitration law, a separate and independent *ad hoc* annulment committee as is provided in Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965.

separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.

Enforcement of the arbitral award was refused for excess of jurisdiction by the arbitral tribunal in one of the reported cases only. The case was decided by the courts in Hong Kong.[22] The arbitration clause provided for arbitration in Malaysia and read in relevant part: "All disputes as to quality or condition of rubber or other disputes arising under these contract regulations shall be settled by arbitration." The arbitrators awarded a claim for non-payment by reason of a failure to open a letter of credit as required by the contract. The party resisting enforcement asserted that the arbitration clause applied only to claims based on quality, size and weight. The High Court in Hong Kong rejected that allegation, reasoning that "the draftsmen intended something by adding the words 'or other disputes arising under these contract regulations.' Payment is a crucial element in all contracts for the sale of goods and I cannot conceive that it was intended that quality claims should be arbitrated but that claims for non-acceptance and non-payment should be litigated with all delay that this can entail in certain jurisdictions." The Court of Appeal reversed. It reasoned that the "contract regulations" covered specific provisions but did not include the letters of credit. The Court of Appeal noted: "The court is not entitled to ignore any of these words [*i.e.*, 'or other disputes arising under these contract regulations']. No more is it entitled to write a fresh arbitration clause for the parties on the footing that so to do would render it more efficacious from a business point of view and enable all disputes arising under one or more of the agreements to be dealt with by the same tribunal."

In another case, partial enforcement was granted under the relevant clause of ground (c). The Italian Court of Appeal of Trento, which considered an award rendered in Syria based on an arbitration agreement providing for arbitration in Syria in respect of "non-technical" disputes and for arbitration under the ICC Rules in respect of "technical" matters, adopted a simple yardstick: finding that the Syrian arbitrators had decided not only on "non-technical" matters but also on "technical" matters, and that only the arbitrators' decisions in respect of the "non-technical" matters were to be enforced, it held that before a certain date the disputes were "non-technical" in nature (*i.e.*, delay in delivery); thereafter they were "technical."[23]

Both cases show that the refusal of enforcement could have been avoided if the parties had drafted an appropriate text for the arbitration clause.

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

Under this ground, enforcement may be refused if the respondent asserts and proves 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. Thus, according to its text, the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure ranks first, and only failing an agreement on these matters, the arbitration law of the country where the arbitration took place must be taken into account.

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

22 High Court, 28 November 1990, and Court of Appeal, 18 January 1991, *Tiong Huat Rubber Factory (SDN) BHD v. Wah-Chang International Company Limited and Wah-Chang International Corporation Limited*, reported in *YB Comm. Arb.* XVII(1992), pp. 516-524 (Hong Kong No 1).

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

Under the New York Convention's predecessor, the Geneva Convention of 1927, enforcement of the award could be refused if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with either the agreement of the parties or the law of the country where the arbitration took place. The International Chamber of Commerce, which took the initiative in establishing a new Convention, considered the Geneva Convention's main defect to be that it provided for the enforcement of only those awards that were strictly in accordance with the procedural law of the country where the arbitration took place. The ICC therefore proposed a Draft Convention in 1953 for the enforcement of truly international awards, *i.e.*, arbitral awards which are not governed by a national arbitration law, in which the present text of ground (d) was inserted (*Bulletin,* Vol. 9/N°1, May 1998). The concept of truly international arbitration was subsequently rejected by the drafters of the Convention, who substituted the wording "foreign awards" for "international awards," thereby making references in Article V(1) to an applicable national arbitration law. The drafters recognized, however, that enforcement could be frustrated if it were to be refused in cases where the composition of the arbitral tribunal and the arbitral procedure agreed upon by the parties did not follow in all details the requirements of a national arbitration law. Various solutions to this problem were proposed, but the final result of the long discussions was that the ICC text was retained.

Although ground (d) has given rise to extensive comments in scholarly writing, it has led to a refusal of enforcement in only three cases.

The first case where the composition of the arbitral tribunal was found not to be in accordance with the agreement of the parties, although it was in accordance with the law of the country where the arbitration took place, is a decision of the Court of Appeal in Florence.[24] The case involved a charter party (Exxonvoy 1969) between a Finnish charterer and an Italian shipowner, which provided in clause 24 that: "Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London, whichever place is specified in Part I of this Charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any of two of the three on any point or points shall be final..." The arbitral clause further contained details as to how the three arbitrators had to be appointed, including provisions for the case that the second was not appointed by the respondent and the case that the two arbitrators could not reach agreement on the third arbitrator. In the latter circumstance the third arbitrator was to be appointed by the "Judge of any court of maritime jurisdiction in the city above-mentioned." The place specified in Part 1 Charter Party was London. Following a dispute, each party appointed an arbitrator. The two arbitrators, however, did not appoint a third arbitrator. In the award, made in favour of the Finnish charterer, the arbitrators explained this as follows: "Clause 24 of the said charter party required arbitration before a board of three persons, the third arbitrator to be appointed by the two chosen by the parties. The Arbitration Act 1950, section 9(1), states that any such provision shall take effect as if it provided for the appointment of an Umpire. As the two arbitrators were minded to agree, an Umpire was not required and if so appointed would not have entered into the Reference." This was indeed mandatory English arbitration law at the time. However, the Court of Appeal in Florence, before which the enforcement of the award was sought by the Finnish charterer against the Italian shipowner, refused to grant enforcement on

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

account of Article V(1)(d) of the Convention. It considered that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. The Court overruled the applicability of section 9(1) of the English Arbitration Act of 1950, reasoning that according to Article V(1)(d) the agreement of the parties prevails over the law of the country where the arbitration took place.

The second case where enforcement of the award was refused under Article V(1)(d) because the composition of the arbitral tribunal and the arbitral procedure had not been carried out in accordance with the agreement of the parties is a case decided by the Court of Appeal in Basel.[25] The contract between a Swiss seller and a German buyer concerning the sale of nuts contained an arbitral clause according to which arbitration was to be held under the Conditions of the Commodity Association of the Hamburg Exchange. When a dispute arose between the parties in respect of the quality of the nuts delivered by the Swiss seller, the German buyer wanted to settle the dispute in two phases: the first to ascertain the quality of the nuts and the second to assess the damages. This bifurcation was unacceptable to the Swiss seller, who wished to have the differences settled in a single-phase arbitration. When the German buyer pursued the arbitration in two phases, the Swiss seller declined to participate. The enforcement of the award, which was in favour of the German buyer, was refused by the Court of First Instance in Basel. The Court of Appeal in Basel affirmed this decision. With express reference to Article V(1)(d) of the Convention, the Court of Appeal reasoned that neither the composition of the arbitral tribunal nor the arbitral procedure was in accordance with the agreement of the parties because the applicable Arbitration Rules of the Hamburg Commodity Association (section 20 of the *Platzusancen*) do not provide for arbitration in two phases, even though at that time it might recently have become customary to do so in Hamburg. The court added that inasmuch as the Swiss seller may have had knowledge of this development, he still could have assumed in good faith that the Arbitration Rules as printed were still in force.

A third case involved an arbitral award made in Switzerland between a Finnish party and a party owned by the Turkish State.[26] The arbitration clause included the proviso: "The Board of Arbitration shall take as base the provisions of this Contract and Turkish laws in force." In the arbitration, the Turkish party argued that this proviso meant that Turkish law applied both to the substance and the procedure. In the award, the majority of the arbitral tribunal held that "'Turkish laws in force' [should] not be understood as choice of procedural rules." Having prevailed in the arbitration, the Finnish party sought enforcement in Turkey. The Court of First Instance and the Court of Appeal refused enforcement, holding that the award violated Article V(1)(d) of the Convention.

It is unlikely that the first two cases of refusal will come up again. The rule that an agreement on three arbitrators means an agreement on two arbitrators and an umpire was abolished in the English Arbitration Act 1996. An arbitration in two phases (*i.e.*, bifurcation) is nowadays widely accepted in international arbitration and, in this respect, arbitration rules will no longer be narrowly construed as the Court in Basel did in the above case. Finally, the third case might have been avoided by a more careful drafting of the arbitration clause, although it is surprising that a court construes the words "Turkish laws in force" as referring not only to the substantive applicable law but also to the procedural applicable law. The choice for the place of arbitration (*i.e.*, Zurich) is generally understood as an implied choice for the arbitration law of that place (*i.e.*, Swiss international arbitration law).

25 *Appellationsgericht* [Court of Appeal], Basel-Stadt, 6 September 1968, *Swiss Corporation X AG, buyer v. German Firm Y, seller*, reported in *YB Comm. Arb.* I (1976), p. 200 (Switzerland No 4).

26 Court of Appeals, 15th Legal Division, 1 February 1996, No 1996/627, *Metex Andelslag VS. v. Türkiye Electrik Kumuru Genel Müdürlügü General Directorate, Ankara*, reported in *YB Comm. Arb.* XXIII(1998), pp. 807-14 (Turkey No 1).

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

Under this ground, enforcement may be refused if the respondent asserts and proves that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. It actually contains three grounds which may be considered in turn.

1. "Binding"

Ground (e) of Article V(1) provides in the first place that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has not become "binding." The Convention's predecessor, the Geneva Convention of 1927, required that the award had become "final" in the country of origin. The word "final" was interpreted by many courts at the time as requiring a leave for enforcement (*exequatur* and the like) from the court in the country of origin. Since the country where enforcement was sought also required a leave for enforcement, the interpretation amounted in practice to the system of the so-called "double-*exequatur*." The drafters of the New York Convention, considering this system to be too cumbersome, abolished it by providing the word "binding" instead of the word "final." Accordingly, no leave for enforcement in the country of origin is required under the New York Convention. This principle is almost unanimously affirmed by the courts.

The courts differ, however, with respect to the question whether the binding force is to be determined under the law applicable to the award or in an autonomous manner independent of the applicable law. Indeed, a number of courts investigate the applicable law in order to find out whether the award has become binding under that law. Other courts interpret the word "binding" without reference to an applicable law, as meaning that the award is no longer open to a genuine appeal on the merits to a second arbitral instance or to a court.

Whatever the merits of this debate may be, there is just one court decision reported so far in which enforcement was refused because the court considered that the award had not become binding within the meaning of Article V(1)(e) of the Convention. After the award was made in the United States under the auspices of the AAA, the US Court of Appeals for the District of Columbia refused to confirm the award for lack of subject matter jurisdiction. This prompted the claimant MINE to resort to ICSID arbitration. In the meantime, however, it sought enforcement of the AAA award in Switzerland. The Geneva Court inferred from the conduct of MINE that the dispute between the parties could not be considered as definitely settled.[27] The court then considered that the question whether an award is binding is first of all a question of the law governing the arbitral proceedings which the parties may freely designate as is provided in Article V(1)(d). Thereupon the court held that the parties had agreed to ICSID arbitration as acknowledged by MINE's application for ICSID arbitration. According to the court, "MINE has thus acknowledged that the award had no binding effect." It is submitted that the rather unusual circumstances of this case justified a refusal of enforcement.

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

2. Set aside

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

It rarely occurs that an action for setting aside the award in the country of origin is successful. In fact, in only two reported cases has the setting aside of an award in the country of its origin led to a refusal of enforcement abroad under the Convention.

The first is the Dutch episode of the famous case of *SEEE v. Yugoslavia* saga. In the arbitration, in which Yugoslavia did not participate, the award was made by two arbitrators in the Canton of Vaud, Switzerland, in 1956.[28] SEEE deposited the award with the Tribunal of the Canton Vaud, whereupon Yugoslavia instituted an action before that court for setting the award aside. The Tribunal did not set aside the award, but ordered that it be given back to SEEE, on the ground that it was not an arbitral award within the meaning of Article 516 of the Code of Civil Procedure of the Canton of Vaud, which required an odd number of arbitrators at the time.[29] After several unsuccessful attempts to have the award enforced in a number of countries, enforcement was sought in the Netherlands. Several rounds of proceedings followed, and when the case came for a second time before the Dutch Supreme Court, the latter decided that enforcement had to be refused, reasoning that the order of the Tribunal of the Canton of Vaud was to be equated to a setting aside of the arbitral award as mentioned in Article V(1)(e) of the Convention.[30]

The second case was decided by the Court of Appeal of Paris. It refused to enforce an ICC award made in Geneva on the ground that the award had been set aside by the Court of Appeal of the Canton of Geneva. The Geneva Court had done so because it considered the award to be "arbitrary," which is a ground for setting aside under the Swiss Arbitration Concordat of 1969.[31] Since international arbitration in Switzerland nowadays takes place on the basis of a modern arbitration statute (the 1987 Private International Law Act) which does not contain the ground for setting aside that the award is "arbitrary," it is unlikely that the situation as occured before the Paris Court of Appeal will be repeated.

Rather, some courts are now going in precisely the opposite direction. Courts in France and the United States have declared an award enforceable notwithstanding the fact that it had been set aside in the country of origin.[32] It is submitted that this is in principle an undesirable development.[33]

3. Suspended

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

28 The award is published in French and English in *Journal du Droit International* (1959), p. 1074.

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

30 Hoge Raad [Supreme Court], 7 November 1975 (*Société Européenne d'Études et d'Entreprises - SEEE v. Federal Republic of Yugoslavia*), reported in *YB Comm. Arb.* I (1976), pp. 195-98 (Netherlands No 2D). It is interesting to note that already in his comment on the first decision of the Dutch Supreme Court in the *SEEE v. Yugoslavia* case, Prof. H. Battifol suggested that the order of the Tribunal of the Canton of Vaud to give back the award could be equated to a setting aside within the meaning of Article V(1)(e); see *Revue de l'arbitrage* (1974) pp. 326-30. An opposite conclusion was reached by Cour d'Appel, Rouen, 13 November 1984 (*Société Européenne d'Études et d'Entreprises (SEEE) by its liquidator Mme. Y. Cleja v. Socialist Federal Republic of Yugoslavia; International Bank for Reconstruction and Development (the World Bank) and the French State*), reported in *YB Comm. Arb.* XI(1986), pp. 491-499 (France No 8), which determined that the decision of the Swiss courts to give back the award did not amount to a setting aside of the award within the meaning of Art. V(1)(e) of the Convention, but rather that the award was not an award under Vaud arbitration law. The Court of Appeal held that, according to the procedure applicable to the arbitration, the decision of the arbitrators was consequently binding on the parties in the sense of the New York Convention.

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

32 *Cour de Cassation* [Supreme Court], 10 June 1997, *Omnium de Traitement et de Valorisation v. Hilmarton*, reported in *YB Comm. Arb.* XXII(1997), pp. 696-701 (France No 45), approving enforcement of an award that has been set aside in Switzerland. US District Court, District of Columbia, 31 July 1996, *Chromalloy Aeroservices Inc. v. The Arab Republic of Egypt*, reported in *YB Comm. Arb.* XXII (1997), pp. 1001-12 (US No 230), declaring enforceable in the United States an award that had been set aside in Egypt.

drafters of the Convention meant by the suspension of an award, it refers presumably to a suspension of the enforceability or enforcement of the award by a court in the country of origin.

The foregoing raises problems with awards made in Paris against which an action for setting aside is instituted before the French courts. Under French (international) arbitration law, such recourse suspends by operation of law the enforcement of the award (Article 1502 of the French Code of Civil Procedure). Two foreign courts have failed to appreciate that such a suspension is insufficient for ground (e) of Article V(1)(e) of the Convention.

In one case, the Court of First Instance in Geneva simply refused enforcement of an award made in France because the respondent had filed an application for the setting aside of the award with the French court.[34]

The matter of *Creighton v. The Government of Qatar* has attracted more attention. In that case, the award made in Paris under the auspices of the ICC was in favour of Creighton. While Creighton sought enforcement in the United States, the Government of Qatar applied for the setting aside (annulment) to the Paris Court of Appeal. As mentioned, under French law, the application for annulment suspends automatically (by operation of law) the enforcement of the award in France. Relying on Article V(1)(e) of the Convention, the US District Court in the District of Columbia refused to enforce the award.[35] The Court reasoned: "To determine whether an award has been set aside or suspended, the Court must look to the laws of the competent authority of the country under which the award was made... In this case, according to [the] French Code of Civil Procedure, the arbitral award has been suspended. Because this Court must look to the procedural law of the place in which the award was rendered, this Court concludes that the award has been suspended for Article V(1)(e) purposes... In this case, there is no question that the award has been suspended; an action to set aside an arbitral award in France is all that is required to suspend that award according to [the] French Code of Civil Procedure."

Obviously, the District Court in the District of Columbia (like the Geneva Court) failed to appreciate the distinction between a suspension of enforcement in the country of origin by operation of law and one pronounced by a court in that country. Suspension within the meaning of Article V(1)(e) of the Convention is a suspension that has been pronounced by "a competent authority." The latter is almost always a court. Thus, to determine whether an award has been suspended (or set aside), an enforcement court must look to what the courts of the country in which the award was made have done (*i.e.*, suspended or set aside) and not to the laws of that country (as the District Court erroneously did). In short, both decisions are simply the result of a judicial error.

G. Article V(2): public policy

The second paragraph of Article V provides that a court may refuse enforcement on its own motion if it finds that the subject matter of the difference is not capable of settlement by arbitration under its country's law or enforcement would be contrary to its country's public policy. The cases in which this provision has been relied upon for refusing enforcement are summarised below.

33
This matter will be developed in a future contribution to the *ICC International Court of Arbitration Bulletin* in response to the article by the theory's advocate Mr Jan Paulsson, "Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment (LSA)," *ICC International Court of Arbitration Bulletin*, Vol. 9/No 1, pp. 14-31.

34
Tribunal de Première Instance [Court of First Instance], Geneva, 25 April 1985, and *Cour de Justice* [Court of Appeal], Geneva, 10 October 1985, *Continaf BV v. Polycoton SA*, reported in *YB Comm. Arb.* XII(1987), pp. 505-09 (Switzerland No 12).

35
US District Court, District of Columbia, 22 March 1995, *Creighton Ltd. v. The Government of Qatar*, reported in *YB Comm. Arb.* XXI (1996), pp. 751-58 (US No 197).

1. Distinction between domestic and international public policy

The public policy defence rarely leads to a refusal of enforcement. One of the reasons is the distinction between domestic and international public policy. This distinction means that what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. According to the distinction, the number of matters considered as falling under public policy in international cases is smaller than in domestic ones. The distinction is justified by the differing purposes of domestic and international relations. In cases falling under the Convention, the distinction is gaining increasing acceptance by the courts. They apply it to both the question of arbitrability (ground (a) of Article V(2)) and other cases of public policy (ground (b) of Article V(2)).

An exception is a 1983 case in which the Austrian Supreme Court refused enforcement of a Dutch award because it violated Austrian public policy (*i.e.*, the prohibition of purchases on a margin basis, *Differenzgeschäfte*). It held that Article V(2)(b) does not contemplate a distinction between domestic and international public policy, as "Article V(2)(b) of the above-mentioned Convention refers clearly to cases where an award is contrary to the public policy of the country where it shall be enforced."[36]

Another case doubting the narrow interpretation of Article V(2) was decided by the High Court in Delhi, which said that it was not impressed by the argument making a distinction between domestic and international public policy.[37] In the arbitral award made in London, the arbitrators had rejected the Indian party's defence of force majeure based on an Indian export prohibition. In view of this aspect of the award, the High Court refused enforcement on grounds of public policy.

2. Arbitrability

The arbitrability of the termination of an exclusive distributorship agreement was considered by the Belgian Supreme Court and led to a refusal of enforcement of an award under the Convention on the ground of a non-arbitrable subject matter.[38] The case involved the Belgian Law of 27 July 1961, concerning the Unilateral Termination of Concessions for Exclusive Distributorships of an Indefinite Time. This Law is an example of non-arbitrability of the subject matter in view of the protection of a party which is considered to be in a weaker position (*i.e.*, the exclusive distributor in Belgium). The Belgian Law of 1961 gives an exclusive distributor within the Belgian territory the right to compensation upon termination in certain cases. If the parties cannot agree, a Belgian court can be requested to determine the amount of compensation. The Court of First Instance in Brussels affirmed the aforementioned principle in 1979, ruling that under the Belgian Law of 27 July 1961, disputes arising out of the termination of an exclusive distributorship agreement cannot be referred to arbitration.[39]

The Appellate Division of the Supreme Court of New York County held that in the State of New York a difference with the liquidator of an insolvent insurer is not capable of settlement by arbitration.[40]

36
Oberster Gerichtshof [Supreme Court], 11 May 1983, *Dutch Appellant v. Austrian Appellee*, reported in *YB Comm. Arb.* X(1985), pp. 421-23 (Austria No 7).

37
High Court, Delhi, 12 July 1985, *COSID Inc. v. Steel Authority of India Ltd*, reported in *YB Comm. Arb.* XI(1986), pp. 502-07 (India No 11).

38
Cour de Cassation [Supreme Court], 28 June 1979, *Audi-NSU Union AG v. SA Adelin Petit & Cie*, reported in *YB Comm. Arb.* V(1980), pp. 257-59 (Belgium No 2), affirming *Cour d'appel* [Court of Appeal], Liège, 12 May 1977, reported in *YB Comm. Arb.* IV (1979), pp. 254-57 (Belgium No 1).

39
Tribunal de commerce [Commercial Court], Brussels, 13 September 1979, *SA Agima v. Smith Industries*, reported in *YB Comm. Arb.* VIII(1983), pp. 360-61 (Belgium No 4).

40
Supreme Court (Appellate Division), New York County, 10 April 1990, *Corcoran et al. v. Ardra Insurance Co. Ltd., et al*, reported in *YB Comm. Arb.* XVI(1991), pp. 663-68 (US No 141).

3. Lack of impartiality

The Court of First Instance in Hamburg held that an arbitral tribunal of an association does not satisfy the requirement of independence and impartiality when, being dominantly or exclusively composed of association members, it has to decide a dispute between a member and a non-member.[41] This decision was rendered in 1985, *i.e.*, prior to the 1986 decision of the German Supreme Court concerning the appointment of a sole arbitrator by one party only under section 7(b) of the English Arbitration Act 1950 (no longer in force).[42] In view of the Supreme Court's holding that "the finding that a party had predominant weight in constituting the tribunal is... not sufficient" for "a violation of the duty of impartial administration of justice," the decision of the Hamburg Court is probably no longer good law.

Probably no one will have any difficulty with the decision of the Swiss courts denying enforcement under the following circumstances.[43] By a contract of 15 June 1990, the defendant undertook to find exhibitors for an arms trade fair organised by the claimant in Turkey. The contract was drawn up by Dr E, who was the claimant's lawyer and later also acted as the defendant's lawyer. The contract contained a clause referring all disputes to Dr E as sole arbitrator. The clause further provided that the sole arbitrator could not be removed under any circumstances; a contracted penalty of SFR 1 million was to be paid to the arbitrator in the case of a violation of this provision. A dispute arose regarding the rent for the fair stands which had been collected from the exhibitors, and the claimant commenced arbitration as provided for in the contract. Deciding in Ankara on 11 June 1991, the sole arbitrator Dr E directed the defendant to pay the claimant SFR 1 463 131. The defendant sought to have the award set aside in Turkey but, on 14 July 1992, the Turkish Supreme Court denied the request to set aside the award. The claimant sought enforcement of the Turkish arbitral award and the decision of the Turkish Supreme Court in Switzerland. The Court of First Instance found that the arbitral clause violated Swiss public policy and denied enforcement. The Court of Appeal in Zurich affirmed.

4. Lack of reasons in award

The Italian Supreme Court refused enforcement of an English award which did not contain reasons on the ground that the agreement mentioned in Article V(1)(d) incorporated the provisions of the European Convention of 1961, as both parties came from countries which have adhered to the latter Convention (*i.e.*, Italy and Germany).[44] Article VIII of the European Convention of 1961 provides that reasons must be given for an award if a party so requests before the end of the arbitral hearing.

5. Public policy – Other cases

In one case, the Court of First Instance in Munich held that the failure of the arbitrators to make a preliminary inquiry as to their competence in regard to whether the time limits for initiating arbitration as provided in the Arbitration Rules in question had been met constituted a "serious procedural violation" for which enforcement was to be refused on the basis of the public policy provision of Article V(2)(b).[45]

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

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

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

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

45 *Landgericht* [Court of First Instance], Munich, 20 June 1978, *German Seller v. German Buyer*, reported in *YB Comm. Arb.* V (1980), pp. 260-62 (Germany No 19).

In another case, the Court of Appeal in Hong Kong refused to enforce an award rendered under the auspices of CIETAC in Beijing because the Chief Arbitrator (but not the two other arbitrators) and the Tribunal-appointed experts had attended an inspection of the factory in the presence of the plaintiff's staff but in the absence of the defendant, who had not been notified.[46]

6. Conclusion regarding public policy

The above review shows that the number of cases in which the public policy defence has been accepted is very limited (some 11 cases). Moreover, most of these cases resulted from outdated arbitration laws (*e.g.*, the English Arbitration Act 1950) or facts that truly warranted a refusal of enforcement (*e.g.*, Dr E and his SFR 1 million penalty). Indeed, if anything shows that the Convention is successful in practice, it is the interpretation and application of Article V(2) of the Convention by the courts.

II – Other reasons for refusal of enforcement

A. Retroactive application of the convention

The Convention does not contain a provision on the question of whether it applies retroactively. This point has given rise to a number of diverging court decisions, although it is possible to discern a tendency in favour of retroactive application, whereby the Convention is applicable to the enforcement of an arbitration agreement and arbitral award no matter when they were made. The issue has, however, led to refusal of enforcement of the Award in the following cases:

- The Court of Appeal in Geneva and the High Court of Ghana refused to apply the Convention to an award made before it entered into force in Switzerland and Ghana, respectively.[47]
- The Court of First Instance in Brussels refused to apply the Convention to an award made in Algeria before Algeria had become a party to the Convention.[48]
- The Court of Appeal in Hamburg declined to apply the Convention in a case concerning a contract including an arbitration clause, concluded between a US and a German party before the accession of the United States to the Convention.[49] This was sufficient reason for the Court of Appeal to deny the application of the Convention, notwithstanding the fact that the award was made in New York after the date of accession by the United States to the Convention.
- The commencement of the enforcement proceedings in respect of an arbitral award before the Convention had entered into force in the state in which the enforcement was sought, was in 1969 a ground for refusal to

46 High Court of the Hong Kong Special Administrative Region, Court of Appeal, 16 January 1998, Civil Appeal No 116 of 1997, *Polytek Engineering Company Ltd. v. Hebei Import & Export Corp.*, reported in *YB Comm. Arb.* XXIII (1998), pp. 666-84 (Hong Kong No 12).

47 *Cour de Justice* [Court of First Instance], Canton of Geneva, 12 May 1967, *Commoditex SA v. Alexandria Commercial Co.*, reported in *YB Comm. Arb.* I (1976), p. 199 (Switzerland No 2); High Court of Ghana, 29 September 1965, *Strojexport v. Edward Nasser and Company Ltd.*, reported in *YB Comm. Arb.* III (1978), p. 276 (Ghana No 1).

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

49 *Oberlandesgericht* [Court of Appeal], Hamburg, 3 April 1975, *US firm P v. German firm F*, reported in *YB Comm. Arb.* II (1977) p. 241 (Germany No 11); see also note 14. It should be noted that the German Supreme Court decided that the Convention is applicable to an arbitration agreement and arbitral award whenever made, *Bundesgerichtshof*, 8 October 1981, *Comitas, Mutuamar; Levante v. Schwarzmeer und Ostsee Versicherungs AG (Sovag)*), reported in *YB Comm. Arb.* VIII (1983), pp. 366-70 (Germany No 25).

apply the Convention for the Italian Supreme Court.[50] The court argued that Article II of the Convention, because of its contents, is a rule of substantive law rather than a rule of procedure.[51]

- The Supreme Court of Nigeria held the Convention inapplicable to an award, for which enforcement proceedings had been initiated one month prior to Nigeria's accession to the Convention.[52]

It is regrettable that the drafters of the Convention refrained from including a provision regarding its retroactive applicability. It could have avoided a number of frustrating decisions, as the above survey demonstrates. Now, more than 40 years and 120 Contracting States later, it is crying over split milk. The issue of retroactivity is unlikely to rise in practice again. Actually, an amendment to the Convention would be positively undesirable since if it were introduced, the traumatic experience regarding retroactivity might have to be repeated.

B. Lack of implementing legislation

Certain countries have a constitutional system under which an international convention becomes effective only after enactment of implementing legislation. This has given rise to difficulties in certain countries in respect of the New York Convention. A number of them had initially not passed implementing legislation.

Nigeria appeared to belong to this group of countries, where the Supreme Court used, for good measure, the perceived lack of retroactivity as an additional reason for the above-mentioned refusal of enforcement of the award made in Moscow.[53] Reportedly, Nigeria has recently introduced legislation in pursuance of the Convention.

The same applied to Indonesia, where the Supreme Court refused enforcement of an award made in London for this reason.[54] Indonesia has now introduced an implementing regulation.[55]

The legislation implementing the New York Convention in Colombia, Law No 37 of 1979, was declared unconstitutional by the Colombian Supreme Court in 1988 because it was signed by the Minister in charge of Presidential Affairs and not the President himself, who was travelling abroad.[56] The case report does not make clear whether this led to an actual refusal of enforcement. In any event the Convention was again implemented in Colombia by Law No 39 of 1990.[57]

It may also happen that the implementing legislation is in place but is ignored by the enforcement court. The Witwatersrand Local Division of the Supreme Court in South Africa held in 1982 that the Convention was not applicable as "the necessary legislation requisite to make it operative and binding on me has apparently not been passed."[58] However, South Africa enacted the Recognition of Foreign Arbitral Awards Act 1977 on 25 March 1977 (Act No 40 of 1977, date of commencement 13 April 1977).

The lack of implementing legislation therefore has led in two reported cases to a refusal of enforcement. A third case of refusal was due to a mistaken belief that no implementing legislation had been enacted. Obviously, such refusals of enforcement have nothing to do with an inherent shortcoming in the Convention itself.

50 *Corte di Cassazione* [Supreme Court], 30 April 1969, No 1403, *Officine Fratelli Musso v. sarl Seviplant*, reported in *YB Comm. Arb.* I (1976), p. 189 (Italy No 1). The Convention entered into force in Italy on 29 April 1969; the action was initiated on 27 April 1962.

51 In subsequent decisions, the Italian Supreme Court abandoned this view and held that the Convention is essentially of a procedural nature. See, *e.g. Corte di Cassazione* [Court of Appeal], 8 April 1975, No 1269, *Agenzia Marittima Constantino Tomasos Ltd. v. Sorveglianza Sipa*, reported in *YB Comm. Arb.* II (1977), pp. 247-48 (Italy No 13).

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

53 *Ibid.*

54 Mahkamah Agung [Supreme Court], 20 August 1984, *Navigaton Maritime Bulgare v. P.T. Nizwar*, reported in *YB Comm. Arb.* XI (1986), pp. 508-09 (Indonesia No 1 sub 2).

55 Reprinted in *YB Comm. Arb.* XVI (1991), pp. 398-401.

56 *Corte Supreme de Justicia* [Supreme Court], 6 October 1988, *Carmen Marina Melo Torres*, reported in *YB Comm. Arb.* XV (1990), pp. 443-49 (Colombia No 1).

57 See *Corte Supreme de Justicia* [Supreme Court], 20 November 1992, *Sunward Overseas SA v. Servicios Maritimos Limitada Semar Ltd.*, reported in *YB Comm. Arb.* XX (1995), pp. 651-55 (Colombia No 2).

58 Supreme Court, Witwatersrand Local Division, 24 February 1982, *Transvaal Alloys Ltd. v. Polysius Ltd. and Benoni Engineering Works and Steel Ltd.*, reported in *YB Comm. Arb.* VIII (1983), pp. 404-05 (South Africa No 2). It may be noted that the Transvaal Provincial Division of the Supreme Court had already applied the Convention in a decision rendered in 1977: Supreme Court, Transvaal Provincial Division, 16 June 1977, *Benidai Trading Co. Ltd. v. Gouwe & Gouwe Pty. Ltd.*, reported in *YB Comm. Arb.* VII (1982), pp. 351-55 (South Africa No 1).

C. Interim award

In most cases an arbitral award contains a decision in which one party is ordered to pay the other an amount of money. Less common are awards in which a party is enjoined from doing something or, conversely, specific performance is ordered. Also less frequent are awards which are declaratory, *e.g.*, an award in which it is merely determined that an event of force majeure existed. There appear to be no difficulties in enforcing these awards under the Convention, although the latter category qualifies for recognition rather than enforcement. Furthermore, in principle, the Convention does not preclude the recognition and enforcement of a partial award, *i.e.*, an award in which a part of the dispute is finally resolved.

The question has arisen, however, as to whether an interim award can be enforced under the Convention. An Australian court believed that this was not possible and refused enforcement. The case involved an arbitration held under the rules of the AAA in Indianapolis, Indiana, USA. The arbitral tribunal had issued an "Interim Arbitration Order and Award" to the effect that the respondents were enjoined during the pendency of the arbitration from, *inter alia*, carrying out activities related to the agreement in dispute. The claimant sought enforcement of the "Interim Arbitration Order and Award" in Australia. The Supreme Court of Queensland refused to grant enforcement, holding that it was not an "arbitral award" within the meaning of the Convention.[59]

In my view, an interim arbitral award can be enforced under the Convention provided that it is capable of enforcement as an arbitral award in the country where made. This is typically a matter on which one can have differing views in interpreting the Convention. That one of the views has led to a refusal of enforcement is not alarming, albeit regrettable.

D. Reciprocity reservation

According to paragraph 1 of Article I, the Convention applies to awards made in any other state. However, a state, when becoming party to the Convention, can limit this field of application by using the first reservation of Article I(3). The state making that reservation will apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State only (the so-called reciprocity reservation).

The reciprocity reservation has led to the refusal of enforcement in one case only. A claimant sought enforcement in the United States of an award made in the United Kingdom before that country's ratification of the Convention. The US District Court for the Southern District of New York held in 1974 that the Convention was not applicable and did not grant enforcement.[60] Obviously, such a decision would not be possible today in relation to awards made in the United Kingdom since that country has adhered to the Convention. More generally, it is very unlikely that the reciprocity reservation will lead to a refusal of enforcement, because more than 120 countries are party to the Convention and in those cases where the award has been rendered in a non-Convention state, a party will not seek enforcement in a country that has used the reciprocity reservation.

59 Supreme Court of Queensland, 29 October 1993, *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums(Australasia) Pty Ltd.*, reported in *YB Comm. Arb.* XX (1995), pp. 628-50 (Australia No 11). See also note 1.

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

E. Commercial reservation

The second reservation of Article I(3) permits a state to reserve the applicability of the Convention "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." This reservation was inserted because at the New York Conference of 1958 it was believed that, without this clause, it would be impossible for certain civil law countries, which distinguish between commercial and non-commercial transactions, to adhere to the Convention.

In practice, the commercial reservation generally has not caused problems as the courts tend to interpret the term "commercial" broadly. Insofar as enforcement of awards is concerned, there is one notable exception. The Supreme Court of Tunisia held in a 1993 decision that a contract under which architects undertook to design an urbanization plan for a resort in Tunisia did "not fall under the definition of Articles 1 – 4 of the [Tunisian] Commercial Code" and that the contract "is not by its nature commercial according to Tunisian law."[61] With specific reference to the commercial reservation in Article I(3) of the Convention, the Supreme Court refused to enforce the ICC award made in Paris in this case.

The decision of the Tunisian Supreme Court is worrisome. In the past, the lower Tunisian courts had shown themselves to be quite in favour of international arbitration.[62] The present case seems to throw Tunisia back to the old times in India, where two lower courts reached the same conclusion in two cases in which enforcement of an arbitration agreement was refused because the underlying contract was not considered to be commercial under the laws of India.[63] The Indian Supreme Court has rectified such a parochial attitude.[64]

F. Problems with the identity of a party

Various questions can be brought under this heading. One question is whether an award rendered against a company can be enforced against another company which was not a party to the arbitration agreement but is closely connected with the former company (usually the parent company). This question of piercing the corporate veil is not dealt with by the Convention and is to be answered by the individual court on the basis of the law that it finds applicable. Another question is whether a legal successor is bound by an arbitration agreement concluded by its predecessor. A similar question may arise out of the assignment of a contract which includes an arbitration clause or an arbitral award to a third person.

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

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Cour de Cassation [Supreme Court], 10 November 1993, *Taie Haddad and Hans Barrett v. Société d'Investissement Kal*, reported in *YB Comm. Arb.* XXIII (1998), pp. 770-73 (Tunisia No 3).

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

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

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

Although these matters are raised with increasing frequency in enforcement proceedings, they rarely lead to a refusal of enforcement of the arbitral award.

The US Court of Appeals for the Second Circuit remanded a case to the District Court on the question whether a party is the successor of interest to another party in the context of the enforcement of an arbitral award.[65] In another case before the District Court in New York, enforcement was sought against three parties. The court determined that two of them had not been parties to the arbitration and declared the award enforceable only against the party that had been.[66]

The Court of Appeal in The Hague refused enforcement of an arbitral award rendered under the auspices of the AAA insofar as it concerned one of the respondents, reasoning that it did not appear from the documents before it that this party had bound itself to submit to arbitration in respect of the disputes which had arisen with the petitioner.[67]

The Moscow District Court denied the application by Sokofl Inc., Panama, for enforcement of an award made in London in favour of Sokofl Ltd., Panama.[68] Both the Russian Trade Counsel in Panama and the Panama State Register had advised that the company Sokofl Ltd. had not been registered in the Panama State Register of legal and natural persons being engaged in commerce.

In a case before the Spanish Supreme Court, it appeared that the Spanish defendant had died before the request for arbitration was notified.[69] The proceedings were not conducted against his heirs, nor did the request for enforcement of the arbitral award invoke a right against any heir. The Supreme Court denied enforcement.

These problems concerning the identity of the parties are not typical for the New York Convention and could also not have been resolved by an international instrument. Rather, as mentioned above, they must be resolved on the basis of the applicable law and the facts before the enforcement court.

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

In Italy, two principal types of arbitration exist. The first is known as *arbitrato rituale* [formal arbitration] which is governed by the Italian Law on Arbitration set forth in the Code of Civil Procedure. The second is *arbitrato irrituale* [informal arbitration] which is entirely based on contract law and which is not governed by the provisions of the Law on Arbitration. The main difference between the two is that a decision rendered in *arbitrato irrituale* cannot be enforced as an arbitral award but only by means of a contract action.

The Italian Supreme Court takes the view that a decision [*lodo*] rendered in *arbitrato irrituale* falls under the Convention.[70] The German Supreme Court, on the other hand, has held that a decision resulting from *arbitrato irrituale* can neither be recognized nor enforced under the Convention.[71]

The question whether procedures like *arbitrato irrituale* (and the Dutch *bindend advies* and the German *Scheidsgutachten*) fall under the Convention is open to debate. The Italian courts seem to stand alone in considering that decisions resulting from these procedures can be enforced under the

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

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

67 *Gerechtshof* [Court of Appeal], The Hague, 10 April 1981, case No 496 R 80 and President, Rechtbank [District Court], Rotterdam, 14 April 1980, *Keck Seng (S) Pte Ltd. and K.S. Edible Oil (Hong Kong) Ltd. v. Hunt-Wesson Foods, Inc.*, reported in *YB Comm. Arb.* VII (1982), pp. 347-48 (Netherlands No 6).

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

69 *Tribunal Supremo* [Supreme Court], 7 October 1986, *T.H. v. Juan Antonio Dominguez*, reported in *YB Comm. Arb.* XIV (1989), pp. 708-09 (Spain No 21).

70 *Corte di Cassazione* [Supreme Court], 18 September 1978, No 4167, *Gaetano Butera v. Pietro e Romano Pagnan*, reported in *YB Comm. Arb.* IV (1979), pp. 296-300 (Italy No 33); 6 July 1982, No 4039, *Colella Legnami SpA v. Carey Hirsch Lumber Company*, reported in *YB Comm. Arb.* IX (1984), pp. 429-31 (Italy No 62); 15 December 1982, No 6915, *Rocco Giuseppe e Figli snc v. Federal Commerce and Navigation Ltd.*, reported in *YB Comm. Arb.* X (1985), pp. 464-66 (Italy No 72).

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

Convention. It seems therefore advisable not to agree to *arbitrato irrituale* or similar procedures akin to arbitration in the international context, as otherwise enforcement may not be ensured under the Convention.

H. Merger of award into judgement

If, in the country of origin, a leave for enforcement is issued by the court on the award, the leave may constitute a court judgement in that country. Such judgement may have the effect of absorbing the award into the judgement in that country. If in this case enforcement is sought in another Contracting State, the question arises whether the award can be enforced as a foreign award under the Convention, or as a foreign judgement on another basis.

Most courts hold that the merger of the award into the judgement in the country of origin does not have extra-territorial effect and that therefore the award remains a cause of action for enforcement in other countries on the basis of the Convention. The only dissenting view was expressed by the Court of Appeal in Florence in 1980.[72] That Court dealt with an English award which had been subject to the Special Case procedure (as it then was). It refused to grant enforcement, reasoning that the petitioner was entitled to a sum of money not because of the award but because of the (court) decision made in the Special Case proceedings. According to the court, the arbitral award becomes an integrated element of the judgement and, therefore, not the award but the judgement must be taken as basis for enforcement. The Court of Appeal in Florence appears to represent an isolated view in this regard.[73]

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

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

In the cases reported so far, only the Italian courts have refused enforcement on grounds that the party seeking enforcement failed to submit a duly authenticated original award or duly certified copy thereof.

One case was decided by the Court of Appeal in Florence. The court was faced with the request for enforcement of two awards made by the arbitral tribunal of the Commodity Exchange in Vienna.[74] It refused enforcement of one award because "only an informal photostatic copy of the document containing the

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

73 A year later, the Court in Florence did not see an independent English judgement in another case. Enforcement of the award had been refused by the same court on the grounds that the constitution of the arbitral tribunal was not in accordance with the agreement of the parties. *Corte di Appello* [Court of Appeal], Florence, 13 April 1978, *Rederi Aktiebolaget Sally v. srl Termarea*, note 24. Thereupon, the petitioner obtained a judgement on the award in England, and came back to Italy requesting enforcement, this time on the basis of the English judgement. In this case, the Court of Appeal did not consider the judgement to be an autonomous judgement, which can be enforced according to international conventions and domestic law on civil procedure relating to foreign judgements. Rather, the court now viewed it the other way around: the judgement was to be assimilated to the arbitral award. It therefore refused enforcement. *Corte di Appello* [Court of Appeal], Florence, 19 January 1981, *Rederi Aktiebolaget Sally v. srl Termarea*, reported in *YB Comm. Arb.* X (1985), pp. 453-54 (Italy No 66).

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

award has been submitted in these proceedings, although together with the request, as it appears from a summary examination (the seal on the back of the last pages is a translator's seal)". The court reached a different conclusion with respect to the second award as the petitioner had submitted the original award together with a translation in Italian by a sworn translator.

In another case, the Court of Appeal in Bari deemed the requirement of Article IV of the New York Convention not fulfilled "as the confirmations sent by the broker... certainly cannot be deemed to be an agreement under the Convention."[75]

The Italian courts are rather formalistic with respect to the authentication and certification of the award. The Italian Supreme Court refused enforcement of an award made in England on the grounds that only two of the three signatures of the arbitrators were authenticated.[76] The Supreme Court held that the existence of the required conditions for authenticity must be ascertained according to the procedural law of the state seized, *i.e.*, Italian law, since Article III of the Convention provides that each state shall recognize an arbitral award and enforce it "in accordance with the rules of procedure of the territory where the award is relied upon..." Consequently, in the Supreme Court's view, the English practice that the authentication of the signatures of two arbitrators suffices for an award to be authentic was irrelevant.

The formalistic approach of the Italian courts can also be seen when they rely on the words "shall, at the time of application, supply" in Article IV(1). These words have led the Italian Supreme Court to decide – in a case where a petitioner had not supplied the arbitration agreement at the moment he made the application for enforcement – to refuse enforcement of the award.[77] The Supreme Court specifically held that this perceived defect must be raised *ex officio* by the enforcement court.

In conclusion, but for the Italian courts, Article IV of the Convention does not seem to be in need of repair.

Concluding remarks

This review of court decisions in which enforcement of an arbitral award was refused under the Convention shows that the number of such cases is surprisingly small, given that the Convention is now being applied by judges in a large number of Contracting States with diverse legal and cultural perspectives. Most of the cases of refusal are the result of mistakes of one kind or another: parties drafting inadequate arbitration clauses, arbitral tribunals not paying sufficient attention to the conduct of the proceedings, or courts misunderstanding the meaning of the Convention.

As a result, the cases of refusal do not provide any argument for modifying the Convention. Rather, the "unfortunate few" simply constitute a collection of lessons to be learned by parties, arbitrators, arbitral institutions and national courts in order to ensure the efficacy and enforceability of awards.

These "exceptions" prove the general rule of enforcement, and therefore underscore how successful the New York Convention has been. Indeed, the International Chamber of Commerce can be proud of the initiative that it took in 1953 to propose the adoption of the Convention.

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

76 *Corte di Cassazione* [Supreme Court], 14 March 1995, No 2919, *Sodime – Società Distillerie Meridionali v. Schuurmans & Van Ginneken BV*, reported in *YB Comm. Arb.* XXI (1996), pp. 607-09 (Italy No 140).

77 *Corte di Cassazione* [Supreme Court], 26 May 1981, No 3456, *Viceré Livio v. Prodexport*, reported in *YB Comm. Arb.* VII (1982), pp. 345-46 (Italy No 47), see also note 3; 12 February 1987, No 1526, and 26 May 1987, No 4706, *Jassica SA v. Ditta Gioacchino Polojaz*, reported in *YB Comm. Arb.* XVII (1992), pp. 525-28 (Italy No 109). This led also to a refusal of enforcement in the *Corte di Appello* [Court of Appeal], Bari, 19 March 1991, *Lenzina Shipping Co. SA v. Casillo Grani snc*, reported in *YB Comm. Arb.* XXI (1996), pp. 585-86, and in *Corte di Appello* [Court of Appeal], Bologna, 4 February 1993, *wtb v. Società cooperative a responsibilità limitata – crei*, reported in *YB Comm. Arb.* XXI (1996), pp. 590-93 (Italy No 137).