Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard, Gordon E Kaiser and Benjamin Siino

Second Edition

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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of *The Guide to Challenging and Enforcing Arbitration Awards*.

For those new to Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and more in-depth books and reviews. We also organise conferences and build work-flow tools. Visit us at www.globalarbitrationreview.com.

As the unofficial 'official journal' of international arbitration, sometimes we spot gaps in the literature earlier than others. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters had increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes – and soon evidence and investor-state disputes – in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the original group of editors for their vision and energy in pursuing this project and to our authors and my colleagues in production for achieving such a polished work.

Alas, as we were about to go to press, we were stunned by the unexpected demise of one of those editors, Emmanuel Gaillard. This news was as big a shock as I can recall. Emmanuel was one of three or four names who define international arbitration in the modern era. It was a delight to know him, and a source of huge satisfaction that he respected GAR, and it is hard to imagine professional life without him. Our sympathies go to his family and beloved colleagues, who I have no doubt will keep at least some of the magic alive.

David Samuels

London
April 2021

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Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – in other words, efficient, experienced and impartial – leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in 166 countries (at the time of writing). When enforcement against a sovereign state is at issue, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 163.

Awards used to be honoured

International corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily – of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

During 2020, *Global Arbitration Review*'s daily news reports contained hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement. Indeed, in the first three months of 2021, there has not been a day when the news reports have not headlined the attack on, survival of, or a successful or failed attempt to enforce an arbitral award.

A sprinkling of recent headlines on the subject are illustrative:

- Uganda fails to knock out rail-claim award
- Iranian state entity fails to overturn billion-euro award
- US Supreme Court rejects Petrobras bribery appeal
- Spanish court sets high bar for award scrutiny
- Swiss award against Glencore upheld on third attempt
- Tajik state airline escapes Lithuanian award
- Dutch court refuses to stay Yukos awards
- Undisclosed expert ties prove fatal to ICSID award
- Brazilian airline's award enforced in Cayman Islands
- ICC arbitrators targeted in Kenyan mobile dispute

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, in summer 2017, I raised the possibility of doing a book on the subject with David Samuels (Global Arbitration Review's publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project. It was a dreadful shock to learn of Emmanuel's sudden death in early April. Emmanuel was an arbitration visionary. He was one of the first to recognise the revolutionary changes that were taking place in the world of international arbitration in the 1990s and the early years of the new century. From a tiny group defined principally by academic antiquity, we had become a thriving, multicultural global community, drawn from the youngest associate to the foremost practitioner. Emmanuel will be remembered for the enormous contribution he made to that remarkable evolution.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said almost 40 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

This guide begins with a particularly welcome and inciteful foreword by Alan Redfern, recognised worldwide as one of the most thoughtful and experienced practitioners in our field. The guide is then structured to include, in Part I, coverage of general issues that will always need to be considered by parties, wherever situate, when faced with the need to enforce or to challenge an award. In this second edition, the 14 chapters in Part I deal with subjects that include initial strategic considerations in relation to prospective proceedings; how best to achieve an enforceable award; challenges generally and a variety of specific types of challenges; enforcement generally and enforcement against sovereigns; enforcement of interim measures; how to prevent asset stripping; grounds to refuse enforcement; and the special case of ICSID awards.

Part II of the guide is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This edition includes reports on 26 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 51 questions. All relate to essential, practical information about the local approach and requirements relating to challenging or seeking to enforce awards. Obviously, the answers to a common set of questions will provide readers with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

With this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors those colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach even further.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this second edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

London
April 2021

Part I

Issues relating to Challenging and Enforcing Arbitration Awards

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Grounds to Refuse Enforcement

Sherina Petit and Ewelina Kajkowska[1]

New York Convention and UNCITRAL Model Law

The central objective of the New York Convention is to facilitate enforcement of foreign arbitral awards by subjecting the enforcement to a limited number of conditions. Under Article V of the Convention, the grounds for refusal to enforce an arbitral award are restricted to a narrow list of defects affecting the arbitral procedure or the award. As analysed in detail in the following two sections, these defects must be of a serious nature and include irregularities such as invalidity of the arbitration agreement, lack of due process or violation of public policy of the enforcement state.

The grounds for refusal to enforce an arbitral award under the UNCITRAL Model Law parallel those enacted in the New York Convention. Article 36 of the UNCITRAL Model Law is virtually identical to Article V of the Convention and subjects the enforcement to the exceptions grounded in the Convention. Three fundamental features of the framework concerned must be identified:

- exhaustive list of exceptions to enforcement, excluding review of the merits of the award;
- discretion to enforce an award notwithstanding the grounds to refuse enforcement; and
- preclusion of parties' objections.

With regard to the feature in point (1), above, Article V of the New York Convention (replicated in Article 36 of the UNCITRAL Model Law) provides for an exhaustive list of the objections to enforcement. Under this framework, the recognition and enforcement of the award may be refused 'only if' one of the exceptions applies. Accordingly, a party resisting enforcement cannot successfully bring a defence that is not grounded in the provisions of the New York Convention. In particular, no review of the merits of the award is allowed, and national law cannot be the basis of any such defence against enforcement. The list of

1 Sherina Petit is a partner and Ewelina Kajkowska is an associate at Norton Rose Fulbright LLP.

possible grounds on which the party may resist enforcement does not include an error of law or fact by the arbitral tribunal and allows only for the most serious irregularities to form the basis of the party's defence. The exclusive character of the exceptions to enforcement means that Article V of the New York Convention must be interpreted narrowly.[2]

Turning to the second feature, both Article V of the New York Convention and Article 36 of the UNCITRAL Model Law are drafted in a permissive, rather than mandatory fashion. The provisions in question state that enforcement 'may be' (rather than 'shall be') refused on one of the specified grounds. Consistent with the pro-enforcement policy of the New York Convention, nothing in that act requires a contracting state to deny enforcement of the award. Instead, the court may overrule the defence to enforcement and give effect to the award, even if one of the objections in Article V of the New York Convention has been established. This notion of the enforcing court's autonomy has far-reaching consequences. It allows the enforcing court to independently assess potential defects of the arbitral award and procedure and, in appropriate circumstances, enforce even those awards that were annulled at the seat.

The third feature of the enforcement framework in question is preclusion of objections to enforcement of the award. In accordance with this principle, a party is barred from invoking Article V defences in the enforcement court, if it failed to bring the relevant objection during the arbitration or before the courts of the arbitral seat. Although the rules governing preclusion are not expressly included in the text of the New York Convention, they are widely recognised in national arbitration laws and considered compatible with the spirit of the Convention.

The rules governing preclusion affect almost every ground specified in Article V of the Convention; most notably jurisdiction objections are typically required to be raised at the outset of arbitral proceedings. Generally, preclusion may extend to both the objections that should have been raised in arbitration and the objections that must be first exercised in the foreign state's court proceedings (e.g., for setting aside the award). However, the position on this issue is not consistent across jurisdictions. Under the English authority in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*,[3] a party is not precluded from relying on a given defence in the enforcement proceedings even if it failed to bring the same defence in an action to set aside the award at the seat. A different conclusion has been reached in other jurisdictions, where the courts held that a party who failed to bring certain defects by way of an action to set aside an award may not rely on the same defects in the enforcement procedure.[4]

New York Convention Article V(1)

Article V(1) of the New York Convention prescribes grounds that need to be proven by a party to successfully resist enforcement of the award. It provides that enforcement of the award may be refused if:

- a party to the arbitration agreement was under some incapacity;

2 A J van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981), pp. 267, 268.

3 [2010] UKSC 46.

4 See P Nacimiento, in H Kronke (et al), *Recognition and Enforcement of Foreign Arbitral Awards* (Wolters Kluwer 2010) p. 214 in relation to German judiciary.

- the arbitration agreement was invalid;
- the procedure before the arbitral tribunal was affected by procedural unfairness;
- the award deals with issues falling outside the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, absent such an agreement, the law of the arbitral seat;
- the award has not yet become binding on the parties; or
- the award has been set aside in the country where it was made.

Each of these grounds is now discussed.

Incapacity of the party

Under Article V(1)(a) of the New York Convention, an award may be refused enforcement on the basis that the award debtor lacked the capacity to conclude a binding arbitration agreement. Two issues require special attention. First, Article V(1)(a) provides that the parties' capacity must be determined by reference to the law 'applicable to them'. However, the provision does not specify the choice of law rules relevant to this determination, leaving it to the court of the enforcement state to deal with any conflicts of law rules.

Second, Article V(1)(a) of the New York Convention is restricted to lack of capacity to enter into the agreement at the time it was made. It does not deal with any lack of capacity to enter into the underlying contract, or lack of proper representation during the arbitral proceedings. This conclusion is particularly important with regard to those jurisdictions whose arbitration laws require special authority to enter into arbitration agreements.[5]

Lack of valid arbitration agreement

Article V(1)(a) of the New York Convention provides that enforcement of an award may be refused if the arbitration agreement was not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. This provision is the expression of a consensual nature of arbitration and one of the commonly invoked grounds for refusal of enforcement for want of jurisdiction.

As has already been mentioned, it is commonplace in modern arbitration legislation and institutional arbitration rules that an objection to a tribunal's jurisdiction must be raised promptly, failing which it will be considered waived. As a consequence, the enforcement court hearing the defence under Article V(1)(a) of the Convention is likely to be presented with the consideration of the same issue by the arbitral tribunal and, in appropriate circumstances, possibly also by the court of the arbitral seat. Importantly, however, under the New York Convention, the enforcement court is empowered to undertake an independent analysis of the validity of the arbitration clause.

Notably, Article V(1)(a) contains a conflicts of law rule, which states that the law governing the validity of an arbitration clause should be the law chosen by the parties. Absent a parties' choice, the applicable law is that of the arbitral seat.

5 See, e.g., UAE Arbitration Law, Article 4(1).

The parties' choice of law applicable to their arbitration agreement may be express or implied and the New York Convention does not provide for any restrictions in this regard. Absent an express choice as to the law governing the arbitration agreement, the applicable law is typically considered to be the same as the law governing the remainder of the contract. However, failure to specify the law applicable to the arbitration clause may result in a different law being applicable, based on the presumption that an arbitration agreement is separable from the main contract.[6]

Procedural unfairness

Article V(1)(b) of the New York Convention provides a basis for refusal of enforcement of an award if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his or her case. The defence concerned applies in circumstances where the arbitral procedure was tainted by procedural unfairness. Irregularity contemplated in the above provision must be sufficiently serious to be taken into account. In particular, the defence will not typically be successful if it is beyond doubt that the award could not have been different, notwithstanding the irregularity.

The variety of issues emerging in the jurisprudence of the national courts applying this ground goes beyond the scope of this chapter. However, it is important to note that the enforcement courts in the developed arbitral jurisdictions tend to defer to arbitrators' procedural decisions and the application of Article V does not typically interfere with procedural informality and flexibility of arbitration. By way of example, omission of evidence by a tribunal or an order to discontinue document production does not on its own satisfy the ground in Article V(1)(b).

Active participation in arbitration, notwithstanding procedural defects, may result in waiver of the objection contemplated in Article V(1)(b). On the facts of the English decision in *Minmetals Germany GmbH v. Ferco Steel Ltd*,[7] the party resisting enforcement of an award failed to avail itself of an opportunity to challenge the findings of fact resulting from the investigations undertaken by the arbitrators. The court held that the party waived its right to object by failing to contest the improperly acquired evidence in the course of arbitral proceedings by calling on the courts of the country concerned to exercise their supervisory jurisdiction. It was concluded that, in these circumstances, no substantial injustice would result from enforcement of the award.

Unlike Article V(1)(a), Article V(1)(b) of the Convention does not contain any indication as to the law governing the determination of procedural unfairness. According to the accepted view, the standard of due process for the purposes of Article V(1)(b) is that of the enforcing state. However, the relevant measure must take into account the specificity and international character of arbitration. In particular, having contracted for arbitration, the parties should not expect the same procedural safeguards as those available in the domestic judicial forum.

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6 This conclusion has been reached (albeit in the context of an anti-suit injunction) in the English Court of Appeal decision in *Sulamerica CIA Nacional de Seguros SA and others v. Enesa Engenharia SA and others* [2012] EWCA Civ. 638.

7 [1999] 1 All ER (Comm) 315.

Excess of authority

Article V(1)(c) of the New York Convention is concerned with awards that decide issues falling outside the terms of the submission to arbitration, or contain decisions on matters beyond the scope of the submission to arbitration. Article V(1)(c) deals with jurisdictional defects in circumstances where the arbitrators have exceeded their mandate (as opposed to complete lack of jurisdiction, is governed by Article V(1)(a)). In particular, this provision covers awards *ultra petitum* (i.e., where the arbitrators granted relief not requested by the party). However, if the tribunal fails to address all the issues presented to it (award *infra petitum*), the resulting incomplete award is not covered by the language of Article V(1)(c). In these circumstances, the party may resist enforcement of an award on other grounds (e.g., Article V(1)(d)).

Despite the specific wording of the provision, it is widely accepted that Article V(1)(c) also deals with the excess of the arbitrators' authority and not merely with the scope of the request submitted to arbitration.[8] The provision would therefore be engaged if the award in question decides issues that do not fall within the ambit of the relevant arbitration clause.

Unlike in the case of Article V(1)(a) providing that validity of arbitration agreements should be primarily determined under the law chosen by the parties, there is no guidance in the New York Convention regarding the law applicable to the assessment of the scope of the arbitrators' jurisdiction. The absence of any conflicts of law provision is particularly problematic in circumstances where the scope of the arbitrators' mandate raises issues of interpretation of the arbitration agreement.

As with other jurisdictional objections, a party can waive the defence in Article V(1)(c) by failing to raise a timely objection.

Composition of a tribunal or arbitral procedure not in accordance with the parties' agreement

Article V(1)(d) of the New York Convention is concerned with cases in which the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, in the absence of such an agreement, with the law of the arbitral seat. The provision confirms the consensual nature of the arbitral procedure, with the law of the seat having a subsidiary role. The parties have autonomy in determining the procedure to govern their arbitration and may select the national rules of any country, agree to their own rules or refer to the rules of an arbitration institution.

If the parties have agreed that their proceedings will be governed by institutional rules, the procedural discretion of the arbitrators warranted by those rules often renders the defence based on the first prong of Article V(1)(d) inoperative. As has already been mentioned, the courts are not prepared to police arbitrators' procedural decisions and a review on this basis

8 A J van den Berg, op.cit., pp. 314, 315 with reference to the English and French texts of the Convention.

is frequently limited.[9] Conversely, the second prong of Article V(1)(d) of the Convention is a more frequently invoked ground and provides a substantial defence in cases where the composition of the tribunal was not in compliance with the parties' agreement.

Similarly to the defence under Article V(1)(b) concerning procedural unfairness, in most instances the defence in Article V(1)(d) will be considered waived, if not raised promptly.

The award is not yet binding

Under Article V(1)(e) of the New York Convention, an award may be denied enforcement if it has not yet become binding on the parties.

The New York Convention eliminated the double *exequatur* requirement prevalent under the enforcement regime of the Geneva Convention. Essentially, double *exequatur* meant that a party seeking enforcement of an award had to prove that it had become 'final' in the country it was made, and the country in which enforcement was sought. This could only be proven by obtaining an *exequatur* (i.e., leave for enforcement) in both countries. Courts and practitioners found this to be an unnecessary, time-consuming hurdle.

The New York Convention accomplished the removal of the double *exequatur* in two ways. First, it replaced the word 'final' with the word 'binding', to indicate that it was not necessary to prove an award was final in the country it was issued. Second, it shifted the burden of proof from the party seeking enforcement to the party against whom enforcement is sought, to prove that the award has not become binding.[10] Nonetheless, the meaning of the word 'binding' remains controversial and it is unclear whether it should be considered binding according to the law of the country of origin or where enforcement is sought.

Annulment of the award at the seat

Under Article V(1)(e) of the New York Convention, the court may refuse to enforce an award annulled by the court of the arbitral seat. However, as has already been mentioned, the discretionary nature of Article V leaves room for national courts to give effect even to those awards that have been set aside at the seat.

There is no guidance in the Convention as to the requirements that a court should take into account when deciding whether to enforce an annulled award. In the absence of an international standard, the courts in different jurisdictions have taken diverging approaches to this matter. In most jurisdictions, there is an increasingly high burden to satisfy when seeking to enforce an annulled award. In summary, the circumstances in which the enforcement is permissible include:

- the annulment procedure being tainted by serious procedural irregularity or otherwise contrary to basic principles of honesty or natural justice;
- an annulment based on local public policy standards or other local standards of review; and
- the annulment being a result of an extensive substantive review.

9 The alleged failure to follow the China International Economic and Trade Arbitration Commission Rules as parties' agreed procedures has been rejected on English authority in *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.

10 A J van den Berg, op.cit., p. 267.

An example of the above approach is an English decision in *Yukos Capital SARL v. OJSC Rosneft Oil Company*,[11] in which several arbitral awards were given effect despite them being set aside in Russia.[12] However, a different result was reached in *Maximov v. OJSC Novolipetsky Metallurgichesky Kombinat*,[13] in which the court refused to give effect to an arbitral award set aside in Russia. Absent cogent evidence of actual (rather than apparent) bias, the court relied on the Russian annulment and denied enforcement. Notably, the same conclusions were reached by the Dutch courts in analogous cases concerning the same awards as considered by the English courts in the above-mentioned cases.

The US courts apply a similar approach. In *Chromalloy Aeroservices v. Arab Republic of Egypt*,[14] the award concerned was set aside in Egypt following a detailed substantive review. The court reasoned that the US public policy in favour of final and binding arbitration of commercial disputes compelled it to enforce the award despite its annulment at the seat. More recently, the court gave effect to an annulled award in *Corporación Mexicana de Matenimiento Integral, S De RL De CV v. Pemex-Exploración y Producción*.[15] The arbitral award in question was set aside in Mexico on the ground that Pemex, as an entity deemed part of the Mexican government, could not be forced to arbitrate. It was held that the US court's deference to the Mexican court's annulment would run against US public policy.[16]

Different considerations apply if annulment of an award is not one of the grounds for refusing enforcement under the national legislation of the enforcing court. In these instances, Article VII of the New York Convention enables contracting states to apply a more liberal domestic regime for enforcement of arbitral awards. This is the case in France, where the approach to enforcement of annulled awards is characteristically less restrictive.[17]

New York Convention Article V(2)

Article V(2) of the New York Convention provides that the court may refuse enforcement if it finds that the dispute was not arbitrable under the law of the state where the enforcement is sought or if the enforcement is contrary to the public policy of that state. The grounds in Article V(2) may be taken into account by a court on its own motion.

11 [2014] EWHC 2188 (Comm).

12 cf. *Malicorp Ltd v. Egypt* [2015] EWHC 361 (Comm), in which the English Commercial Court refused enforcement of an award annulled in Egypt. The Court held that it would not be right to exercise discretion to enforce an annulled award if, applying English principles of private international law, the set-aside decision at the court of the seat was one to which English courts would give effect.

13 [2017] EWHC 1911 (Comm).

14 939 F. Supp. 907, 912-13 (DDC 1996).

15 No. 13-4022 (2d Cir. Aug. 2, 2016).

16 The court's discretion was based on Article 5(1) of the Inter-American Convention on International Commercial drafted in a similarly non-mandatory manner as Article V(1)(e) of the New York Convention.

17 See the seminal decision in *Hilmarton v. Omnium* (Court of Cassation, first civil chamber, Case No. 92-15.137 (23 March 1994)), in which the French Court of Cassation permitted enforcement of an arbitral award that has been set aside in Switzerland. See further S Petit, B Grant, 'Awards set aside or annulled at the seat', *International Arbitration Report* (Issue 10, May 2018), pp. 20 to 22.

Non-arbitrability of the dispute

Article V(2)(a) provides that enforcement of an award can be refused if the subject matter is not capable of being arbitrated under the laws of the enforcing state.

There is no international definition or uniform standard of non-arbitrable matters. A matter is considered to be non-arbitrable if mandatory national laws provide that certain issues are to be decided only by domestic courts. Although variations exist from country to country, some common examples of non-arbitrable matters include certain categories of criminal disputes, family law matters, bankruptcy, antitrust claims, employment grievances, sanctions and intellectual property disputes.

The reference in the New York Convention to the national law of the enforcing state may suggest that the non-arbitrability ground has given leeway to contracting states to designate particular subject matters, or claims and defences, as non-arbitrable. However, there are only a limited number of cases in which enforcement has been denied on the ground of non-arbitrability.[18]

Furthermore, national courts, particularly in the context of international arbitrations (as opposed to domestic arbitrations, in which non-arbitrability is given a broader meaning), generally take the view that a clear statement of legislative intent is needed before determining that a subject matter is non-arbitrable under Article V(2)(a) of the Convention.[19] Accordingly, this has led commentators to state that 'arbitrability is the rule, inarbitrability is the exception'.[20]

Violation of public policy

Article V(2)(b) of the New York Convention provides that an award may be denied enforcement if it is contrary to the public policy of the state in which enforcement is sought. The notion of public policy is not defined in the Convention and its meaning varies between the contracting states. Of all the grounds prescribed in Article V, the public policy exception is probably the most unsettled, owing to its indeterminate and evolving nature.

The International Bar Association's 'Report on the Public Policy Exception in the New York Convention' confirms no uniformity in the extent of review of an award by the enforcing courts.[21] Notwithstanding the localised nature of the public policy exception, many jurisdictions define it narrowly, in line with the Convention pro-enforcement approach. The violation concerned must therefore be considered sufficiently serious to warrant the refusal of enforcement. By way of example, serious infringement of due process was found by the Paris Court of Appeal in a matter in which the arbitrators decided to

18 One of the reasons for this is that disputes relating to arbitrability often tend to arise and be resolved at the stage of enforcing the arbitration agreement.

19 For instance, the Canadian Supreme Court in *Editions Chouette Inc. v. Desputeaux* [2003] SCC 17 stated that, if 'Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so'.

20 B Hanotiau, O Caprasse, 'Public Policy in International Commercial Arbitration', in E Galliard, D di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* 819 (Cameron May 2008) p. 819.

21 See International Bar Association, 'Report on the Public Policy Exception in the New York Convention', October 2015, p. 18, https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx (accessed 8 February 2021).

conduct the case as an *ad hoc* proceeding seated in Tunis rather than as a Qatar-seated arbitration administered by the Qatar International Centre for Conciliation and Arbitration.[22] Conversely, in *RBRG Trading (UK) Limited v. Sinocore International Co Ltd*,[23] the English Court of Appeal confirmed that the public interest in the finality of arbitration awards outweighed an objection to enforcement on the grounds that the transaction was 'tainted' by fraud.

However, certain countries continue to maintain parochial approaches to the public policy exception. In those jurisdictions, public policy can be used opportunistically by award debtors as a gateway to review the merits of the award. However, a reassuring trend can be observed towards a more curtailed application of the public policy exception in those jurisdictions that have traditionally displayed idiosyncratic approaches to the interpretation of the New York Convention.[24] A notable example is the Indian judiciary, which once endorsed an expansive definition of public policy to include even a mere error of law but has now aligned its application of this ground with the generally accepted view that the public policy exception must be interpreted narrowly.[25]

Given the role of public policy as an exceptional device, issues of waiver and preclusion of the relevant objection are treated differently from other grounds. Public policy is a matter that a court can take into account on its own motion. Further, it is based principally on the national law of the enforcement court, which may render recourse to the courts of the arbitral seat inadequate. Consequently, failure to seek annulment of the award on public policy grounds should not preclude a party from resisting enforcement on the same basis. Similarly, failure to raise the public policy argument in arbitral proceedings should not constitute a bar to consider the same by the enforcing court. However, different considerations may apply if the arbitrators considered an argument based on public policy and rejected it. In these circumstances, certain courts have considered themselves bound by the arbitrators' findings and refused to entertain the public policy argument *de novo*.[26]

Non-New York Convention enforcement

The New York Convention governs enforcement and recognition of arbitral awards within contracting states, of which there are currently 166. Given an almost universal remit of the Convention, instances in which arbitral awards are subjected to a non-New York Convention enforcement regime are inevitably rare. However, if a more favourable, alternative enforcement regime is available to a party seeking to enforce an arbitral award, Article VII of the Convention provides that the treaty more advantageous to enforcement should prevail. The same applies to a more favourable domestic law.

22 Arret du 17 decembre 2020, available at https://files.lbr.cloud/public/2021-02/Al%20Misnad%20decision.pdf?hyh4XVsnMp2S.5jn7jBWTveG3hxaKqaH (accessed 8 February 2021).

23 [2018] EWCA CIV 838. See also *Westacre Investments Inc v. Jugoimport SDPR Holding Co Ltd* [2000] QB 288.

24 P Stothard, A Biscarro, 'Public policy as bar to enforcement', *International Arbitration Report* (Issue 10, May 2018), pp. 23, 24.

25 *Cruz City 1 Mauritius Holdings v. Unitech Limited*, 11 April 2017, EX.P.132/2014 & EA(OS) Nos. 316/2015, 1058/2015, 151/2016, 670/2016.

26 *Westacre Investments Inc v. Jugoimport SDPR Holding Co Ltd* [2000] QB 288.

When no international regime is available,[27] a party seeking enforcement of an arbitral award will have to rely on the domestic legislation of the enforcing state. Some jurisdictions incorporate the New York Convention grounds into their domestic framework by repeating the relevant provisions in national legislation, without distinguishing between Convention awards and non-Convention awards. This approach has been adopted in the UNCITRAL Model Law. In these instances, the framework originating from the New York Convention will apply with minor or no modalities incorporated in the national legislation.[28]

However, a number of jurisdictions prescribe different enforcement rules for Convention awards and non-Convention awards. A notable example of the latter approach is the English Arbitration Act 1996.[29] Consequently, if a foreign arbitration award is not a New York Convention award, a variety of provisions under which it can be enforced in England may apply.[30]

Other examples of subjecting enforcement to the requirements extrinsic to those prescribed in the New York Convention are less straightforward and include deviating from the Convention standard. This may occur primarily by way of (1) application of internationally recognised non-New York Convention grounds for refusal of enforcement, (2) disregard of the Convention by the courts of the contracting states, contrary to their international law obligations, and (3) enacting in national legislation grounds for refusal of enforcement inconsistent with the Convention.

The most notable example of the practice described in point (1), above, is defence of state immunity. In most jurisdictions, foreign states are granted certain immunities (typically from suit and execution) that protect them against proceedings brought against them before the courts of another state. Although the defence of state immunity is not mentioned in the New York Convention or the UNCITRAL Model Law, it is frequently invoked in practice by unsuccessful state parties resisting enforcement of awards rendered against them. Pursuant to the widely accepted doctrine, the existence of state immunity depends on whether the acts of the state giving rise to a dispute are regarded as *iure imperii* (understood as the exercise of the state's sovereign functions) or *iure gestionis* (i.e., acts undertaken in the state's commercial capacity).

In England, the position is set out in the State Immunities Act 1978. Section 9 of the Act deals specifically with arbitration and clarifies that when a state has agreed in writing to submit disputes to arbitration, it has waived immunity from both the arbitration proceedings and the arbitration-related proceedings before English courts. A similar rule is adopted internationally. However, notwithstanding the principle that the state is deemed to have waived its immunity from suit by entering into an arbitration agreement, this may not implicate a waiver of the state's immunity from execution. Under English law, waiver of immunity extends to court proceedings relating to the recognition and enforcement of

27 e.g., as a result of the reciprocity reservation under Article I(3) of the New York Convention and in the absence of a regional convention or bilateral treaty dealing with enforcement of foreign awards.

28 Notable examples include Switzerland or France, albeit the latter does not track verbatim the language of the UNCITRAL Model Law.

29 Sections 99ff.

30 For an overview, see R. Merkin, Arbitration Law (Informa 2004) paras. 19.20, 19.21.

foreign arbitral awards[31] but it does not ordinarily extend to execution measures following recognition and enforcement, for which a separate, explicit waiver of immunity is required (Section 13, State Immunities Act 1978).

The second example of a departure from the New York Convention enforcement standard entails disregard of the provisions of the Convention by the courts of the contracting states. Although discrepancies in interpretation are inevitable in any area regulated by way of a transnational legal instrument and over which no supreme body exercises adjudicative power, certain instances of blatant violation of the Convention's standards have been reported in various jurisdictions.[32] However, these anomalous results are contrary to the practice of the vast majority of the contracting states that adhere to the Convention and uphold its pro-enforcement policy.

Finally, certain states prescribe in their legislation exceptions to enforcement of arbitral awards that depart from the language of, and go beyond the list of exclusions permitted by, the New York Convention. By way of example, Article 459 of the Vietnamese Code of Civil Procedure prohibits enforcement of a foreign arbitral award that is contrary to basic principles of Vietnamese law. In a similar fashion, the UAE Arbitration Law[33] allows refusal of enforcement of an arbitral award on grounds that are not envisaged in the New York Convention. These include, for example, circumstances in which 'the arbitral award excludes the application of the parties' choice of law for the dispute' or 'was not issued within the specified time frame'.[34]

It remains to be seen whether the courts will apply these additional restrictions to enforcement of Convention awards. As emphasised by A J van de Berg, the New York Convention should supersede domestic law concerning the enforcement of foreign awards and should be applied directly (or, as the case may be, by way of reference to the implementing act), leaving no room for the application of *lex fori* of the enforcing court.[35]

31 *Svenska Petroleum Exploration AB v. Government of Republic of Lithuania and AB Geonafta* [2006] EWCA Civ. 1529 at para. 117.

32 See examples of Turkish, Indonesian, Chinese and Russian cases in Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2020) 26.05(C), s 17.

33 Federal Law No. (6) of 2018 on Arbitration.

34 UAE Arbitration Law, Articles 53(1)(e), (g) and 55(1)(2). Pursuant to Article 2, the UAE Arbitration Law applies to (1) arbitration conducted in UAE, (2) international commercial arbitration conducted abroad, if the parties have chosen this law to govern such arbitration, and (3) arbitration arising from a dispute in respect of a legal relationship, whether contractual or not, governed by UAE law. Instances (2) and (3) leave room for application of the UAE Arbitration Law to foreign arbitration awards.

35 A J van den Berg, op.cit., pp. 268 to 270.

Appendix 1

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Sherina Petit is a partner at Norton Rose Fulbright in London and heads the international arbitration practice across Asia, Europe and the Middle East. She also heads the firm's India practice.

Besides arbitration, she has significant experience in investor-state disputes resolution, alternative dispute resolutions, litigation and regulatory investigations. In addition to acting as counsel in arbitrations, she regularly sits as an arbitrator.

Sherina has a wide range of experience in all key aspects of international arbitration across a broad range of industries, including energy, construction, oil and gas, trade, transport, pharmaceuticals, commodities, finance and technology. She represents clients across the globe in a wide variety of commercial and investment arbitration proceedings, including those before the London Court of International Arbitration (LCIA), International Chamber of Commerce (ICC), United Nations Commission on International Trade Law, Singapore International Arbitration Centre (SIAC), and in *ad hoc* proceedings.

Sherina is ranked in all leading directories and is highly recommended as 'a stand-out name in the international arbitration space'. She is on the LCIA board of directors, on the board of the European Federation for Investment Law and Arbitration (having recently retired as its chair), part of the ICC Indian Arbitration Group, the SIAC Users Council, and on the Steering Committee of the Pledge for Equal Representation for Women in Arbitration.

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Enforcement used to be an irrelevance in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly.

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