KINGS COLLEGE LONDON

CENTRE OF CONSTRUCTION LAW AND DISPUTE RESOLUTION

PART D

INTERNATIONAL ARBITRATION: REVIEW

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PART 1: LAWS AFFECTING INTERNATIONAL ARBITRATION

1A: INTRODUCTION

1. Some characteristics of an international commercial contract.

- Parties have places of business in different countries.
- Place of performance is in a country other than that where one or both parties have their place of business.
- The contract concerns property in a foreign country.
- One or both parties have their principal/only assets in country other than that of place of performance.
- Third parties (eg sureties and providers of letters of credit) who have an interest in the performance must perform obligations in a country other than their place of business.

Litigation and arbitration compared

2. Litigation as a method for resolving disputes under international commercial contracts.

Advantages: Judicial expertise in national law and procedure, coercive power in the face of disruptive tactics, power to order joinder in multi-party disputes, public nature of judgements.

Disadvantages:

- Courts of one party may be unacceptable to the other party.
- Courts of one party may be perceived by other as incompetent or biased by the other party, or language and procedure may be inaccessible.
- Local court expertise in the national law may be irrelevant to the substantive law of the contract.
- Local courts may lack specialist judiciary familiar with the relevant commercial issues, or be jury based.
- Public nature of court proceedings may be unacceptable.
- Extensive rights of appeal can be used as delaying tactics.
- Cost and complexity of commencing proceedings and litigating in a foreign court, generally that of the defendant, may be unacceptable.

- Problems with service of process on defendants out of the jurisdiction.[1]
- Problems with the international recognition and enforceability[2] of court orders and judgements.[3]

3. Arbitration as a method for resolving disputes under international commercial contracts.

4. Disadvantages: Costs of tribunal/administration not state subsidised;[4] delays in convening multi-arbitrator tribunals,[5] problems with joinder (unless contracted for), weak coercive power over parties and, in particular, non-parties.Expense, cost and the risk of court intervention are perceived as the greatest disadvantages: Pricewaterhouse Coopers and Loukas Mistelis of Queen Mary's School of International Arbitration: "International Arbitration: Corporate Attitudes and Practices 2006". See also #"International Arbitration, Can we realise the potential?", J Beerbower (2011) 27 Int. Arb. 91; #"Can a world exist where expedited arbitration

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1 Many foreign courts do not have jurisdiction over a defendant not present in/resident in their country. English courts are somewhat unusual in exercising an exorbitant jurisdiction. See Enforcement of Foreign Judgements, ed Dennis Campbell (LLP 1997).

2 Difference between recognition and enforcement. Foreign judgements have, for instance, no direct operation in England. They can't be immediately enforced by execution since operation of legal systems is territorially circumscribed. They may, however, be recognised, that is they can be relied on to resist a claim in the same or a connected matter. Some judgements (eg dismissal of claim, declaration) are not capable of enforcement.

3 This difficulty can be overstated. There may be multi/bilateral treaties that minimise it; See in the UK the Foreign Judgements (Reciprocal Enforcement) Act 1933 (principally concerned with such treaties between commonwealth countries) and the Civil Jurisdiction and Judgements Act 1982, principally concerned with such treaties between countries of the European union and of EFTA Furthermore, some countries, eg England and Wales and Switzerland, are generous to the judgements of other jurisdictions. For example, English common law will entertain an action on the judgement that is final and conclusive and for a certain sum, and give summary judgement subject to a circumscribed range of defences, eg obtained by fraud, serious breach of natural justice (eg no opportunity be heard), public policy, not a court of competent jurisdiction [not competent if a proceedings brought in breach of an arbitration clause, See Tracomin SA v. Sudan Oil Seeds Ltd (No 1) [1983] 1WLR 662, affirmed [1983] 1 WLR 1036 (CA). Many other countries are less generous. Their courts reserve the right to enquire into the merits. It is because of this, that there is a need for reciprocal obligations between states to enforce and recognise judgements created by bilateral or multilateral treaty. See, for example, the Brussels and Lugano Conventions, now largely replaced by the Judgement Regulation 2000, concerned with the mutual recognition and enforcement of judgements within the European Union and EFTA. There is no world-wide treaty along these lines.

4 Litigation in a foreign forum can also be expensive, slow and cumbersome.

5 Proceedings can be slow and cumbersome: an inevitable feature (also may affect legal proceedings) of the multinational nature of the parties, the dispute and the tribunal and of the need to produce awards capable of enforcement in different countries and cultures?

becomes the default procedure", P Morton (2010) 26 Arb. Int. 103; #"The Cost Conundrum", N Ulmer (2010) 26 Arb. Int. 221.

Advantages:

- A neutral forum divorced from the parties' legal cultures; alternatively a forum in which each party's legal culture is represented.
- A forum, free from the procedural constraints of either party's local courts.
- An independent tribunal with relevant technical and commercial expertise, or legal expertise appropriate to the law of the parties' contract.
- Party autonomy, tribunal having procedural flexibility over matters not agreed.[6]
- Privacy (usually) and, in many jurisdictions, confidentiality.
- Limited scope for delaying enforcement, because limited grounds for challenging or appealing an arbitral award.[7]
- Worldwide (almost) recognition and enforcement of arbitral awards in commercial disputes under the New York Convection on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (The New York Convention).
- In a 2006 Price Waterhouse survey on corporate attitudes to international arbitration it was flexibility of procedure, enforceability of awards and privacy that were regarded as the main advantages, these outweigh the disadvantages, expense, length of time, followed by risk of court intervention and joinder problems.

5. Dispute review boards, adjudication and mediation are considered elsewhere on this course.

Possible definitions of international arbitration

6. Article 1, The UNCITRAL Model Law: An arbitration is international if: (a) the parties to the arbitration agreement have, at the time it is concluded, their places of business in different States; (b) either the place of arbitration, any place where a substantial part of the obligation of the relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected, is outside the State where the parties have their places of business; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

7. Article 1(1) of the New York Convention): Any arbitration where the award will have to be recognised or enforced in a state other than that where the award was made.

8. These definitions are principally concerned with commercial arbitration (see footnote to Article 1 of the Model Law).

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6 This may enable a dispute to be managed in a way that is sensitive to the different expectations of the parties in respect of matters such as language, geographical location, case presentation, disclosure, evidence and conduct of hearings.

7 In most jurisdictions there is (unlike in court proceedings) no appeal on the merits.

Commercial: Covers matters arising from all relationships of a commercial nature, whether contractual or not. Such relationships ordinarily include, but are not limited to, any trade transaction for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreements or concessions, joint ventures and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road.

9. Commercial dealings are generally entered into between private entities but states or state entities may also contract for commercial purposes (but if there are disputes difficulties can arise where the administrative or executive decision making of the state are issue and with state immunity). **State arbitration (disputes between states)is outside of the scope of this course.**

A political and economic dimension

10. There is a political and economic dimension to international arbitration. Politically it may viewed with suspicion, as favouring western (capitalist) commerce, particularly by developing countries and those with socialist or communist structures. It may also be viewed with suspicion by national courts concerned at inroads into national law. But, economically, the encouragement of inward investment and international trade is dependent on a stable and certain context for trans-national commercial transactions and a neutral environment for enforcement.

    - Consider Vimar Sueguros v. M/V Sky Reefer (USA Supreme Court) YB Com Arb XXI, 773 "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multinational endeavours, its courts should be more cautions before interpreting its domestic legislation in such a manner as to violate international agreements" (in that case the New York Convention).

11. Inexcess of 140 states have ratified/ acceded to the New York Convention, creating a minimum international standard for the recognition and enforcement not just of arbitration awards, but of arbitration agreements.A similar number of states are signatories to, and have ratified the Washington Convention 1965, which provides for the settlement of investment disputes between foreign private investors and Host States by arbitration. There is also a recent proliferation of multilateral and bilateral investment protection treaties (BITS), many of which provide for arbitration.

12. International commercial arbitration is also business in itself. Thus, States in which most international arbitration takes place have, over recent years, modernised their arbitral laws to reduce court interference in the process. There is also a growing harmonisation of arbitral law prompted by the promulgation by the UN of the Model Arbitration Law of 1985, amended 2006 (The Model Law).

De-localised arbitration?

13. There is a school of thought that argues that arbitration concerned with transitional commerce should be divorced from all municipal systems of law and not be subject to

state court control or interference at any level. Consider the Iran-US Claims Tribunal[8] and the arbitration system created by the Washington Convention 1965.

14. This is unrealistic. State court support is required, as a minimum, to recognise and enforce arbitral agreements and arbitral awards. State court support may also be required in constituting tribunals and in assisting with interim and conservatory measures. Thus, a degree of state supervision is only to be expected, not just on enforcement of any award, but at the place of the arbitration.

15. But de-localisation from State court procedure is possible, indeed desirable (see, for example, 1998 ICC Rules, article 15(1)),[9] subject to any mandatory procedural rules at the seat (place) of arbitration, eg AA1996, s. 4(1).

Some introductory articles

16. In addition to the recommended texts, see # "Does the world need additional uniform legalisation on arbitration", G Herrmann (2003) 19 Arb. Int 415; #"International commercial Arbitration; possible future work …", (UNCITRAL, 9th April 1999, in Diploma materials).

1B: LEGAL SYSTEMS AFFECTING INTERNATIONAL ARBITRATION

17. There are a number of different legal systems relevant to international arbitration; #Channel Tunnel v. Balfour Beatty [1993] AC 334, 357.[10] For example:

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[8] Consider Iran Aircraft v. Avco, YB Comm Arb XVIII (1993) 596 (USA). Tribunal made procedural order that secondary evidence concerned with proof of invoices, ie. an affidavit with audited accounts and receivables ledgers, was acceptable. But, after a change of Chairman, made an award that held this evidence to be insufficient! Enforcement of the award was refused in the USA on basis that the tribunal, by misleading Avco, had denied it opportunity to present it claim in a meaningful manner. The Iran-US Claims tribunal subsequently censured the US Court of Appeal for this decision in Award No 586-A27FT (1998), on basis that the USA had violated its obligation under the Algiers Declarations to ensure that valid awards of the Tribunal were treated as final and binding and enforceable in the USA, and expressed the view that its awards did not come within Article V of the NYC. The tribunal appeared to consider that only it could review its own awards on, for example, grounds of procedural error or possible fraud, forgery or perjury. But where is such a procedure in the Algiers Declarations or in the Tribunal's procedure, contrast ICSID Art 52. See A J van den Berg, *Refusals of Enforcement under the New York Convention of 1958*, ICC Bulletin Special Supplement (1999), 75 at 79.

[9] ICC Rules, art. 15(1) The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

[10] **Channel Tunnel**: There may be more than one national system of law bearing on international arbitration: The proper law of the contract; the law of the arbitration agreement (concerned with its validity and interpretation and performance, [but note NYC, art. II(1) on arbitrability, art. V(1)(a) concerning capacity]; the curial law of the arbitration, the *lex arbitri*, (including the conflict of

- The law of the substantive agreement.

- The law of the arbitration agreement.

- The procedural law of the arbitration (the *lex arbitri*).

- The law of the place or places of domicile (or residence)/nationality of the parties.

- The law of the place of enforcement of the arbitration agreement and of recognition and enforcement of the tribunal's award.

The law of the substantive agreement (lex causae)

18. This includes the proper law of the contract and, possibly, any mandatory rules of law applicable at the place of performance and the parties' countries of domicile/nationality. The proper law of the contract (the governing law/the applicable law) is concerned with the validity and interpretation of the contract, the parties' rights and obligations, performance and substantive remedies, eg. damages, and limitation where it is a substantive defence or deemed to be such.[11] See #"Choice of law applicable to the contract …", Y Derains (1995) 6 ICC Bulletin 10.

    - Which prevails where the law of the contract views a matter as substantive, but the *lex arbitri*views it as procedural.[12] Consider, for example, the discussion of this in #Lesotho Highlands v. Impreglio SpA [2005] UKHL 43 (HL).[13]

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law rules of that state). See also, The Importance of National Law Elements on International Commercial Arbitration, Hong-Lin Yu and Peter Molife, [2001] International Arbitration Law Review, 17.

[11] In the EU, see Rome Convention 1980: given effect to in UK by the Contracts (Applicable Law) Act 1990. See art. 10(1): the proper law of the contract also governs questions of prescription and limitation of action.

[12] An example is given by Sir Michael Kerr, *Concord and Conflict in International Arbitration*, (1997) 13 Arb Int 2/121, 137: Arbitration between French Company and Pakistani public authority, governing law, the law of Pakistan, ICC arbitration in Singapore. Limitation period in Pakistan law, 3 years: in Singapore, where viewed as a procedural defence, 6 years.

[13] **Lesotho**: Contract governed by the law of Lesotho, provided for payment in Maloti (Lesotho currency). Arbitration agreement, ad hoc, provided for ICC arbitration under the Arbitration Act 1996. The tribunal concluded that questions of currency and interest were procedural matters governed by ss. 48 and 49. It ordered payment in various European Currencies and the payment of interest on a commercial rate. HL accepted that, in regard to the currency of damages, the tribunal had erred in law in deciding that it had discretion under s. 48 to disregard the substantive law in relation to the currency of damages, but that the wrong use of an available discretion was not an excess of jurisdiction. It held that, on the assumption that the tribunal erred in law in exercising its discretion over interest the way it did, this was at most an error of law, and not an excess of jurisdiction, and there was, in any case, no substantial injustice caused by this error. The implication is that only if the tribunal exercises a power that it does not have, will there be an excess of jurisdiction.

19. If agreement to a proper law is not possible (eg because of cultural differences) seek to agree a mechanism for the tribunal to apply in making a choice. Not all substantive laws operate on contractual obligations in the same way, see M Abrahamson, *Checklist for foreign laws*, (1988) 5 ILQR 266;[14] Yves Derains, *The ICC Arbitral Process, Pt VIII, Choice of the law applicable to the Contract and International Arbitration*, ICC Bulletin, (1995) Vol 6/1, 10.

- The indirect approach requires the tribunal to choose the conflict of law rules that it considers appropriate and apply it (eg Model Law, art. 28.2, AA1996, s. 46(3).

- The direct approach gives the tribunal discretion to choose the applicable law it considers appropriate (eg. France, NCCP, art 1496, ICC Rules, art 17(1)), or with which the case has the closest connection (eg. Swiss PILA, art. 187).

The *Lex mercatoria* (international principles of law)

20. Many local laws permit such a choice: eg. France, NCCP, art. 1496; Swiss PILA, art 187(1); Model law, art 28, AA1996, s. 46(1)(b). The main objection to it is uncertainty. Are there legal principles that are generally followed by the international commercial community?[15] For an introduction, see Lord Mustill, *The new Lex Mercatoria, the first twenty five years*, (1988) 4 Arb Int 86.

(International?) Public policy restrictions on choice of law

21. Some laws are not amenable to choice of law clauses:

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[14] Failure to identify a substantive law may, itself, become a source of disputes. Consider differences in matters such as the following: Significance of pre-contractual negotiations in interpreting contracts; Limitation periods; Doctrine of unforeseen circumstances (allowing contractual provisions to be adapted in the event of major changes from the circumstances prevailing when contract concluded) Swiss law allows this, not French or English law; Doctrines of good faith; Significance given to the service of formal notices of default; Laws concerned with repudiation (law of repudiatory breach, not part of Italian law). As further examples, consider article 370 of the Swiss Code of Obligations, which provides that if work is accepted without objection, the provider of that work is released from liability for patent defects and that latent defects must be notified immediately to avoid a similar consequence. Article 388 of the Greek Civil Code (there is a similar provision in some other civil law codes) provides that the court can dissolve contracts or vary contractual obligations where a contract has become exceptionally onerous due to unforeseen changed circumstances.

[15] See, for example: The Uniform Law on the Formation of Contacts for the International Sale of Goods 1964The Uniform Law on the International Sale of Goods 1964. This is part of UK law but only if adopted by the parties.Both of these are now embodied in the Vienna Convention on Contacts for the International Sale of Goods 1980 (CISG). CISG, art 1: defines international sales as contracts for sale of goods between parties whose places of business are in different states.See also CENTRAL Transnational Law Digest, University of Cologne, for a consideration of what the lex mercatoria might contain.

- Laws linked to capacity of the parties (considered below).

- Mandatory rules of law (at place of domicile/nationality, place of performance of obligations, place of enforcement of award?) that cannot be waived by a choice of law clause. For example, health and safety, restraint of trade, anti-trust and competition law, enshrined in national or trans-national legislation (eg the Sherman Act 1890 (USA) and article 81 of the Treaty of Rome (EU)) or laws governing bribery, money laundering and corruption. Outside of the domestic arena, many of these are no longer regarded as raising questions of arbitrability, but issues of (international) public policyare relevant on enforcement. Consider #Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc YB Comm Arb XI, 555 (US Supreme Court);[16]#Eco Swiss China Time v. Benetton International 1999 ECR 1-3055.[17] (ECJ). See also #"Arbitration and

[16] **Mitsubishi**: (555 473 US 614 (1985) Soler's agreement with Mitsubishi required Soler to sell care exclusively in Puerto Rico, not elsewhere in USA, provided for arbitration in Switzerland. Soler sold cars on the mainland contending that the agreement was contrary to the Sherman Act. Soler commenced legal proceedings against Mitsubishi under that law and resisted Mitsubishi's application to stay those proceedings to arbitration, arguing that the dispute about the application of the Sherman Act was not arbitrable in the forum of enforcement, the USA. The Supreme Court ordered arbitration, but noted that the courts of the USA would be able to ensure, at the enforcement stage, that the legitimate interest in the enforcement of the USA's mandatory anti-trust laws had been addressed. This is known as the second look doctrine, see Art V(2)(b) NYC. Note: If the agreement had provided for arbitration in USA, the court might well have held that the dispute was not arbitrable. The Swiss court takes a similar view, Tribunal Federal, 28th April 1992 (1993) YB Com Arb 143 [[[Article 85 (now art 81) of the Treaty and Regulation 17 do not preclude an arbitral tribunal from examining the validity of a contract said to be in breach of those provisions.

[17] **Eco**: Licensing agreement between Netherlands Company and Hong Kong Company provided for arbitration in the Netherlands with arbitrators to apply Netherlands law. First part award concluded that Benetton should pay damages to Eco for terminating the agreement. Second award determined quantum (the art 85 point was not raised before the tribunal). Benetton then applied for annulment of both on grounds of public policy (a statutory ground for annulment – but with a three month period to apply) contending that the license agreement was invalid under art 85 (now art 81) Treaty of Rome. Held: Where national court had power to annul an award for failure to observe national rules of public policy, it must also grant such an application where it was founded on a failure to comply with the prohibition in art 85. This may also be regarded as a matter of public policy within the meaning of the NYC. Questions concerning the prohibition in art 85 should be open to examination by national courts when asked to determine the validity of an arbitration award, court must grant annulment if it considers the award is contrary to art. 85. But Community Law does not require a national court to refrain from applying domestic rules where award has become final because no application to annul within applicable time limits. The Advocate-General also considered that, since European antitrust law was part of the public policy of member states of the EU, it had, where relevant, to be applied by arbitrators, even if not raised by

Competition Law …". L Radicati Di Brozolo (2011) 27 Arb. Int. 1.

- Contrast Accentuate v. Asigra Inc [2009] EWHC 2655 (QB) where the court held that since an arbitration agreement provided for a substantive law and place of arbitration (Ontario, Canada) other than one that would give effect to the EU Commercial Agents Directive, it was null and void in so far as it purported to encompass claims under that Directive.[18]

The law of the arbitration agreement

22. In general, an arbitration agreement is regarded as separate from any substantive agreement in which it is found (the doctrine of seperability or autonomy).[19] This means that it can survive the invalidity or premature discharge of the substantive agreement in which it is embodied. See, for example, #Harbour Assurance v. Kansa [1993] 1 Lloyd's Rep 455 (CA);[20] AA1996, s. 7; Branch Manager Magma v. Potlure (India SC, September 2009) (2010) 13 Int ALR N-12 (also recognising the doctrine as part of the law of India). It also means that the law of the arbitration agreement is not necessarily the same as the either the *lex arbitri*or the proper law of the contract.

23. The law of the arbitration agreement is concerned with the same matters as the proper law of a contract, in particular the validity[21] and interpretation of the arbitration agreement, identification of the parties to it (although the curial law, may also be relevant),[22] and its performance and discharge.[23] It may also govern questions of confidentiality (under the implied term theory).Compare, for example, MR Engineers v. SOMDatt Builders (India SC, July 2009) (2010) 13 Ind. ALR N-10 with Sea Trade

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the parties. But the ECJ did not have to decide this question. It is often difficult to distinguish national public policy from international public policy, the latter always affects the enforceability of awards, the former may do so if enforcement is sought in the country with that policy.

18 **Accentuate**: The judge seems to have muddled substantive law and lex arbitri issues.

19 See for example, AA1996, s. 7, the Model Law, art 16(1), Swiss PILA, art 178(3). Note also Prima Paint v. Flook & Conkin 388 US 395, 402 (USA Supreme Court), where the concept was recognised in US (federal) law.

20 **Kansa**: By substituting "agreement" for "contract" words such as "in respect of", "in connection with" have an even wider meaning, and can encompass disputes about whether the contract in question is void, for instance, for illegality

21 But note Swiss PILA, art 178(2), arbitration agreement is valid if it conforms either to the law chosen by the parities or the law governing the subject matter of the dispute, or if it confirms to Swiss law.

22 See Non-Signatories and International Arbitration in the United States, James Hosking (2004) 20 Arb Int 289, for a discussion of US cases considering which law applies to determine whether a non-signatory can take the benefit of/be bound by an arbitration agreement.

23 **Channel Tunnel v. Balfour Beatty**[1993] AC 334, 357: The law of the arbitration agreement is concerned with its validity and interpretation and performance [but note NYC, art. II(1) on arbitrability, art. V(1)(a) concerning capacity].

v. Hellenic Mutual [2007] 1 Lloyd's Rep 280 (England, Com Ct) (tests for whether an arbitrationagreementincorporated by reference).

24. A law governing the arbitration agreement is seldom stated expressly. Thus, there can be problems in deciding the parties' intentions; the principal options being the *lex arbitri*or the law of the substantive agreement. There is academic support for a presumption in favour of the latter,[24] but the former cannot be disregarded and appears to accord more closely with the New York Convention, art. V(1)(a). Contrast #XL Insurance v. Owens Corning [2001] 1 All ER (Comm) 529 with #Union of India v. McDonnell Douglas [1993] 2 Lloyd's Rep 48.[25]

25. A more recent trend, is to regard it as governed by *lex mercatoria*, if no specific is law identified.

- See, for example.Dalico(1993) (France);[26] Revue de L'Arbitrage 1994, 116 (An arbitration clause is legally independent of the main contract by virtue of a substantive rule of international arbitration law. Subject to mandatory rules of French law and international public policy, its existence and efficacy are assessed according to the common will of the parties without any need to refer to a national law);Occidental Exploration v. Republic of Ecuador [2005] 2 Lloyd's Rep 707 (CA) where the court considered, without deciding, that an

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24 See Redfern & Hunter (3rd Edition), 158ff.

25 **XL Insurance:** The choice of law clause in the insurance contract (State of New York) had to be considered in conjunction with the arbitration clause which provided for arbitration in London under the provisions of the Arbitration Act 1996 to decide the proper law of the arbitration clause. By stipulating for arbitration in London under that Act the parties had choose English law to govern the matters which fell within those provisions including the formal validity of the arbitration clause and the jurisdiction of the tribunal and, by implication English law as the proper law of the arbitration clause. Thus the US FAA (which might have invalidated the agreement because it was not signed by both parties or contained in an exchange of letters, was irrelevant. **Union of India**: the parties by art. 11 of their agreement (did not expressly refer to the arbitration agreement) had chosen the law of India not only to govern the commercial bargain but also the agreement to arbitrate.

26 **Dalico**: Cour de Cassation, Dec 1993. An arbitration clause is legally independent of the main contract by virtue of a substantive rule of international arbitration law. Subject to mandatory rules of French law and international public policy, its existence and efficacy are assessed according to the common will of the parties without any need to refer to a national law. This suggests that subjective arbitrability is determined by the parties' agreement, not by the country of a party's nationality. ICC arbitrators adopt a similar principle on the basis that it is contrary to international arbitration law and good faith that a public law entity who enters into an arbitration agreement with a private foreign company unacquainted with the domestic law of that entity can seek to have the arbitration agreement declared void when a dispute arises, alleging that its own law prevents it from entering into such an agreement. Note this does not mean that the award will be enforceable in the state of the public law entity, but it might be elsewhere.

arbitration agreement in a BIT might be governed by international law, as was the BIT.

- Contrast the conventional English approach in Halpern v. Halpern [2006] EWHC 603 (Comm); [2006] 2 Lloyd's Rep 83[27] (Common law principles apply as arbitration agreements not governed by the Rome Convention. The law of the arbitration agreement must be that of a country. Also the law of the seat had also to be a municipal system of law). Note #Dallah Real Estate v. Pakistan[2010] UKSC 46, where the tribunal had applied transnational principles to conclude that Pakistan was a party to the arbitration agreement, but the English court on enfacements proceedings applied French law, the law where the award was made, and concluded Pakistan was not a party.

- It matters: Consider Hamlyn v. Talisker [1894] AC 202; XL Insurance v. Owens Corning[2001] 1 All ER (Comm);Nirma Ltd v. Lurgi Energie, (India), YB Comm Arb XXVIII, 790 (the approach of the Indian courts finds little favour elsewhere,[28] see "Yet another misad-Venture by the Indian Courts …", AN Jain (2010) 26 Arb. Int. 251); #JSC Zestafoni v. Ronly Holdings [2004] 2 Lloyd's Rep 335 (Com Ct).[29]

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27 **Halpern**: It was for these reasons that Jewish law, could not be the law of the arbitrator or of the agreement.

28 **Hamlyn**: A construction contract between Scotch and English firms to be performed in Scotland provided of arbitration by the London Corn Exchange. Action by Scotch firm in Scotland for damages, who successfully resisted a stay to arbitration on grounds that arbitration invalid in Scotch law as arbitrators were un-named. On appeal to HL held: Although the proper law of the contract was Scots' law, the issue as to validity of the arbitration agreement had to be distinguished from the proper law of the contract. The arbitration agreement was governed by laws of England and Wales. Thus the Scotts' court should have given effect to it. **Nirma Ltd:**(High Court, Gujarat, 2002): Application to set aside tribunal's award on jurisdiction. If proper law of the arbitration agreement (which, unless clearly stated otherwise is the proper law of the contract) is the law of India, the courts of India have jurisdiction over the arbitration. Thus, India court had jurisdiction to set aside an award made overseas where law of the arbitration agreement was the law of India and this was not displaced because parties agreed to locate arbitration in England. But under s. 16 of the Arbitration and Conciliation Act 1996, a decision on jurisdiction is not an award, thus that decision can only be challenged when taking recourse against the award made upon continuation of the proceedings. Note: This, approach appears to be unique to India and Pakistan.

29 **JSC Zestafoni**: Four parties concluded contract, governed by English law, for electricity and services, provided for arbitration before a panel of three. Subsequent disputes between two of them JSCZ (Georgian) and Ronly (English) agreed to arbitration before a sole arbitrator. After award made JSCZ challenged it, *inter alia*, on grounds that agreement to arbitrate before a single arbitrator void under law of Georgia. Court said estopped from taking the point under s. 73, but even if could be taken, arbitration agreement was impliedly governed by English law as made in course of an agreement which provided for English Law and provided for arbitration in England and made by fax send by JSCZ received in England. Since arbitration agreement was made in England and to be performed in

A note on confidentiality

26. Privacy is concerned with the rights of persons other than the tribunal, parties, their advisors and witnesses to attend meeting and hearings. Confidentiality is concerned with the obligation not to divulge or give out information relating to the contents of the proceedings, documents or the award. Consider:

> Privacy of proceedings and the tribunal's deliberations
> Confidentiality as to existence of proceedings and parties.
> Confidentiality of material engendered during the proceedings.
> Confidentiality after the award.

27. The traditional view (based on an implied term theory) is that arbitral proceedings are confidential, except for the award where this is needed to preserve or enforce a legal right. Few arbitral laws, other than the New Zealand Arbitration Act 1996 (which provides for it), deal expressly with confidentiality.[30] In some cases, judge made law fills the gap. See, for example, the law of England and Wales: Dolling-Baker v. Merrett [1990] 1 WLR 1205 (CA).[31] A similar view is taken in France: Aita v. Ojjeh (1986) Rev Arb, 583. But, while there is little argument that arbitration is private, not all legal systems accept that arbitral proceedings are confidential. Consider:

> Australia: Esso v. Plowman (1995) 128 ALR 391 (HC).[32] Private, but not confidential.
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> Sweden. AI Trade Finance v. Bulgarian Foreign Trade Bank (Bulbank) YB Comm Arb 291).[33] Private, but no implied duty of confidentiality on parties

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England, and concerned acts lawful in England, not contrary to public policy to enforce it on grounds that it was illegal and/or void under law of a foreign friendly state.

30 Swiss Law of arbitration has no imposition of confidentiality in arbitration proceedings as a whole. French law: only provides for secrecy of tribunal's deliberation. US Federal Arbitration Act and US Uniform Arbitration Act do not contain confidentiality provisions, but some state laws, eg Florida, have limited provisions (their concerning the award). The English AA1996, is silent on the issue.

31 **Dolling** an implied obligation on parties not to disclose or use for any other purpose documents prepared for or used in the arbitration, or disclosed or produced in the proceedings, or transcripts or notes of evidence or the award, other than with consent of other party, or permission of court. But the mere fact that the a document was used in arbitration does not impose confidentiality. See also Hassneh v. Mew [1993] 1 Lloyd's Rep 243, the award and reasons could be disclosed where reasonably necessary to found claim or defence against third party. But not otherwise, see Insurance Company v. Lloyd's Syndicate [1995] 1 Lloyd's Rep 272.

32 **Esso:** No general duty of confidentiality implied into an agreement to arbitrate. Confidentiality is not an essential attribute of private arbitration or part of inherent nature of a contractual relationship. Even if there is such a duty it is subject to a public interest exception where outcome of arbitration affects the public interest here outcome affected natural gas utility prices for consumers. But there is an absolute right to exclude third parties from the proceedings.

(but tribunal had to recognise confidentiality, and counsel were bound by their professional rules.

USA. United States v. Panhandle Eastern Corporation 118 FRAT 346 (D Del 1998).[34] No implied obligation of confidentiality, but US equivalent to rules of legal professional privilege may restrict what can be disclosed.

28. Is total confidentiality desirable?[35]What if the actions of a state affecting the wider community are in issue?[36]For a discussion on this see Confidentiality in Arbitration and the Public Interest Exception, Andrew Tweeddale, 21 Arb Int 59. Confidentiality may, in any case, be undermined by court proceedings concerned with the arbitration. But note City of Moscow v. Bankers Trust [2004] 2 Lloyd's Rep 179 (CA).[37]

29. Questions of privacy and confidentiality should, ideally, be dealt with expressly in the arbitration agreement, particularly if there are concerns about possible disclosure of trade secrets and the like. It may be difficult to bind persons other than the parties, the

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33 **AI Trade**: (Svea Supreme Court, 2000) Award finding that tribunal had jurisdiction, published in Mealey's International Arbitration Reports on the initiative of AIT's counsel. Bulbank alleged this was a material breach of the arbitration agreement that entitled Bulbank to repudiate it. Tribunal rejected this contention and made a final Award. Bulbank challenged the award in the Stockholm City Court on the same grounds, seeking nullification. Swedish Supreme Court held, on appeal: No legal duty of confidentially implied or inherent in an arbitration agreement, and nothing in the relevant legalisation (now see the Swedish Arbitration Act 1999, which is silent on the issue) imposed such a duty. But since arbitration founded on agreement, in generally follows that the proceedings will be private which was sufficient to exclude outsiders from being present during the proceedings or receiving any documents produced during the proceedings. Also arbitrators had to recognise confidentiality when performing their duties and counsel was restricted by their professional rules. The fact that the parties normally recognise confidentiality is different from holding that there is a legal duty of confidentiality combined with legal sanctions.

34 **Panhandle**: Court, in proceedings before it, refused to exclude documents from a prior ICC arbitration on ground of confidentiality. Nether parties or tribunal had expressly agreed to confidentiality. Nothing in the rules stipulated for confidentiality. Article 2 of the 1988 ICC Rules concerned with the court, insufficient for this purpose. But note Samuels v. Mitchell 155 FRD 195 (ND Cal 1994) (US equivalents of legal professional privilege apply to international arbitration and may restrict subsequent disclosure of documents prepared for and during arbitration, but not necessarily to documents produced during arbitral proceedings.

35 Party may wish to reveal existence of the dispute and its nature for commercial reasons. They may need to do so to fulfil statutory or other duties, to auditors, shareholders, etc. The recipient of material in an arbitration may wish to use in other proceedings. It may be that publicity is desirable, to exert commercial leverage.

36 A particular concern in investor/state arbitration, see Confidentiality in Arbitration and the Public Interest Exception, Andrew Tweeddale, 21 Arb Int 59.

37 **City of Moscow**: International arbitration in London. Judge's order that his judgment on a s. 68 application should remain private was justified in the circumstances.

tribunal and the arbitral institution (such as witnesses and representatives). It may be necessary to make the receiving party responsible for maintaining confidentiality in such material provided to it for the purpose of the arbitration. Institutional rules deal with the problem in a variety of different ways varying from full confidentiality, to little or no mention of confidentiality or privacy.[38]

The procedural law of the arbitration (*lex arbitri*)

30. The *lex arbitri* governs a number of matters.

- It sets minimum standards, potentially independent of the parties' agreement (mandatory provisions), for the conduct of the arbitration. For example, matters such as appointment, removal and replacement of arbitrators, challenges to arbitrators, time limits, conduct of the arbitration, procedural issues, such as disclosure, interim measures of protection, power to consolidate, the power to proceed *ex aequo et bono*, ordering costs and interest, as well as the form of award and its finality.

- It is relevant to arbitrability[39] (objective and subjective) but consideration must also be given to the law of the place of domicile, the law of the place of enforcement and the law of the arbitration agreement. An interesting aspect of this is to be found in Prodim v. G&A Distribution (French Cour de Cassation, May 2008) (2008) 11 Int ALR N-81 where is was held that in arbitration, like in court, a party must bring forward all claims relating to the same cause in a single arbitration. This contrasts with the position in English law where it has been accepted that successive arbitrations under the same contract are possible.

- It governs the court's supportive and supervisory powers[40] and the applicable

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38 UNCITRAL Rules, art.25(4) hearing in camera unless parties agree otherwise; art. 32(5) award may only be made public with consent of both parties. The ICC Rules are silent on general confidentiality, but Appendix 1, art 6 provides that the work of the Court is confidential. Article 20(7) allows the tribunal to take measures to protect trade secrets and confidential information. Article 21(3), persons not involved, are not admitted to hearings without the approval of the parties and the tribunal. See Arbitration International. LCIA Article 30(1), provides that, unless the parties agree in writing, they, and the Court and the tribunal, are under a general obligation to keep awards and material created for the purpose of the proceedings, and documents produced, not otherwise in the public domain, confidential, unless disclosure required by legal duty or to enforce or challenge award or to pursue a legal right. The WIPO Arbitration Rules 1994, (arts 52-53, 73-76) have similarly wide confidentiality provisions. ICSID: Rule 15, deliberations of the tribunal are secret; Rule 48, the award may only be made public with the consent of the parties.

39 Arbitrability (objective). What types of dispute are arbitrable. The law of the place of a party's domicile will be relevant to the question of (subjective) arbitrability.

40 Karaha Boas: Application for enforcement of Award made under rules with provided for arbitration in Switzerland, previously set aside by Jakarta court. The Court held that the curial law was Swiss, this being the law under which the award was made; also that, in Swiss Law (like England and Wales) the law of Switzerland mandatorily applies

procedural law (eg conflicts rules, procedural time bars). Consider #Karaha Boas Co v. Perusahaan Pertambangan, etc (Hong Kong) YB Comm Arb XXVIII.

31. The *lex arbitri*is the arbitration law of the country where the arbitration has it legal place.[41] This is increasingly referred to as the seat of arbitration to distinguish the legal place of arbitration from the physical location where the tribunal holds its meetings (which may be different); Union of India v. McDonnell Douglas [1993] 2 Lloyd's Rep 48.[42] The *lex arbitri*can be distinguished from the *lex fori*, the law (other than arbitral law) at the seat of the arbitration.

- In many cases, the arbitration agreement identifies the seat (eg."London arbitration clause"). Consider Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] 1 WLR 262 (HL), Lord Mustill.[43]

- If it does not, the agreed rules may provide an answer (eg. ICC Rules, art 14(1)).[44]

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its own law as the lex arbitri for arbitration where the seat is in Switzerland. In consequence, the award has not been set aside by a competent authority of the country in which or under the law of which it was made, s. 44(2)(f) HK Ordinance (similar to NYC, art V(1)(e).

41 The NYC is somewhat ambiguous about this, referring to the law of the country where the arbitration took place, art V(1)d) but also to the law of the country where the award was made, arts. V(1)(a), (e). Model law is clear of the link between the place of arbitration and the application of the arbitral law of that place, see art 1(2). AA1996, s. 2(1) and Swiss PILA art 176(1) refer to the seat, but latter also requires that at least one of the parties has neither its domicile nor its habitual residence in Switzerland.

42 **Union**: The contract provided for arbitration in London but with the procedural law to be that of the Indian Arbitration Act. This was held to mean that the internal conduct of the arbitration was to be governed by the relevant provisions of the IAA, but that the curial law, for instance as regards supervision, was to be the law of England. The court followed Naviera Amazonica v. Compania Internaconale [1988] 1 Lloyd's Rep 115 (CA) where it was said that every arbitration must have a seat and a national system of procedural law, even though hearings may be held anywhere. In that case it was also noted, that the arbitration must comply with the mandatory laws of that place or risk challenge in the local courts.

43 **Channel Tunnel**: There may be an express choice of a *lex arbitri* that is not the law of the place where arbitration to be held, but in absence of clear or express words to this effect, the irresistible inference is that the parties by contracting to arbitrate in a particular place intend the arbitral process to be governed by the law of that place.

44 ICC Rules, art 14(1). The place of arbitration to be fixed by the court unless agreed by the parties. Note (2), tribunal can conduct hearings and deliberate at any location. Note s. 3 AA 1996, seat designated by parties agreement, by an arbitral institution vested by the parties with this power, by the arbitral tribunal if authorised by the parties or, if not so designated, to be determined (by the court??, see s. 2(4)) having regard to the parties' agreement and all the relevant circumstances.

- If not, the tribunal (or a court?) must decide. See, for example, AA 1996, ss. 2(4) and 3; Dubai Islamic Bank v. Paymentech, [2000] 1 Lloyd's Rep 65;[45] Occidental Exploration v. Republic of Ecuador [2005] 2 Lloyd's Rep 707 (CA) (BIT between Ecuador and USA, stated that seat should be in NYC state. UNCITRAL Rules provided for the tribunal to determine the seat).[46]

A note on natural justice

32. The *lex arbitri* will generally dictate minimum standards of natural justice that the tribunal must observe. The words used in different jurisdictions may be similar but they have different nuances.

- In England and Wales natural justice is expressed in terms of fairness and impartiality (AA1996, ss. 24(1)(a), 33(1) (actual and apparent) and the parties' right to a reasonable opportunity to put forward their cases and know and be able to deal with the case against them (AA1996, s. 33). There is no separate common law requirement of independence, although this can be imposed by agreement between the parties, AT&T Corp v. Saudi Cable Co [2000] 1 Lloyd's Rep 22 (HL).[47]

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45 **Dubai**: Seat of the arbitration is determined having regard to the parties' agreement and all the relevant circumstances which include any connection with one or more countries that can be identified in relation to the parties, the dispute, the proposed arbitral procedures including the place of interlocutory and final hearings, the issue of awards. This is to be determined at the date at which the relevant arbitration began. Circumstances after that date are not relevant. In this case the relevant date was when Dubai invoked the arbitration appeal process and Paymentech submitted to it. This was in California, the place where the preparatory administrative work for the appeals and the constitution of the tribunal was carried out. This was despite the appeal board sitting in London.

46 **Occidental:** Tribunal, when appointed, selected London (England), albeit held hearings in Washington. Thus English Court was the forum in which a challenge brought by Ecuador to the tribunal's jurisdictional award (under s. 67 AA1996). Court rejected Occidental's argument that since the question of jurisdiction concerned a BIT, to which UK was not a party, that issue, which concerned what matters could be arbitrated under the BIT, was not justiciable in the English Courts, the BIT allowing the individual investor to enforce its own rights, not being merely concerned with rights between states, which would be non-justiciable. Thus they could determine the s. 67 challenge, even though this involved ruling on the interpretation of the scope of the arbitration provisions in the BIT.

47 **AT&T**: R. v. Gough [1993] AC 646 and Lochbail v. Bayfield [2000] 1 All ER 65 (HL) applied to arbitral proceedings. Satisfaction of the separate requirement of independence imposed under the ICC Rules was a matter for the ICC. The tests for independence were considered in Magill v. Porter (2002) 2WLR 37 (HL). In deciding whether a tribunal is independent regard must be had to, inter alia, the manner of its appointment, the term of office, the existence of guarantees against outside pressures and the question of whether the tribunal presents an appearance of independence. Independence and impartiality are closely linked but the tribunal must satisfy both requirements subjectively and objectively.

- In many other jurisdictions, the focus is on (actual and apparent) independence, eg Swiss PILA, art. 180(1)(c), and procedural principles of equality and contradiction (a civil law concept often translated into English as the adversarial principle).[48] See eg. Swiss PILA, art 182.[49]

- The Model law requires both impartiality and independence (art. 12(2)), and the parties to be treated with equality and each given a full opportunity of presenting its case (art. 18).

33. For a common law lawyer the dictates of procedural natural justice may be seen as reflecting common law court procedure. Civil law lawyers may see them as embodying the civil law court procedure and regard the common law (English/US) approach as labour intensive, costly and culturally insular. In both cultures, there is a growing recognition that the principles of natural justice must be balanced by the need for an expeditious and economical process.

<u>The civil law/common law debate</u>

34. There are a number of potential points of friction between the two systems.

- The civil law tradition may allow for tribunal facilitated conciliation in the process of arbitration (most proceedings settle and this should be facilitated).[50] This is not the tribunal's role in the common law tradition.

- Common law procedures for exchange of written material generally favour successive exchange of case statements, documents, witness statements, expert reports leading to a full testing of evidence at an oral hearing. Many civil law lawyers would expect all material relied on to be adduced with case statements and full double exchange of this material. In the civil law tradition any hearing may be limited to a day or two, even in complex matters, and concerned with the questioning of key witnesses by the tribunal, and to giving the parties' representative an opportunity to orally explain their parties' cases.

- In the common law tradition facts are adduced orally at hearings through the examination of witnesses who introduce documents, with elaborate rules

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48 Equality: Each party must have the opportunity to be heard so as to be able to explain its case. Contradiction: All arguments and evidence invoked by a party must be communicated to the other party who must be given an opportunity to respond.

49 PILA, art 182(2): Whatever procedure is chosen, the arbitral tribunal shall assure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure (en procédure contradictoire"). Note PILA, art 180(1)(c), An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his independence.

50 In certain jurisdictions the court will hold a preliminary reconciliation hearing immediately after the close of pleadings, and a judge will seek to conciliate the dispute whether the parties request or otherwise. In International arbitration, it is doubtful whether this can be done without party agreement. But note art. 19.1 of the DIS (German) Arbitration Rules 1992: "At every state of the proceedings the tribunal shall seek to reach of amicable settlement of the dispute or of individual issues in dispute".

concerning the admissibility of evidence and, in the American tradition, for the deposition of witnesses (discovery by pre-hearing questioning witness in the presence of the parties but not the tribunal). The civil law tradition places greater reliance on written submission and on documents as the primary method for submitting evidence and places less value on oral evidence. There are few exclusionary rules. Proof is generally concerned only with weight. A further difference concerns who is primarily responsible for the questioning of witnesses, and the nature of the enquiry, the tribunal or the parties' advocates. If the tribunal is to do this, significant preparation time is involved, otherwise its questioning is superficial. There isa degree of consensus in international arbitration that even if questioning of a witness is initiated by the tribunal the parties should have a limited opportunity to ask questions of their own.

- The common law tradition considers wide powers of disclosure as an essential feature of adversarial proceedings and indispensable to a just result.[51] The civil law tradition regards the ideal of producing all documents, both those that help and those that are unhelpful to one's case, as unpalatable and the concept of depositions as incomprehensible.[52] This divide can lead to unfairness where one party is represented by civilian lawyers, the other by common law lawyers. For instance, they will have different concepts of what constitutes compliance with an order for general disclosure and of their professional duties in respect of such an order. The International Bar Association, (IBA) Rules of Evidence 1999 (which provide for limited involuntary disclosure) were devised as an attempt to bridge this gap and there is a growing consensus towards their use in

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[51] Note wide discovery powers in America. Depositions of witnesses, written interrogatories, physical inspection of real evidence, physical and mental examinations of persons and requests for admissions. These procedures result in complicated and time consuming pre-trial proceedings and satellite litigation. Are they needed to compensate for the judge's lack of inquisitorial powers?

[52] In civil law proceedings a party only discloses the documents on which it intends to rely, parties are not compelled to reveal documents that do not support their argument, in the absence of an order to the contrary. The concept of discovery whether practised by the English, or worse, the Americans, is an invasion of privacy that is only acceptable in criminal cases. Parties will produce relevant supporting documents with their pleadings and judges possess inquisitorial powers, can call for witnesses to be heard at any state of the proceedings, can put questions to them directly and in many countries can order a party to produce relevant document or other evidence (see for example, the French NCCP, arts 11, and 218). But these processes are controlled by the judge not the parties. Also note the use of the court appointed expert. His role is to investigate a factual or legal aspect of a case, particularly one with complex or technical elements. He is given terms of reference and then sent off to investigate and report. The parties are generally placed under an obligation to co-operate with the expert even if this means revealing facts detrimental to their cases, i.e. permitting scrutiny of relevant documents and property, but this does not, ordinarily, extend to providing general access to all records. Such a procedure has been used in arbitration. See discussion in D B King and L Bosman, *Rethinking Discovery in International Arbitration*, ICC Bulletin (2001) Vol 12/1, 24.

international arbitration. See #"Rethinking discovery in international arbitration …", DB King (2001) 12 ICC Bulletin 24.

- Problems can also arise at the interface between common law notions of privilege (eg legal professional privilege and the privilege attaching to without prejudice negotiations to settle) and more limited civilian law doctrines concerned with preventing lawyers revealing client communications to third parties, but with no client privilege attaching to such communications.

- The new (2010) edition of the IBA Rules of Evidence seeks to address these and other problems concerned with evidence. See the series of articles on the new edition at (2010) 13 Int. ALR157-219#.

- When it comes to writing arbitral awards, however, best practice for civil law and common law tribunals appears to be similar. Compare: #M Fontain: *Drafting the Award – A perspective from a Civil Law Jurist*, 1CC Bulletin Vol 51/1, 30, with #H Lloyd QC: *Writing Awards – A common Lawyer's Perspective*, 1CC Bulletin Vol 51/1, 38.

Common law procedures are generally more lengthy and costly then the civil law procedures. Common law lawyers may consider that they offer a greater investigation of the truth, then is possible under civil law procedures. But, is this something the parties to international arbitration want or can afford?

The Shari'ah

35. This procedural and substantive code applies where both parties are Muslim irrespective of where they are based. It only applies by agreement if one of the parties is a non-Muslim and does not apply if neither is a Muslim. The substance of the Shari'ah is outside the scope of this course. For a brief introduction see Redfern & Hunter (4th Edition).

The law of the place or places of domicile of the parties

36. The capacity to arbitrate (subjective arbitrability) is generally determined by the law of the place of domicile/nationality of the parties.[53] This law may also determine how a party can instruct representatives. In some countriesrepresentatives must have a power of attorney.It may also be relevant on insolvency.

- Consider, in the case of the EU, the Regulation on Insolvency Proceedings andSyska v. Vivendi Universal[2009] EWCA Civ 677 (lawsuit pending included arbitration proceedings. Thus, by Articles 4.1, 4.2 and 15, if the arbitration is pending, the effect of insolvency on that lawsuit is governed solely on the law of the Member State in which the lawsuit is pending. If, however, the arbitration had not commenced the law application to insolvency proceedings and their effect would have been that of the Member State where the insolvency proceedings were opened.Since the arbitration was pending in England and there is nothing in English law that voids an arbitration agreement

[53] Common law jurisdictions generally refer to the place of domicile or residence, Civil law jurisdictions to the country of which the person is a national.

or reference on insolvency, the arbitration agreement was not voided under Polish law as a result of the Polish party being subject to a bankruptcy order in Poland.

Capacity and state or state entities

37. The problem is whether a state or its offshoots can resist arbitral proceedings on the grounds of sovereign immunity? Can it, on those grounds, resist recognition and enforcement of an arbitral award made against it, or execution? Do the courts at the seat have jurisdiction over the foreign country in proceedings concerning the arbitration? For an introduction, see #E Silva-Romero, *ICC Arbitration and State Contracts*, ICC Bulletin (2002) 13/1; #H R Al Khalifa, N*egotiating and Arbitrating against Government Entities*, (2003) 19 Cost LJ, 258.

38. This problem is particularly acute in civil law jurisdictions that distinguish between private and administrative laws and provide is a separate court system for each (eg France).[54] Some such countries forbid the state or its offshoots from submitting to arbitration or require a particular form of ratification (eg by a Council of Ministers/by Parliament!);[55]Fougerolle v. Syria, YB Com Arb XV, 515.[56]

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[54] See French NCCP, art 2060. Disputes involving public bodies and undertakings or public policy cannot be the subject of an arbitration agreement. One view is that arbitrations concerning state contracts are no different from any other commercial arbitration, the state or offshoots forgo the prerogatives it would have in its national courts since commercial transactions should be respected by those who conclude them.

[55] Some jurisdictions, eg Columbia, have a concept of administrative decisions that limits the state's power to agree to arbitrate. Administrative decisions are generally those emanating from a government authority in the course of exercising a prerogative of pubic power or through the use of a prerogative of public power (France). Some jurisdictions restrict arbitrabilty through the concept of administrative contract, eg Brazil and Argentina. It is difficult to distinguish an administrative contract and a private law contract where the state can agree to arbitrate. Depends whether the country inclines to protectionism or liberalism. Consider Etat Libanais v. Société FTML, [2001] Rev Arb 855. Lebanese administrative court set aside ICC arbitration clause in concession agreements on the ground that they were administrative contracts and the prohibition of arbitration in administrative was well established in court decisions and literature relating to administrative law. This has been criticised, as Art 809 of the Lebanese CCP expressly allows the states and its offshoots to agree to arbitration, and transcends the distinction between private and Public law contracts, and overlooks the fact that states engaged in international trade. Apart from Columbia and Lebanon, few countries have made such inroads into the concept of subjective arbitrability.

[56] **Fougerolle**: (Syria, 1990): Ministry of Defence lacked capacity to agree to arbitration, since it had not obtained the prior advice of the Council of State on the referral of the dispute to arbitration under Article 44 of law No 55 of 1959. This was held to be a mandatory norm pertaining to public policy (A ground for refusing enforcement under NYC, art V(2)(b). Such an argument is, now rarely accepted as it is based on domestic rather than international public policy).

39. Some international Conventions deal expressly with (part of) this problem.

- The European Convention on International Commercial Arbitration (Geneva 1961),[57] Art II(1): legal persons considered by the law that is applicable to them as "legal persons of public law" have the right to conclude valid arbitral agreements.

  Note also the European Convention on State Immunity (Basle 1972), Article 12(1):[58] Where a Contracting State has agreed in writing to submit disputes which has arisen or may arise out of a civil or commercial matter to arbitration, that State may not claim immunity from the jurisdiction of a court of another contracting State where the arbitration has or will take place in relation to any proceedings relating to the validity or interpretation of the arbitration agreement, the arbitration procedure and the setting aside of the award, unless the arbitration agreement provides otherwise.Applied in Svenska v. Republic of Lithuania[2006] EWCA Civ 1529, thus the English Court had jurisdiction in respect of proceedings to enforce an award against Lithuania. Contrast ETI Euro Telecom v. Bolivia [2008] EWCA Civ 880 where the CA, applying s. 13 of the State Immunity Act 1978,[59] held that a freezinginjunction in support of an arbitration could not be issued against a state. Contrast Ministry of Trade ... of Iraq v. Tsavlirs Salvage [2008] EWHC 612 (Comm) where a freezing injunction was issued against the Grain Board of Iraq.[60]

- The Convention on the Settlement of Investment Dispute Between States and Nationals of Other States (Washington, 1965), Article 54(1): Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State. Article 55: Nothing in Article 54 shall be construed as derogating from the law in force in any ContractingState relating to immunity of that State or any foreign State from execution.

40. In the absence of a relevant treaty obligation, many national legal systems distinguish

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57 Geneva 1961: The intention is to facilitate East/West trade. Only applies where the disputing parties are resident in contracting states (UK is not a contracting state).

58 See UK State Immunity Act 1978, s. 9 (Where a state has agreed in writing to submit disputes to arbitration, it is not immune in respect of proceedings in the UK that relate to the arbitration. A similar principle applies in the USA, see Redfern & Hunter (3rd Edition), 479. A World Wide convention along the lines of the European Convention on State Immunity has been proposed in draft (in the 1990s by the International Law Commission ("ILC")). Several states have enacted similar provisions in domestic law.

59 Section 13 SIA 1978, "Relief shall not be given against a State by way of injunction...".

60 **Tsavlirs**: The judge applying s. 14 of the SIA 1978 concluded that the cargo in question was owned by the Grain Board of Iraq, a separate entity from the State, and its entry into the salvage agreement was not done in the exercise of sovereign authority, thus it had no state immunity.

between waiver of immunity from arbitral jurisdiction and waiver of immunity from enforcement and waiver of immunity from execution (following enforcement).[61] See for example, Swiss Private International Law Act (PILA) 1986, art. 177(2): If a State or an undertaking or organisation under its control or domination is a party to an arbitration, it cannot rely on its own law to challenge the arbitrability of a dispute or its capacity to be a party to an arbitration.

- In France, the problem is addressed in a number of higher Court decisions. Galakis [1966] Rev Arb 99-100; Dalico (December [1994][62]Rev Arb 116.; Société Creighton v. Qatar YB Comm Arb 451.[63] But noteCreighton v. Qatar (USA) YB Comm Arb XXV, 1001.[64]

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61 Agreement by a State to submit to arbitration may not be sufficient to imply consent to the jurisdiction of the court in the State where enforcement is sought nor to imply consent to execution (this problem is dealt with in Articles 7 and 18 of the ILC's draft Articles on Jurisdictional Immunities of States and their Property. Note the distinction, in Article 18(1), between property that is used in the commercial activities of a State and property that is used in its executive role. Only a few countries have enacted laws that deal expressly, in the arbitration context, with all these matters.

In most cases state legislation deals with enforcement of judgements generally. Two types.Old view, No attachment of foreign State property of any kind without the consent of that state.Modern approach (more common). Either restrict the definition of foreign state so as to exclude state entities engaged in commercial activities, or allow execution against commercial property of the state, or property that is linked to the claim being enforced. UN considers this a problem for the International Law Commission.

62 **Galakis**: Cour de Cassation, 2 May 1966. Prohibition, in the then French CCP arts. 83, and 1004, of state entities entering into arbitration agreements concerned domestic arbitration. It does not apply to international arbitration. Dalico: Cour de Cassation YB Comm Arb [[[[; An arbitration clause is legally independent of the main contract by virtue of a substantive rule of international arbitration law. Subject to mandatory rules of French law and international public policy, its existence and efficacy are assessed according to the common will of the parties without any need to refer to a state law. This suggests that subjective arbitrability is determined by the parties' agreement, not by the country of a party's nationality. ICC arbitrators adopt a similar principle on the basis that it is contrary to international arbitration law and good faith that a public law entity who enters into an arbitration agreement with a private foreign company unacquainted with the domestic law of that entity can seek to have the arbitration agreement declared void when a dispute arises, alleging that its own law prevents it from entering into such an agreement. Note this does not mean that the award will be enforceable in the state of the public law entity, but it might be elsewhere.

63 **Qatar**: Court of Cassation. On application for annulment of French award. Held that by agreeing to ICC arbitration, in particular article 24 (parties agree that award is final, and are deemed to have undertaken to carry out it out without delay and to have waived their right to any form of appeal in so far a such wavier can validly be made, now see art 28(2) 1998 Rules), Qatar waived immunity from enforcement (is this now part of the lex mercatoria or part of public international law relating to state immunity, or is it purely

- For a consideration of similar problems in Hong Kong, see FG Hemisphere v. Congo (Hong Kong, 2009) (2010) 13 Int ALR N-21 (state by agreeing to ICC arbitration waived immunity form arbitration proceeding but not as regards execution against sovereign assets).

- Unless the municipal law of the state entity has developed principles such as these, they are unlikely to assist in enforcement proceedings in that state. But, since awards are generally regarded as transportable, they may assist in enforcement elsewhere.

The law of the likely country/countries of enforcement of the arbitration agreement and of awards

41. The former is the law of any country where an attempt is made to commence legal proceedings in contravention of the arbitration agreement. The latter is the law of any country where relevant assets are located.

42. The critical issue is whether that law will enforce arbitration agreements (including those that provide for arbitration elsewhere) and whether it will recognise and enforce arbitral awards rendered in other jurisdictions. If so, what matters it will consider in deciding whether or not to do so.

43. In practice, the principal question is likely to be whether that country has ratified the New York Convention 1958 or some other relevant convention, eg. The Washington Convention 1965.But, irrespective of whether or not this is the case, the local law may be relevant to how the convention rights are interpreted.

- In the case of arbitration agreements a particular concern is the formalities that the law requires for such agreements to be valid and what restrictions it places on their scope. The *lex arbitri* may take a broader view of these matters that the law of the enforcing state. Different views are also taken about whether questions of arbitrability and validity are to be determined under the law of the enforcing state or the law of the arbitration agreement/ *lex arbitri* and whether the answer to that question differs depending on whether the these questions are raised in the context of proceedings to enforce an arbitration agreement or an award.

- In the case of awards, consideration must be given to how these are to be authenticated, and the time limits to enforcement. There may also be a concern over whether mandatory requirements of public policy in the enforcing state conflict with the legal principles applied by the tribunal, and

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contractual. But note Paris court of appeal, Ambassade de la Fédération de Russe en France v. Compagnie Noga [2001] Rev Arb 114, the waiver of immunity for enforcement applies only to the property of a state or its offshoot that is not used for a public service.

64 **Creighton**: USA Federal Court of Appeals refused to enforce award against Qatar on grounds that it had not waived sovereign immunity by agreeing to arbitrate in France (it also participated), a NYC country (it accepted that it would have done so if it was a signatory to the NYC (it wasn't).

whether the enforcing court is parochial or internationalist in evaluating grounds (particularly public policy grounds) to refuse recognition and enforcement.Consider, for example, competition laws, currency controls, environment protection, embargo, blockade and boycott, drug trafficking, and money laundering?

1C: ARBITRATION OF INVESTMENT DISPUTES (OUTLINE)

44. There are few remedies available to foreign national investors whose investments are confiscated or damaged by the authorities of the State in which they invest (the HostState).

- Litigation in the HostState or diplomatic pressure between States.
- Export credit guarantee and insurance schemes to manage risk.
- Letters of credit to secure payment.

45. The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the Washington Convention)[65] and a more recent, proliferation of Multilateral (MITs, eg the North Atlantic Free Trade Agreement (NAFTA), the European Energy Charter Treaty) and Bilateral Investment Treaties (BITs),[66] seeks to address this by providing a stable and certain context for the negotiation, agreement and operation of long term commercial transactions in foreign states requires a method of dispute resolution before a neutral tribunal in a neutral venue with enforceable outcomes.

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65 The UK is a Contracting State. See the Arbitration (International Investment Disputes) Act 1966.

66 For a list of concluded BIT see the World Bank web site: www.worlbank.org/icsid. Key features of BITs, MITs and Investment laws are protection against breach of the investment contract of the investment contract, protection and security for the investment by the Host State (this means the Host State is liable to compensate the investor if state authorities cause damage by taking unreasonable action or failing to take reasonable protective steps. Asian Agricultural Projects v. Sri Lanka (1991) 30 ILM 577, this was equated with standard of due diligence in customary international law. Sri Lankan security forces destroyed AAP's shrimp farming facility in the course of a counter-insurgency operation. Sri Lanka held not to have met this standard (had failed to take up the claimant's offer to remove suspected paramilitaries form its farms), equal and no discriminatory treatment of investors and their investments, sometimes most favoured nation treatment (see Companie Genreale des Eausx v. Argentine Republic (2001) 40 ILM 457, a requirement to exhaust local remedies in the relevant BIT was unenforceable because it was not present in other BITs concluded between the Host State and other countries.), protection against expropriation and nationalisation, prompt compensation for expropriation, rights of transfer of capital and returns, rights of subrogation, and access to independent settlement of disputes.

46. The Washington Convention[67] provides for ICSID arbitration of investment related disputes between a Host State and a foreign private investor. So do many MITs and BITs[68] and some State investment laws[69] but, possibly only after attempts made to reachan amicable resolution or (possibly) exhausting local remedies. But note the effect of "most favoured nation provisions", these may allow arbitration if provided for in another BIT/MIT![70]

47. Some BITs and MITs provide for arbitration, but not under ICSID. For an example of such a BIT, see Occidental Exploration v. Republic of Ecuador [2005] 2 Lloyd's Rep 707 (CA) (BIT between Ecuador and USA provided for UNCITRAL arbitration, thus Washington Convention against State Court intervention did not apply).

ICSID arbitration.[71]

48. Under the Washington Convention ICSID's jurisdiction extends to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State)

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67 Over 130 ratifying States including COMECON and Latin American States (both traditionally unsympathetic to arbitration). ICSID, the International Centre for the Settlement of Investment Disputes, is established by the Convention as an organisation of the World Bank Group. ICSID has its seat in Washington. Its structure comprises an Administrative Council, chaired by the President of the World Bank, in which each member state has a vote, and a Secretariat. It maintain a panel of arbitrators principally formed from persons selected by member States. It administers neutral internal arbitration to resolve investor-state disputes (overcomes a barrier to flow of investment into developing countries) also creates a regime for the enforcement of ICSID awards more favourable than NYC, precluding frustration by local courts.

68 Some of these (but not ICSID) identify what may constitute an investment (such as any kind of asset), and give examples, movable and immovable property, rights, shares, etc in a company and any form of participation in it, claims to money or performance under a contract having a financial value, intellectual property rights, goodwill, technical processes and know how, business concessions conferred by law or contract, including mineral rights concessions.

69 Over 2,000 BITS. 140 states a party to at least one, 2/3 concluded in the 1990s. These provide rights of fair treatment which investors can enforce directly against the Host State. About 900 BITS contain the Host State's advance consent to ICSID arbitration. Some states have foreign investment laws that also provide for this. They do so in order to attract investment at lower rates of interest (less risk).

70 See commentary on Emilio Augistin v. Kingdom of Spain at 21 Arb Int 113.

71 Growing use of ICSID arbitration, more than 2/3 of the cases since 1966 have been brought since 1996, many relating to BITs or foreign investment laws. The ICSID rules provide for arbitrations to be held at the seat of the Centre (Washington). But there are arrangements with other arbitral institutions for proceedings to be held there. Eg the Permanent Court of Arbitration at the Hague. Parties can, in general, agree other venues. Procedural languages are English, French, and Spanish. Average length of proceedings is about 2.5 years, costs average cost about $200,000 per case (Lovells Client Note).

and a national of another Contacting State, which the parties to the dispute consent in writing to submit to the Centre".Until the 1990s there was little arbitration conducted under this convention, but the increase of BITs and MITs (eg NAFTA) have led to a rapid growth since then and much dissatisfaction particularly from states concerned with the lack of consistency in tribunal awards and exercise of discretion and tribunals and there favouring of commercial over policy considerations. For an introduction, see Lovells, Client Note, Protecting Investments Overseas, 2003, also Bernstein's Handbook of Arbitration (4th Edition), Part 10.

49. What is an investment? Investment is not defined. It depends on the nature of the parties' relationship and how they characterise it. But the project must be substantial and significant to the Host State's development, be relatively long term and involve an assumption of risk, normally to bothsides.[72] See "The meaning of 'investment' in ICSID arbitrations", J Ho (2010) 26 Arb. Int. 633.

- Examples of ICSID arbitration (see: web site www.worldbank.org/icsid) include the following. Holiday Inns v. Morocco: Construction and operation of hotels where the HostState failed to provide promised financing or, Amco Asia v. Republic of Indonesia, (The State authorities seized control of the enterprise. Adriano Gardella v. Cote d'Ivorie: Cultivation of crops and construction of a textile factory were the HostState failed to pay for materials invoiced in accordance with the project agreement. Llockner v. UnitedRepublic of Cameroon: Construction and management of a fertiliser factory where the HostState failed, in breach of contract, to pay construction costs. Alcoa Minerals v. Jamaica: Mining of bauxite where the Host State raised a production levy in breach of a no further tax agreement.[73]

50. What is consent in writing? The Washington Convention does not confer a right to arbitration on an investor, just a facility. In general, an investor can only request ICSID arbitration if there is an ICSID arbitration clause in its contract with a Contracting State or State-entity, if there is an applicable treaty (BIT or MIT or foreign investment law in which the Contracting State gives its advance consent to ICSID arbitration or, if both the Host and Home states are contracting states to the Washington Convention and the Host State is prepared to grant consent to arbitration.

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72 Art 25. The inclusion of an ICSID arbitration clause in a contract creates a presumption in favour of the existence of an investment as to words indicating that the parties consider the transaction to be an investment, in nature, size and duration.
The ICSID Secretary General must be satisfied, on the basis of information in the request for arbitration that the despite does not fall manifestly outside the jurisdiction of the Centre. In practice, investment had been defined broadly in include a wide range of economic activity: provision of loans to construction, concessionaire, production, exploration and distribution ventures. Types of dispute registered have included those relating to banking, agriculture, energy, health, industrial, mining and tourism. But the investment project must be substantial and significant to the Host State's development, be relatively long term and involve an assumption of risk, normally to both sides.

73 Lovells, Client Note, Protecting Investments Overseas, 2003.

Thus, two levels of submission are necessary.

- The first is ratification of the Convention by the relevant States. Ratification can be subject to reservations.[74] Reservations are, in effect, policy declarations since the state is not, in any case, bound unless it complies with the second level of submission.

- The second is written consent. No particular form is required. Consent can be individually negotiated, for instance, as a term in a contract, and can be express or implied, Amco Asia v. Indonesia 1 ICSID Rep 277. Consent by a State can also be embodied in a national law or in a MIT or BIT. In such circumstances, the individual party consents by initiating arbitration.

51. Who can be parties? Foreign nationals, who are nationals of a Home State[75] (ie. a Contracting State, one who has ratified the Convention), including individuals and companies. A company is, in general, a national of the country in which it is which incorporated or registered. But, since many Host States require investment to be channelled through a local company, the Washington Convention provides a permissive facility[76] whereby a company incorporated in Host State, but controlled by a foreign investor, is be treated as a company of the State of that investor.

52. What is an act of a Host State? There Can be problems in deciding whether something it the act of the HostState (ie. the acts of a regional or federated region in a state or nationalised corporations).[77]

53. The relationship between investment claims and contract claims. The act of the HostState may also amount to a breach of contract with the investor. If so, there are likely to be difficulties in deciding the extent to which the latter type of claim is amenable to ICSID arbitration, a problem exacerbated by provisions in BITs/MITs

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74 Thus, Saudi Arabia reserves questions relating to oil and sovereignty.

75 Art 25(2) defines individual nationality by reference to nationality at date when parties agree to submit to ICSID, and when an application is made to the Centre. Both individual and company nationality depends on the laws of the relevant State. Unlike in the instruments setting up the Iran – US Claims Tribunal, there is no provision for dual nationality.

76 The Host State must have adopted it.

77 Coppana de Aguas v. Argentine Republic (2001) 40 ILM 457n: Actions of a political sub-division of federal state, here a province, in the federal state of Argentine are attributable to the central government in international law and for the purposes of the tribunal's jurisdiction. The internal constitutional structure of a country cannot alter this. The view of the International Law Commission (expressed in articles on State Authority) is that the conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of governmental authority, shall also be considered as an act of that State under international law, provided that the organ was acting in that capacity in the case in question.

that appear to elevate contractual claims, questions of municipal law, into Treaty claims, questions of international law.[78]

- Is the contract claim amendable to ICSID arbitration: The question that is often asked is whether the claims have, as there basis, the treaty, as opposed to the contract; CAA and Vivendi v. Argentina, annulment decision of 3rd July 2002, 41 International Legal Materials 1135, para 78. In answering this question, ICSID tribunals appear to take different views on the interpretation of treaty clauses that purport to elevate contractual to treaty obligations.

- How are jurisdiction clauses in the contract to be resolved with jurisdiction clauses in the Treaty. In CAA and Vivendi v. ArgentinaCAA and Vivendi v. Argentina, the *ad hoc* (appellate) committee held that an exclusivejurisdiction clause in the contract could not bar the claim for breach of the treaty before the ISCID tribunal.

- See Ole Spiermann, *Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction*, 20 Arb Int 179; Zachary Douglas, *Nothing if not Critical for Investment Treaty Arbitration*, 22 Arb Int 27.

Outline of ICSID arbitration procedure

54. The procedure is governed by the Convention and by the ICSID Rules of Procedure.

- Article 36: Either party to an investment dispute can request the ICSID Secretary General to initiate ICSID conciliation or arbitration (conciliation is seldom used) and he must to do unless the dispute is manifestly outside the jurisdiction of ICSID.

- Article 26, Rule 3(b): ICSID Arbitration is self-contained. Consent to ICSID generally excludes all other remedies.See Friedland, *Provisional Measures in ICSID* (1996) Arb Int 335. Consider ETI Euro Telecom v. Bolivia [2008] EWCA Civ 880. This was one of the grounds on which the English Court concluded that it was not appropriate to grant a freezing injunctionin respect of Bolivian assets in London.Neither does s. 44 of the AA 1996 apply to ICSID arbitration.[79]

- Article 38: Constituting the panel: There must be an odd number of arbitrators; the presumption is three. Each party nominates one and, if they cannot agree a chairman, the Chairman of the Counsel appoints, having regard to the need to avoid a majority of nationals of either party. Only the chairman of the tribunal need be on the ICSID panel.

- Article 41, Rule 41. The tribunal determines its own competence. It must apply the law agreed by the parties or, if no agreement, the law of the

[78] For example: "Each Contracting State Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party."

[79] ETI. There is provision in the Schedule to s. 107 to so extend it, but this has not been done.

HostState (including its conflict rules). Tribunal can decide *ex aequo and bono*, if the parties agree.

- Article 45: If a party fails to participate, the Tribunal can continue to determine the matter on its merits.

- Article 47: The Tribunal can only award damages.

55. Status of Awards: Article 49 to 52, 53: Awards are binding and not subject to appeal or challenge other than as provided within the ICSID system. Other than in the case of applications for annulment, all applications are to the tribunal.

- Within 45 days of award, either party can ask the tribunal to deal with omitted matters and make corrections.

- Either party can, if the parties disagree on its meaning, ask the tribunal to give an interpretation of its award.

- Either party can, within 90 days, request the revision of an award where new information of a decisive effect to the Award comes to light and its previous ignorance of that information was not due to the applicant's negligence.

- An award can be annulled,[80] in whole or in part, on application made within 120 days where (a), the tribunal was improperly constituted; (b) the tribunal manifestly exceeded its powers; (c) an arbitrator was corrupt; (d) there was a serious departure from fundamental rules of procedure; or (e) the tribunal failed to state its reasons. Such challenges are decided by a three-person tribunal appointed by the Chairman of the Council. If an award is annulled, the dispute may be submitted to a new tribunal on the request of either party.

- Article 27: Contracting States are not to give diplomatic protection or bring international claims in respect of disputes by companies submitted to ICSID, unless the HostState (the State party to the dispute) fails to honour the award.

56. Enforcement.[81] Articles 54 and 55: Each Contracting State must recognise and enforce

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[80] There were fears that annulment would be too readily available, requiring new proceedings or settlement, but these fears appear to be groundless. At 2003, only three awards have been annulled (Lovells Client Brief). In the early years of ICSID, errors of law were viewed as excess of power justifying annulment, in effect giving wide rights of appeal on questions of law, but this has not happened. Some suggest there should be rights of appeal, to produce greater consistency in decisions.

[81] The Washington Convention, provides that a party to an ICSID award may obtain recognition and enforcement by furnishing a copy of the ward, certified by the ICSID Secretary General, to a competent court of a Contracting State (that state must be a signatory to and have ratified the Convention. Art 53: ICSID Award shall not be subject to challenge, appeal or remedy other than as provided for in the Convention. Art 54: A Contracting State must enforce pecuniary obligations imposed by the award within its territories as if it were

pecuniary obligations awarded by ICSID tribunals as if final judgements of that State.[82] But this does not override State laws on sovereign immunity. The Washington Convention does not deal with execution, so it may be difficult to execute against a State in a court where the law gives that State extensive immunity from execution.[83]

The additional facility

57. The ICSID Additional Facility, adopted in 1979, extends the Centre's jurisdiction to certain cases where the Convention jurisdictional requirements are not satisfied: Conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not a Contracting State or a national of a Contracting State; conciliation or arbitration proceedings between parties, at least one of which is a Contracting State or a national of a Contracting State, for the settlement of disputes that do not directly arise out of an investment; and fact-finding proceedings. The approval of the Secretary-General of ICSID must be obtained to institute such proceedings.The additional facility is, for example, used for arbitration under BITs where one of the States Parties is not a signatory to the Washington Convention.[84]

PART 2 – SUPPORT AND SUPERVISION FROM LOCAL COURTS

2A: INTRODUCTION

58. The role of State courts in international commercial arbitration is both supportive and supervisory.

- Support is concerned with matters such as enforcing arbitral agreements, assisting in constituting the tribunal, granting conservatory measures and interim relief (including witness orders). Supervision is concerned with controls over arbitrators, jurisdiction issues, and awards. Recognition and

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a final judgement of the court in that State.

82 In UK see the Arbitration (International Investments Disputes) Act 1966 (procedure is registration in the High Court). In practice, enforcement is only possible if execution is possible under the law of the Convention State where it is sought. Ideally, the Host State's consent to ICSID would include a waiver of any immunity against execution.

83 This would be a failure to honour treaty obligations and could lead to discussion between the relevant States at an international level, diplomatic protection and a possible international claim by the Home State on the investor's behalf. Nevertheless, ICSID awards are more widely enforceable than awards under the New York Convention. As at 2003, only in one case at 2003 (Lovells Client Note) has a State failed to comply with an ICSID award. Word Bank Support means there is informal pressure to comply. A non-complying state may feel that it will have difficulties obtain loans and credit from the World Bank if does not honour awards.

84 Since the Washington Convention is not applicable, the insulation from national law it provides is not available. Enforcement will be governed by the New York Convention. Hence the Additional Facility Rules provide that any proceeding must be conducted in a country that is a State Party to that Convention.

enforcement of awards can be regarded as supporting the arbitral process, but that topic is considered later.

- Apart from under Art. II of the New York Convention, and in those States that have adopted the Model law, there is, outside ICSID, little harmonisation of municipal law on these questions. This creates uncertainty and unpredictably.

2B: ENFORCING ARBITRAL AGREEMENTS

59. There are a number of methods available for enforcing arbitration agreements. The principal ones are under the New York Convention, or by Anti Suit injunction

Enforcing under the New York Convention (or related provisions of the Model Law)

60. Article II of the New York Convention provides internationally accepted minimum standards[85] for the recognition and enforcement of arbitral agreements in the territories of Contracting States (States that have ratified/acceded to the Convention),[86] but subject to the possibility of two reservations (reciprocity and commercial disputes).

- Article II(1): Each Contracting State must recognise agreements in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.[87]

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

- Compare Article 8 of the Model Law:[88]This provides that a court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party so requests not later than when submitting its first statement on

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85 Article VII makes clear that the NYC does not affect the validity of other international agreements concerning the recognition and enforcement of arbitral awards or more generous State domestic law.

86 Note possible reservations (art..I(3)) Convention is only to apply to the recognition and enforcement of awards (not agreements) made in the territory of another Contracting State. A Contracting State can declare that the NYC will only apply to differences arising out of legal relationship, whether contractual or not, which are considered as commercial under the national law of that State (Art X). Note, the NYC may not, in the absence of a declaration to the contrary, extend to all the territories for the international relations of which, a State is responsible.

87 The Model Law, art 7(1) omits the reference to being capable of settlement by arbitration, but the Model Law only applies to international commercial arbitration, art 1(1).

88 Note article 1(2). This, unlike most other provisions, applies irrespective of the place of arbitration.

the substance of the dispute, refer to the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

61. What is an agreement in writing (formal validity)?Article II(2): The term agreement in writing includes "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". But note art. VII: domestic law (see, eg. England and Wales, AA1996, s. 5, Swiss PILA, art 178)[89] may have less onerous formalities.

- This definition of writing fails to address technical advances in manner in which agreements are concluded; eg. what of agreements concluded by conduct, oral acceptance, agency or trade usage? How does it apply where rights are assigned or transferred on business re-organisation?

- A somewhat wider definition in the Model Law, Article 7: includes, as well as signed agreements, agreements contained in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by another. Furthermore, that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

- The 2006 Amendments to the Model Law (Article 7) provide two new alternativedefinitions. The first extends the definition of writing to agreementsconcluded by conduct or orally, as well as by exchange of case statements, and takes account of modern technology. The second alternative abandons the requirement for writing all together.

62. As with arbitrability, it is not clear which law should be applied to decide these questions: The local law, the law of the arbitration agreement or the *lex arbitri*. In practice, different State laws interpret these requirements in different ways, reflecting their attitude towards arbitration.[90] See, for example, #Van Hopplynus v. Coherent Inc (Belgium) YB Com Arb XXII, 637;[91]

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89 As regards its form, an arbitration agreement shall be valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

90 Courts have reached rather disparate decisions in those situations, often reflective of their general attitude towards arbitration. In the great majority of cases they have been able to hold the parties to their agreement". UN Commission on International Trade Law. International Commercial Arbitration, (United Nations 1999), part B. Suggests further study of this problem.

91 **Van Hopplynus**: (Tribunal de Commerce, October 1994). Claimant was exclusive distributor of C's products under a contract providing the law of California as the applicable law and AAA arbitration. C terminated the agreement and there was a dispute about how to deal with used stock. V commenced proceedings in Belgium, C applied for a stay under article II. V relied on the Belgian law of exclusive distributorships 1961, which provided that, in the event of

- Is it for the court, on the application, for the tribunal, once the proceedings are stayed, to determine the existence, scope and validity of the alleged arbitration agreement. Again different jurisdictions take different views of this. It may be that different considerations apply where the existence of the agreement is in dispute, from where its scope or contractual validity is in issue.

63. A father difficulty is whether it is for the court to determine the existence of an arbitration agreement on an Art. II application or whether the final determination should be left to the arbitrators. Contrast, for example, FAI Tak Engineering v. Sui Chong (Hong Kong, June 2009) (2010) 13 Int ALR N-4 (the test for the court is whether there is a prima facie case that the parties were bound by an arbitration agreement), with Birse Construction v. St David [2000] BLR 57 (CA) (court has to decide whether there is an arbitration agreement before it can stay).

64. The scope of an arbitration agreement[92] - Objective arbitrability: Different jurisdictions have different views about what is arbitrable and what commercial matters are reserved to the courts. For example,antitrust or unfair competition issues, securities, intellectual property, labour and company law disputes.

- There is an ongoing debate about whether arbitrability, on an article II(3) application, should be decided under local law, under the law of the parties' arbitration agreement, under the curial law of the arbitration (*lex arbitri*), or under the law of the likely place or places of enforcement.[93]See J Paulsson, Arbitrability, *Still Through a Glass Darkly*, ICC Bulletin, Special Supplement 1998.

- For an example consider Fincantieri-Cantieri v. Iraq (Italy) YB Com Arb XXI 594;[94]China Hi-tech v. Guangsheng Investment (China SPC, 2006) (2010) 13

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termination, the agent may bring court proceeding in Belgium and Belgian law will apply. The Court identified three possible laws to decide arbitrability. Law of place of enforcement (for consistency with art V(2)(a) – rejected as would mean validity of arbitration agreement varied with which court was concerned with enforcement. Law of the arbitration agreement, Californian law(for consistency with art. V(1)(a) – Yes, because the Convection recognised the principle of freedom to choose an applicable law, and agreement was valid under Californian law. Mandatory provisions of local (Belgian) law – No, because the Convention as part of intentional law had supremacy. Paulsson asks: Why not the law of the forum, since is not the question of whether the local courts have jurisdiction over the dispute, to be determined under that law? Paulsson also rejects the *lex arbitri* as irrelevant. Why should it constrain what foreign parties can arbitrate?

92 What matters can be within the scope of an arbitration agreement, as opposed to whether or not that agreement is valid (Only in the USA is the latter considered part of arbitrability).

93 Because the New York Convention (art. V(2)(a) entitles a court to refuse enforcement of an award, if the dispute was not arbitrable under the law of the enforcing state.

94 **Fincantieri**: (1994, Genoa Courte di Apello). Italian shipbuilder commenced legal proceedings in Italy against Iraq under a contract that provided for ICC arbitration. Resisted a stay under art II on

Int ALR N-42 (The law applicableto the effectiveness of a foreignrelated arbitration agreement is the law stipulated by the parties or, if not stipulated but a place of arbitration stipulated, that place of arbitration, otherwise the law of the place of the court. Note the court accepted that the law of the arbitration agreement could be different from the substantive law.)

65. Capacity of parties - Subjective arbitrability: Neither the New York Convention, nor the Model Law deals with this. Capacity to arbitrate is decided principally by the law of the place of domicile/nationality, but may also be affected by waivers applied by the *lex arbitri)*.[95]

A note on anti-suit injunctions in support of arbitration

66. Courts of certain, particularly common law, countries may exercise an exorbitant jurisdiction to restrain parties to an arbitration agreement that provides for arbitration under their laws from prosecuting an action in a foreign court in breach of that agreement, even if there is no other connection between the parties or their dispute and that country. This remedy is discussed further under that part of the course concerned with Arbitration under the English Arbitration Act.

2C: COURT ASSISTANCE IN APPOINTING THE TRIBUNAL

67. Most arbitration laws include procedures for constituting and appointing an arbitral tribunal if the parties have not agreed a mechanism for this. They also give one or more designated court power to appoint arbitrators if the appointment procedure breaks down or is unworkable.

- The Model Law, Articles 10 and 11, provides for a three person tribunal, including a chairman, each party to appoint an arbitrator, and the two to agree a third, if the parties' arbitration agreement is silent on the number of arbitrators, and how the tribunal is to be constituted.

- Article 11 provides for appointments to be made by the court, on application in a number of situations. If a party fails make the appointment required of it under the agreed or default appointment procedure, or, where agreement to an arbitrator is required, the parties fail to agree an arbitrator, or where a third party fails to perform appointment functions entrusted to it by the appointment procedure.[96]

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the ground that the sanctions imposed after the first Gulf War excluded the possibility of arbitration, ie. rendered the arbitration agreement null and void, etc. The Court held that where an objection to foreign arbitration is raised in court proceedings, the arbitrability of the dispute must be decided under Italian law, and the question directly affects jurisdiction, and court can only deny jurisdiction on the basis of its own legal system.

95 For example, Swiss PILA, art 177(2).

96 Articles 10 and 11 of the Model Law. The court's powers are more restricted than those provided for under AA1996, s. 18. Also, there is no equivalent to AA1996, s. 17 (power a party to appoint its arbitrator as sole arbitrator if other party fails to appoint. Also, default under AA1996, s. 15, is a sole arbitrator.

Court assistance in appointing the tribunal

68. Where the parties have not incorporatedinstitutional rules providing a solution to appointmentproblems (eg ICC Rules), recourse to a local Court may be necessary. This will generally be the court at the seat.

- Consider #Through Transport Mutual Insurance v. New India Assurance (No 2) [2005] 2 Lloyd's Rep 378 (Com Ct).[97]

- But note, the exception:Government of Israel v. National Iranian Oil Co (France, Cour de Cassation, 1st February 2005) (Parties agreement stipulated that each would appoint arbitrator (NIOC didn't) and that third arbitrator would be appointed, failing agreement, by President of ICC in Paris. The Seat was not in France. Nevertheless the Cour de Cassation held that it had jurisdiction to appoint an arbitrator, as the reference to the ICC a sufficient connection with France to give court jurisdiction to do so.). Also see s. 2(4) of the (English) AA1996 (court can exercise powers where no seat designated but where there is a connection with England and Wales:Chalbury McCouat v. PG Foils Ltd [2011] 1 Lloyd's Rep 23 (TCC).[98]

2D: JURISDICTIONAL OBJECTIONS

69. Most arbitration laws recognise the principle of Kompetenz-Kompetenz: subject to court review, an arbitral tribunal may rule on its own substantive jurisdiction.

- The Model Law, art. 16, provides that an arbitral tribunal may rule on its own Jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement; for which purpose an arbitration agreement in a contract is treated as an independent agreement. Such objections to be raised no later than the submission of the statement of defence or, in the case of an excess of authority, as soon as the matter said to be beyond the tribunal's authority is raised, with the tribunal having power to admit late objections. The tribunal may give its ruling as a preliminary question or in an award on the merits. In the former case, the relevant court (art. 6) can be requested to decide the matter, provided the request is be made within 30 days the ruling being notified. If the ruling is by award on the merits, the award must be challenged by application to

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97 **Through Transport**: CA had previously set aside an interim injunction to restrain New India prosecuting claim under a Finish statute in Finland. The court held, in this case, that once New India (insurer of shipper of lost goods) claimed as an assignee against Through Transport (insurer of allegedly responsible haulage company), there was a dispute, capable of being arbitrated under agreement for London arbitration in Through Transport policy. This did not stop Through Transport commencing the arbitration, and applying under s. 18 AA1996, for appointment of arbitrator when New India refused to do so.

98 **Chalbury**: The court, on a s. 18 application for the appointment of an arbitrator, said that one of the relevant considerations was whether the applicable law of the contact was likely to be that of England and Wales and, finding that this was so, declared that the appointment should be made by the LCIA, even though no seat yet determined.

set aside under article 34.[99] See, for example, El Nino Ventures Inc v GCP Group Ltd[2010] BCSC 1859 (Canada, BC SC). Section. 16 (6) of the International Commercial Arbitration Act (embodying similar principles to art 16) prevents the court deciding jurisdiction questions before arbitral proceedings are commenced. The decision must be first made by an arbitral tribunal, with the arbitral tribunal's decision to accept jurisdiction ultimately being reviewable by the court.

- This can be contrasted with the position in England and Wales where, under s. 32 and 72 and, indeed, under s. 18 of AA 1996, jurisdictional issues can come before and be decided by the court before the arbitration commences; See #"The High Cost of London as an Arbitration Venue, the Court of Appeal Rejects Competence- Competence …", S Shakleton (2010) 13 Int ALR 51.

- A further difference is that under s. 67 AA1996, negative decisions on jurisdiction can be challenged. The Model Law is silent on this. But note X v. Y, 4A, 452/2007 in the Swiss Federal Tribunal, (2008) 11 Int ALR, N-85, where it was held that, under Swiss Arbitral law, an award denying jurisdiction was a final award and could be challenged on the same grounds as any other final awardunder art. 190 PLIA, whereas an award accepting jurisdiction was interlocutory and could only be challenged on jurisdictional grounds under art. 190(2), including that the tribunal was improperly constituted.

70. An arbitral tribunal's jurisdiction derives principally from the parties' agreement to arbitrate and national laws governing the capacity of parties to arbitrate and the arbitrability of disputes and, thereafter, by the request or requests for arbitration and the parties' submissions. Possible jurisdictional concerns include:

Have the requisite formalities been observed in the agreement to arbitrate?
Has the correct party been sued? Do successors or assigns have *locus standi*?
Does the scope of the arbitration clause encompass other entities in a group of companies?
Can third parties be compelled to take part, can they intervene of their own motion, eg sub-contractors?
Does an arbitration clause signed by a State-controlled organisation bind the State to the tribunal's jurisdiction?
Does an arbitration clause signed by a government official bind the state or organisation? Some local laws require ministerial approval.
Has a party validly signed the arbitration clause? Does that party have capacity to sue and be sued?
Is the subject matter arbitrable? Does it come within the scope of the clause?

[99] Article 16. The court is a court at the place of arbitration, art. 1(2). These provisions are similar to AA1996, s. 30 and 31, but the tribunal's power to rule, cannot be excluded by party agreement. Routes of recourse to the court are simpler (no equivalent to s. 32). There is a lacunae in the Model Law in that the possibility of the tribunal ruling that it does not have jurisdiction, is not catered for. Probably, nothing to prevent the dissatisfied party starting another arbitration. An award denying jurisdiction cannot create an estoppel.

Can a multi-party arbitration be conducted?
Has the tribunal been properly constituted?

71. Some of these concerns relate to the substantive law of the contract or arbitration agreement, others to the*lex arbitri*, yet others to the law of the country of domicile or nationality. There is much scope for the outcome of such objections to differ depending on where the question is asked and when.

2E: CONSERVATORY AND INTERIM MEASURES

72. There are a number of possibilities to consider.

Conservatory and interim measures available from the tribunal

73. An arbitral tribunal will generally,[100]but not always, have certain powers to order interim or conservatory measures either under the *lex arbitri*[101]or under institutional rules incorporated into the arbitration agreement.

- Until the 2006 amendments, the Model Law provisions were rudimentary. Article 17, the tribunal has power only in respect of "interim measures of protection in respect of the subject matter of the dispute". But note Article 19, the tribunal's power to conduct the proceedings as it considers appropriate.

- The 2006 Amendments to the Model Law (Chapter IV bis) provide a wider regime for the granting of interim measures, as defined in Article 17(2), to: (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute. Article 17A identifies principles that the tribunal should apply in deciding whether to grant such orders. Articles 17B and 17C provides for the possibility of without notice application for such measures on a preliminary basis to be rewired on a subsequent inter parties hearing. Articles 17D to G deal with a range of ancillary matters relating to such measures including, 17E, the power to order security against the applicant.

- This regime can be contrasted with the provisions of the 1996 Arbitration Act addressing the same issues, eg ss. 38 and 42.

74. The tribunal will invariably have power under the *lex arbri* and/or any applicable institutional rules, to make procedural orders, for instance concerning evidence and documents[102] but some arbitral laws, eg Italy, do not allow for the tribunal to grant conservatory measures.

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100 Some jurisdictions do not allow the tribunal to exercise such powers. For example, Italy, CCP, Bk Four, Title VIII, art 818, also Finland.

101 As at 2008 only very few countries have adopted these amendments.

102 Eg. France, NCCP,, art 1460, tribunal may order a party to produce "elements of proof" in its possession. Compare the more general powers over evidence in AA1996, s. 34.

75. The tribunal's powers may, however, be unavailable, for instance, because the tribunal is not constituted, or inadequate, because the tribunal lacks effective sanctions to ensure compliance, consider Article 25 of the Model Law, contrast s. 41 of the AA1996, or its jurisdiction does not extend to those concerned.

- Since arbitration is consensual, an arbitral tribunal's power is generally restricted to the parties, it has no power to compel third persons to preserve property or produce evidence or documents.[103]Thus, there is a potential role for assistance from the courts at the seat of arbitration (and elsewhere?).

- USA arbitral law[104] is exceptional in providing international arbitral tribunals sitting (holding hearings in) in the USA with power, under s. 7 of the Federal Arbitration Act to summon in writing any person to appear them at a hearing as witnesses and to produce documents that are material as evidence.[105] This does not, however, extend to ordering pre-hearing depositions or general discovery; TH Webster, *Obtaining Evidence from Third Parties in International Arbitration*, Arb Int 17/2, 143, 154.

- Consider ETI Euro Telecom v. Bolivia [2008] EWCA Civ 880. Section 25 of the Civil Jurisdiction and Judgments Act 1982 (giving effect to the Brussels and Lugano Conventions and now the Judgments Regulation) does not empower the English Court to given interim relief in relation to an (ISCID) arbitration or to proceedings in a foreign court, here a NY court, ancillary to that arbitration. Proceedings for the purpose of s. 25 had to be in court and concerned with the substance of the matter.

Enforcing the tribunal's orders through the courts

76. Few arbitration laws address this problem directly. Exceptions include England and Wales (see AA1996, s. 42 (wide power),[106] and Switzerland, PILA, s. 183[107] (more

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103 See example, ICC Rules, art 20(3), (5). Contrast art. 3(8) of the IBA Rules of Evidence, but this is only facilitative. The availability of a power to compel documents from third persons depends on the local law. Since most Arbitration Rules allow hearings in a place other than at the seat it may be possible to use the law of the place of the hearing to obtain such evidence/documents. If, exceptionally, the tribunal has power to direct a third party to provide evidence/documents directly, should be concerned about the financial burden on it, and invite representations from them first.

104 See TH Webster, *Obtaining Evidence from Third Parties in International Arbitration*, Arb Int 17/2, 143.

105 US Federal Arbitration Act, s. 7. If the person fails to comply, the District Court for the district in which the Arbitrators are sitting may, on petition, compel his attendance before the arbitrator or arbitrators, sanctions for non-compliance being the same as in court proceedings. Note limits: Only covers orders by the tribunal orders, not parties, refers to attendance of witnesses and production of documents (at hearings), and is limited to arbitrations pending in the relevant District.

106 AA1996, s. 42: Court's power, on application of the tribunal or a party with the tribunal's permission, to order a party to comply with

limited scope). See also s. 7 US Federal Arbitration Act.[108]

77. The 2006 Amendments to the Model Law (Chapter IV bis) include, in Articles 17H and I, a regime for the recognition and enforcement of interim measures granted by tribunals by tribunals and, Article 17(9) and 17(10) their recognition and enforcement by courts, whether or not at the country where they were issued. The grounds to refuse recognition or enforcement mirror those in Article 36(1)(a)(i) to (vi) (NYC article 5(1)(a) to (d)) plus where security ordered by the tribunal is not provided or the interim measure has been terminated or suspended.

Enforcement of the tribunal's orders under the New York Convention

78. It is not clear whether a tribunal can render orders for interim measures as awards,[109] so as to make them amenable to enforcement under the New York Convention? Article 1(1) states that the NYC is concerned with the recognition and enforcement of arbitral awards made in State other than that of the place of arbitration or which are not considered as domestic awards in the State where recognition and enforcement is sought. In some jurisdictions an Award means a final determination of the substantive merits of the disputes referred to arbitration.

- Consider Resorts Condominiums International v. Bolwell (Australia) (1993) 118 ALR 655.[110]the Court refused to enforce "interim arbitration order and

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a peremptory order of the tribunal, but only where seat is in England and Wales, s. 2(1). There is nothing equivalent in the Model Law.

107 PILA, 183: If party fails to comply with an order for provisional or protective measures, the tribunal may request the assistance of the court, such court to apply its own law.

108 Consider enforcement against states and state offshoots, eg state immunity issues in Comsat Corp v. National Science Foundation 190 F 3d 269 (4th Cir Va 1999). A jurisdiction that adopts the French division between private and administrative law may be reluctant to recognise a tribunal's power to make such orders against the state or state offshoots; the power to make such orders often being reserved to the administrative court (not always independent).

109 The possibility of the tribunal rendering orders for conservatory and interim measures by award is recognised in art 23 of the 1998 ICC Rules. In England and Wales, the tribunal can, apparently, render any decision, for instance a procedural decision or a decision on evidence, by award; Charles M Willie & Co (Shipping) Ltd v. Ocean Lasar Shipping Ltd [1999] 1 Lloyd's Rep 225 (this is not, generally, a good idea as the tribunal will be *functus officio)*.

110 **Resorts Condominiums:** US company, claimant, entered into a licence agreement with an Australian Company. The agreement provided for arbitration in the US under the AAA rules. Tribunal made, on claimant's application, an "interim arbitration order and award" for various injunctions and US-style discovery, which was expressed to apply during the pendency of this arbitration (no distinction made between measures that reflected contractual entitlements under the licence and procedural rights). The Claimant sought to enforce in Australia under the NY Convention. Australian court refused to enforce. Held: First, that, to be enforceable under NYC, award must be one that is final and binding on the parties. An interlocutory order that may be rescinded, varied or re-opened by the tribunal is not final and binding. Secondly, court would have refused enforcement under Article V(2)(b) since there was no cross

award",made by an arbitral tribunal in the USA, for various injunctions and US-style discovery, which was expressed to apply during the pendency of this arbitration holding that Awards had to be final and binding. Note also Merck & Co Inc v. Tecnoquímicas SA, (Columbia) YB Comm Arb XXVI, 755,[111] an award on jurisdiction not an award for the purpose of the NYC since it did not finally determine a dispute concerning the subject matter of the action.

- Contrast Publicis Communications v. True North Communications (US) 206 F.3d 725 (7thCirIll, 2000). Court enforced a tribunal award requiring production of tax records relating to a joint venture, under the New York Convention;[112] there was, however a contractual right to these documents and was part of the dispute referred to arbitration.

- It has been argued that the Publicis approach might work generally, if there is a contractual right to the information. This approach is more doubtful where the right is only procedural unless, perhaps, it can be argued that there is a breach of the arbitration agreement in complying with the tribunal's order; TH Webster, *Obtaining Documents from Adverse Parties in International Arbitration*, Arb Int 17/1, 41, 57ff.

79. Some suggest that the NYC be amended to allow for the enforcement of tribunal orders for interim or conservatory relief. This is unrealistic and it is not going to happen.

Seeking interim or conservatory relief from a court

80. A few arbitral laws provide (sometimes with restrictions) for a party to arbitral proceedings to seek interim or conservatory measures from a court; the Model law, art. 9,[113] being facilitative in respect of such measures but addressing the problem of

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undertaking in damages as regards the injunctions and some of the orders were vexatious, and because of practical difficulties in interpretation and enforcement. The court also noted that the orders made were interlocutory and procedural in nature and in no way purported to finally resolve the dispute or legal right between the parties.

111 **Merck:** (Corte Suprema de Justicia 26 January and 1st March 1999) Thecourt refused to "enforce" an ICC awardon jurisdiction on the ground that it was not an award within the meaning of the New York Convention, since it did not finally decide a dispute concerning the subject matter of the action. Reasoning suggests that would not enforce procedural orders by Award.

112 **Publicis:** Tribunal made order that Publicis produce certain tax records relating to a joint venture. Identified a specific category of documents and stated that it should be complied with before the resolution of the other disputes subject to arbitration. True North sought to enforce in USA under NYC. Court of Appeals rejected the argument that this was a procedural, interim order. Held that, despite not being stated to be an Award was final as regards a part of the dispute referred to arbitration, thus was an award capable of enforcement under NYC. Note: the court's analysis was in terms of the finality of the order, not whether there was a contractual right to the documents.

113 Article 9. It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a

whether seeking such remedies will be regarded as a waiver of the arbitration agreement such as may give the court in question jurisdiction over the substantive dispute.

81. A difficulty with such provisions is that foreign parties may not be amenable to the jurisdiction of the court at the seat, the orders need to be sought where they, or relevant assets or property are located. Few jurisdictions expressly deal with this in their *lex arbtri*.

- In England and Wales the courts have power, s. 44 AA1996, to grant interim and conservatory relief of defined types in support of arbitral proceedings and, unusually, may do so irrespective of the seat of arbitration. But these powers may only be used on application by a party with the consent of the tribunal and where the tribunal or other agreed body is unable to act effectively. Only in urgent cases concerned with the preservation of evidence or assets, do these restrictions notapply.[114] In Hong Kong, the court has as somewhat similar range of powers but differently circumscribed. It is not clear if these powers are exercisable in support of arbitral proceedings elsewhere.[115]

- In some jurisdictions the court's powers to order interim relief are not excluded merely because the parties have agreed to arbitration consider Van Uden Maritime v. Duco Line [1998] ECR I-7091, see [1999] 2 WLR 1181.[116]Consider also the Singapore International Arbitration Act under s. 7,

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court an interim measure of protection and for the court to grant such measure. Note, art.1(2), the court, exceptionally, need not be at the seat.

114 Note: The courts of England and Wales exercise an exorbitant jurisdiction over the parties to actions concerning arbitrations whose seat is in England and Wales even if neither is domiciled in and, apart from the arbitration, has any connection with England and Wales. Thus, the court may give permission for service of proceedings claiming relief from the court under any provision of the 1996 Act out of the jurisdiction (CPR Pt 62.5). This is the case irrespective of whether the defendant is domiciled in a Contracting State to the Brussels or Lugano Conventions or the Judgements Regulation.

115 HK Arbitration Ordinance, s. 2GC (note applies to domestic and international arbitration). See also Singapore, Arbitration Act, s. 27. Neither of these Acts adopt the seat theory, but there is nothing to suggest that they are concerned with arbitral proceedings conducted outside their respective jurisdictions. Many arbitral laws are silent on this question.

116 **Van Uden:** Dispute arose under space charter providing for arbitration in the Netherlands, Van Uden instituted arbitration against Deco in the Netherlands for non-payment of certain invoices, also applied for interim relief to the Rotterdam court seeking a provisional order from the debtor to cover the debts claimed before the arbitrators (note under art 1022(2) of the Code of Civil Procedure, an arbitration clause did not preclude a party's right to seek interim relief). The ECJ said that such measures were not, in principle, ancillary to arbitration proceedings, but were parallel to it and concerned the protection of other rights, the nature of those rights determining the place of such orders in the scope of the convention. The ECJ held that, before such orders could be made, there had (a) to

under which the court on granting a stay to arbitration can order that property previously arrested can be retained for satisfaction of any award or order that the stay be conditional on providing equivalent security.

- In some jurisdictions the courts will only grant interim/conservatory measures in support of an arbitration in seated in their jurisdiction, see for example, Max India v. General Building Corp (India, HC, 2009); (2009) 13 Int. ALR N-8.

Court assistance with obtaining evidence (oral and documentary)[117]

82. In some jurisdictions there are provisions that allow the court to assist the tribunal with the obtaining of evidence (from third persons, not just the parties). Thus, the Model Law, Article. 27, provides that, on application by the tribunal or a party with the tribunal's approval, the court can assist in taking evidence in accordance with its own rules. It may be that, in some jurisdictions, the court's powers extend to the issuing of letters of request (letters rogatory) to a foreign court to take evidence from a witness in that jurisdiction.

- See, for example, Switzerland, PILA, art 184 (request by party or tribunal is to the court at the seat of the arbitral tribunal); England and Wales, AA1996, s. 43 (application by a party, with the consent of the tribunal, seat need not be in England and Wales, provided the witness and the hearing is in the court's jurisdiction); Singapore International Arbitration Act, s. 13, court can subpoena witnesses in support of arbitration.

- It may be that even if a country's arbitral law is silent on this matter, the courts can exercise powers available to them in litigation, in support of arbitration. Consider the USA case Deiulemar Compagnia v. MV 'Allegra' 198 F ed 473 (4th Cir Md 1999):[118] order under Rule 27 of the Federal Rules of Civil

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be a real connection between the subject matter of the measure and the court's territorial jurisdiction and, (b) the measure must have merely a protective and provisional character.

117 An early (1984) draft of Model law envisaged court assistance in order to hear witnesses, produce documents and inspect property and to secure expert evidence. But article 27 more limited: assistance in taking evidence may be requested from a competent court the court at the seat, see art. 6), on request by the tribunal, or a party with the approval of the tribunal. The former more likely in a civilian law seat where the tribunal considers it has an investigative role. Article 27 does not specify a uniform procedure, but relies on the State court's code for taking of evidence (will it take the evidence itself or require it to be presented to the tribunal). Obtaining a court's assistance in support of a foreign arbitration is problematic.

118 **Deiulemar**: Dispute between ship-owner and charterer concerning the condition of engines of vessel. Charterer's expert not allowed to view engines. Charterer applied, before arbitration commenced against owner in England, to US Federal Court for order to preserve evidence under Rule 27 of the Federal Rules of Civil Proceedings. Court stated that the danger of the evidence being lost or materially altered through repair, was an extraordinary circumstance (given that the evidence was otherwise unobtainable) that entitled the court to allow the application under Rule 27. The Rule 27 requirement that the petitioner expects to be a party to an action cognisable in a US

Proceedings, to preserve evidence in connection with intended arbitral proceedings in England. A US court might also be prepared to order limited discovery prior to constitution of the tribunal.[119]

For further discussion see TH Webster, *Obtaining Evidence from Third Parties in International Arbitration*, Arb Int 17/2, 143, 158ff.

2F: CHALLENGING THE TRIBUNAL OR THE PROCEEDINGS IN A LOCAL COURT

83. There are two possibilities to consider, whether the court will supervise arbitrators and whether it will supervise the proceedings prior to an Award being made.

Supervision of arbitrators

84. Most *lex arbitri* require arbitrators to be impartial and/or independent[120] and provide a mechanism by which an arbitrator can be challenged by court action, if they are reasonably believed not to be, and in limited other circumstances.[121] The relevant court is that at the seat.

- Article 12 of the Model law provides that an arbitrator can be challenged on the grounds that circumstances exist that give justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed by the parties. Right of recourse to the court is only available after recourse to the tribunal or under an agreed challenge procedure have been exhausted and, then, is subject to a 30 day time limit from the date the initial challenge is rejected. Article 14, recourse to court can also be had to terminate an arbitrator's mandate if he is unable to perform his functions or fails to act without undue delay.

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court was met because there was the possibly of a US action to compel arbitration or to enforce the Award. Rule 81(3), which states that the general rules cannot be used where the special rules relating to arbitration provide for a matter, did not preclude this. Note the court transmitted the expert testimony prepared as result of the application to the arbitrator in England to determine admissibility. Note, in both these cases, the court considered that to argue exceptional circumstances, the documents/evidence must be otherwise unobtainable. See TH Webster, Obtaining Evidence from Third Parties in International Arbitration, Arb Int 17/2, 143, 155ff.

119 If necessary in respect of questions of arbitrability, jurisdiction, or to prevent disappearance of evidence, Mississippi Power v. Peabody 69 FRD 558 (SD Miss 76), but most courts will not do so once the tribunal is constituted Hunt v. Mobil Oil 583 F Supp 1092 (SDNY 1984).

120 Meeting the requirements of independence and/or impartiality can create difficulties in tight knit business and legal communities (conflicts in large firms, need to disclose personal relationships of family members).

121 Consider Swiss PILA, art. 180: An arbitrator can be challenged if he does not meet the requirements agreed upon by the parties, if there exists a ground for challenge under the agreed arbitral rules, if circumstances exist that give rise to justifiable doubts as to his independence.

- Section 24 of the AA1996 is similar but wider as it also provides for removal if an arbitrator has refused or failed properly to conduct the proceedings, s. 24(1)(d)(i).

85. Three may also be recourse to a supervising or appointing institution where the arbitration is governed by the rules of that institution. See article 12 of the UNCITRAL Arbitration Rules (to the agreed or designated appointing body), LCIA Rules, Article 10 (to the LCIA court), ICC Rules, Article 11 (ICC Court).

86. Standards of independence and impartiality may not be the same in all cultures for party arbitrators as for chairpersons and sole arbitrators.[122]

- In some cultures, eg. Arab states, the party appointed arbitrator (co-arbitrator) is viewed as an intermediary, a means of communication between the tribunal and the parties. The requirement to refrain from separate contacts may not be understood. In some countries (eg US domestic arbitration,[123] contrast the AAA International Arbitration Rules) a party arbitrator may be viewed as a second tier advocate, rather than an independent judge.

- There may also be a greater willingness to accept an interrelationship between a party and its party appointed arbitrator where a state party is involved. See Eduardo Silva-Romero, *ICC Arbitration and State Contracts*, ICC Bulletin (2002) 13/1, 34 at 50ff.

- Nevertheless a consensus is emerging along the lines of the 1987 IBA Ethics for International Arbitrators in International Arbitration. This requires all members of the tribunal to be and remain free from bias, the criteria for assessing this being independence and impartiality. It recommends full disclosure, with failure to disclose creating, in itself, an appearance of bias. It also requires that, apart from obtaining views on the acceptability of candidates

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122 Consider Swiss case law: TF Hitachi Ltd V. Sms Schloemann (1977) Bull ASA 99, 105. The test in that casewas whether, objectively considered,circumstances exist that are liable to giverise to the appearance of bias (a justifiable doubts test). But the court drew a distinction between party-appointed arbitrators (co-arbitrators) and sole arbitrators and chairpersons. A relationship between a co-arbitrator and counsel (latter regularly referred clients to the former) did not disqualify, at least where the referrals were not financially significant source of income (it was considered that the arbitrator could discriminate between this duty as arbitrator and his relationship with counsel. Contrast ATF Sociétè Ligier v. Sociétè Diffusia (France) (1989) Rev Arb 505. Sole arbitrator (specialist in sports law) who was faced with a witness (racing driver) that was a former client and who might be again (because of arbitrator's expertise as lawyer) was successfully challenged. This would also be the case with a chairman as his view will ordinarily carry the day unless both co-arbitrators are in a majority.

123 This was reflected in the AAA 1977 Code of Ethics for Arbitrators in Commercial Disputes. But it is recognised in the AAA International Arbitration Rules, that independence and impartiality is necessary for all members of the tribunal.

for chairman, all arbitrators should avoid unilateral communications with the parties.

- The IBA Guidelines on Conflicts of Interest in International Arbitration provide, by a red, amber and green list, guidance on what relationships debar arbitrators from acting, what should be disclosed, and what need not be disclosed. A current conundrum concerns relationships between arbitrators and counsel, see#"Reconciling conflicting rights in International Arbitration …", Prof. J Waincymer (2010) 26 Arb. Int. 597.

Supervision of the proceedings

87. Few modern laws of arbitration provide the court with general powers of supervision over arbitral proceedings. The powers available to the courts of England and Wales to remove arbitrators for reasons other than for incapacity, want of impartiality or lack of agreed qualifications; in particular for failure, other than by delay or incapacity, to properly conduct the proceedings, and to determine preliminary questions of law and jurisdiction,[124] are regarded as unusual and, at any rate by the international arbitral community, unwarranted.Thus, Article 12 of the Model law limits the grounds of challenge to justifiable doubts as to impartiality or independence and lack of agreed qualifications.

88. In some jurisdictions the courts exercise a somewhat inchoate jurisdiction to control an arbitral tribunal, even one whose seat is elsewhere, thorough the grant of injunctions to restrain its members from acting.[125] The effectiveness of such injunctions, which are often issued on application of a party domiciled in the country concerned, and addressed to the tribunal as well as to the party wishing to prosecute the arbitration, depends on the territorial reach of the court concerned.[126]

Truncated tribunals

89. If a member of the tribunal is injuncted and refuses to act, consideration must be given to whether the truncated tribunal can proceed or whether that arbitrator can be removed on the grounds that they are unable to act, and replaced.Few arbitral laws expressly recognise the validity of a truncated tribunal (But note Bermuda and Germany). The problems may be dealt with in the applicable arbitral rules.

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[124] See ss. 32, 45, and 24(1). The court will only remove for failing to properly conduct the proceedings in exceptional circumstances. It must be satisfied that a reasonable person would no longer have confidence in the arbitrator's ability to come to a fair and balanced conclusion on the issues, James Moore Earthmoving v. Miller Construction Ltd [2001] BLR 322 (CA).

[125] Arbitrators may face threats of personal proceedings and claims if they do not act in a particular manner, The Model Law (and many other arbitral laws) does not expressly provide arbitrators with immunity. The 1987 IBA Rules of Ethics for International Arbitrators, suggest that arbitrators should have immunity, other than in the case of intentional or grossly negligent violations of their contractual duties.

[126] If one of the arbitrators is a national of that country, the arbitration will be halted, unless a replacement can be found or the rules allow a truncated tribunal to proceed with the reference.

2G: CHALLENGING AN AWARD IN A LOCAL COURT

90. A challenge to an award is concerned with having it modified or set aside (nullified). This can be contrasted with recognition and enforcement, which are concerned with giving effect to the award, in particular by enforcing its operative part, through imposing state sanctions, if necessary. Court proceedings at the seat of arbitration, in respect of an award, can be concerned with challenges as well as recognition and enforcement.[127] Court proceedings in respect of an award in other jurisdictions are, ordinarily, concerned with recognition and enforcement. The concern here is with challenges to an award, not with its recognition or enforcement.

91. Apart from the Washington Convention (1965) which precludes state court challenge, there are few international conventions that concern the extent of challenge to arbitral awards. But all modern*lex arbitri*provide, unless excluded by treaty, limited grounds for challenging an arbitral award made in international arbitral proceedings that are subject to their jurisdiction and requiring any challenge to be mounted within a specific period of the award being made. In modern arbitral laws, the grounds of challenge tend to be similar to those provided for in the Model Law which, in turn, derive from the grounds for refusing recognition and enforcement in the Article 5 of the NYC. See #"Review of substantive reasoning of internationalarbitral awards by national courts …", TH Webster (2006) 22 Arb. Int. 431.

- At one end of the spectrum is the arbitral law of England and Wales,[128] regarded by many as unduly interventionist.[129] This allows, in addition to challenges for want of jurisdiction and for "serious (generally, procedural) irregularity", appeals of questions of law; although the right of appeal can be excluded by agreement[130] and, in the international context often is, either by choosing a foreign proper law of the contract[131] or, by the incorporated arbitral rules (see eg 1998 ICC rules art. 28(6).[132]

- At the other end of the spectrum was, until recently reformed, the arbitral law of Belgium. This provided that, where neither party had a connection with Belgium, there was no right of challenge to an award in the Belgium courts.[133]

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127 There may be no prospect of enforcement at the seat, since the seat is often chosen in a neutral, arbitration friendly State with which neither party has any connection; thus has no assets there.

128 The arbitral law of New Zealand also gives a right of appeal, in somewhat similar terms to AA1996.

129 But note Lord Mustill, SA Coppee-Lavalin NV v. Ken-Rem Chemicals [1994] 2 WLR 631 (HL). The court should be less interventionist in cases where parties have little connection with England. Note, a similar view is taken (eg as regards due process objections) by the courts of other countries that are supportive of international arbitration, eg France and Germany.

130 AA1996, s. 67, 68 and 79. Note also restrictions in s.70 and 73.

131 The law in question must be that of England and Wales (or Northern Ireland), AA1996, s. 81(1); Athletic Union v. NBA [2002] 1 Lloyd's Rep 305.

132 ICC Rules, art 28(6). Parties are deemed to have waived their right to any form of recourse (against an Award) insofar as such waiver can be validly made.

133 Belgian Code Judicaire, art 1717. Since May 1996, the parties can

- Some arbitral laws (including, now Belgium) provide limited grounds of challenge (the usual being want of or excess of jurisdiction, serious breach of procedural natural justice (common law), or of the right to equal treatment and contradiction (Civil law), public policy. They may provide that some or all of these rights of challenge can be excluded by agreement of the parties. See, for example Swiss PILL, arts 190, 192.

- The Model law (art. 34) takes a middle position by providing limited grounds (which mirror those in Article V of the New York Convention, other than Article V(1)(e)), and which cannot be excluded by agreement, for setting aside an arbitral award and stating that setting aside for these grounds is the only recourse against an award.

92. Those who favour de-localisation question why there should be any right of challenge at the seat of arbitration, and would prefer all objections to the award to be raised solely on enforcement proceedings. But a challenge at the seat may,[134] if successful "kill" the award so that the risk of multiple enforcement is minimised.

93. The effect of a challenge depends on its outcome, considered in the light of the arbitral law under which it was brought. But, in many jurisdictions the only relief is setting aside, with the court having power to suspend the proceedings for a limited period to enable the tribunal to resume the proceedings and eliminate the grounds for setting aside. In other jurisdictions a wider range of relief can be granted on a challenge, including one or more of the following.

- Setting aside the award. The award loses its validity in the country where the order is made (generally the seat of arbitration) and provides a ground for refusing recognition and enforcement elsewhere (under New York Convention, art V(1)(e)/ Model Law, art. 36(1)(a)(v). Setting aside the award may have the effect of reviving the tribunal's jurisdiction over the disputes decided.

- Remitting an award (an alternative to suspending the setting aside proceedings). The tribunal's jurisdiction revives in so far as necessary to deal with the remitted matters and amend/issue a new award.

- Varying an award. This remedy, which is available to the courts of England and Wales, is anomalous and uncertain in effect.[135] If an English Award may

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agree to this, but it is not mandatory.

134 May, because some awards will not lie down and die despite NYC Art.V(1)(e); a ground to resist recognition or enforcement is that the award has been set aside at the place in which, or under the law of which, it was made.

135 This Page: 47 creates uncertainty as to whether the determination is that of the court or the tribunal, and where the determination is recorded; there being no mechanism for the award to be physically re-written to give effect to the court's variation. These criticisms were made some 15 years ago, see Mustill & Boyd, Commercial Arbitration (2nd Edition) pp. 617-8.

need to be enforced overseas, is best avoided. Remitting the award to the tribunal for re-consideration, is preferable.[136]

- Confirming the award (an alternative to merely dismissing the challenge).

G: THE ARBITRATION EXCEPTION IN THE BRUSSELS AND LUGANO CONVENTIONS AND THE JUDGEMENTS REGULATION

94. If the parties are domiciled in States that are members of the European Union or EFTA, any legal proceedings commenced by one against the other are, ordinarily subject to the EU Council Regulation on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (the Judgements Regulation), or its predecessors, the Brussels and Lugano Conventions.[137] The general rule is that the

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136 Courts in other jurisdictions may find difficulty in understanding how an award, which is the composite product of the deliberations of the tribunal and the court, can be recognized or enforced under the New York Convention. Moreover, it is difficult to see how, in the case of an award varied by the court, a duly authenticated original or a certificate copy can be provided as required by that Convention as required by art. IV(1)(a) Consider Nidera Handelscompagnie BV v. Moretti Cereali SpA (Italy: Corte di Appello, Florence, 1st December 1980) YB Comm Arb X, 450-52. In that case the Italian court held that the New York Convention did not apply to an English award that had been subject to the, now repealed, special case procedure under which a tribunal rendered alternative awards stating that one would be valid depending on how the court decided the various questions asked of it. The Italian court's reasoning that, although arbitration was involved as an indispensable premise to the second juridical phase, the intervention of the court was the last and final stage and it was the court's judgement that was being enforced, appears to be equally, if not more applicable where an arbitral award is varied by the court. In such a case, the court's decision is an indispensable part of what is to be enforced. Furthermore, it is implicit in the Italian court's reasoning that the question, "What is an award?" is a matter for the enforcing state, not for the arbitral law of the seat. If so, the deeming provision of AA1996, s. 71(2) may not have the intended effect where recognition or enforcement is sought outside of England and Wales.

137 The Brussels Convention 1968 and the Lugano Convention 1988 (ECJ has no jurisdiction under the Lugano Convention) both on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters. Under Note Art 1(4) Brussels/Lugano Convention (now Art 1(2) (d) of the Regulations) arbitration is excluded). The basic principle is (art. 2) that persons domiciled in a Contacting State shall, whatever their nationality, be sued in the courts of that state; subject to special jurisdiction exceptions (thus, in matters relating to contract, can be sued in the courts of the place of performance of the obligation in question). Note also art. 21 (now art. 23), where proceedings for same cause of action between same parties, brought in courts of different Contracting States, first has priority, others have to stay proceedings before them. Article 24 (now Art 31). A party can apply for provisional and protective relief in courts of a Contracting State even where court of another has, under the Convention/Regulations, jurisdiction over the substance of the matter. Court judgements rendered in one Convention/Regulation State

action must be commenced in the courts of the defendant's country of domicile but that, even where wrongly commenced, it is for the court sized of the matter to decide that this is so.

95. This is not the case the where the action concerns arbitration, since "arbitration" is excluded from their ambit. The scope of the exception is not, however, as clear as it might be. See #"The arbitrationexception of the Brussels and Lugano Conventions …", J-PBeraudo (2001) 18 Journal Int Arb 13; #"Why not include arbitration in the Brussels Jurisdiction Regulation?", H Van Houtte (2004) 21 Arb Int 509, Consider also:

- Mark Rich and Co AG v. Societa Italina Impianti[1991] 1 ECR 3855; [1992] 1 Lloyd's Rep 342[138] (judgment only). Ask "what is the nature of the subject matter of the proceedings". If arbitration; the proceedings are within the exception.

- Van Uden Maritime v. Duco Line [1998] ECR 7091, [1999] 2 WLR 1181.[139]Arbitration exception does not apply to court proceedings for

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are to be recognised and enforced in another, subject to limited defences. The substance of the judgement cannot be reviewed.

138 **Mark Rich**: Contract for sale and purchase of oil between Italian and Swiss companies said to provide for English law and arbitration in London before three arbitrators, one to be chosen by each party, the third by the two appointed. Mark Rich, buyer, contended that oil contaminated. Italian company brought proceedings in Italy for declaration that not liable to buyers as no contract, denied the arbitration clause, Mark Rich disputed court's jurisdiction. Also, commenced arbitration in London and, Italian company, refusing to take part, applied to court for appointment of arbitrator. Court gave leave to serve originating summons on Italian Company in Italy. Italian company applied to set aside, contending that real dispute concerned the validity of the arbitration agreement, so not within article 1(4) and, relying on article 21, said that Italian proceedings had priority. Reference to ECJ. ECJ held that the intention in Art 1(4) was to exclude arbitration in its entirety including proceedings for the appointment of arbitrators by the court, even if these proceedings involved questions about the validity or existence of the arbitration agreement as a preliminary issue. Suggested test was "what is the nature of the subject matter of the proceedings". If the subject matter is about arbitration, here the appointment of arbitrators, then outside the Convention even if the court had to resolve a preliminary question in order to determine that dispute.

139 **Van Uden**: Space charter, providing for arbitration in the Netherlands, under which Van Uden, Dutch, agreed to make cargo space available to a German shipper Deco-Line on board Van Uden's vessels. Dispute arose, Van Uden instituted arbitration against Deco in the Netherlands for non payment of certain invoices, also applied for interim relief to the Rotterdam court (note under art 1022(2) of the Code of Civil Procedure, an arbitration clause did not preclude a party's right to seek interim relief. Deco contended that Netherlands court had no jurisdiction, since it could only be sued in the German court. Rotterdam court dismissed the objection contending that the application was for a provisional measure covered by Art 24. Issue referred to ECJ included, did Brussels Convention apply to

provisional measures in support of arbitrationprovided that such orders concerned the performance of the contractual obligation itself, and were not concerned with the arbitral proceedings.

- ABCI v. Banque Franco-Tunisienne [1996] 1 Lloyd's Rep 495.[140] Judgement of a French court enforcing an ICC Award made in Paris, was not enforceable under the Brussels Convention.

96. But what where the legal proceedings are solely concerned with the validity of an arbitration agreement? For instance, a claim for a declaration as to its validity and/or for an anti-suit injunction to restrain proceedings in another Convention/Regulation State said to be in breach of it. Consider:

- The question of whether anti suit injunctions are compatible with EU law, in particular the Judgments Regulation, was referred to the ECJ, West Tankers v. Ras Riunione Adriatica [2007] 1 Lloyd's Rep 391 (HL), the HL expressing the view that proceedings for such injunctions do fall outside the scope of the Regulation. The ECJ disagreed #Allianz SpA v. West Tankers (ECJ 10th February 2009); [2009] 2 Lloyd's Rep 413. Proceedings concerning the subject matter of the dispute came within the scope of the Regulations. A preliminary issue in those proceedings, including the scope of an arbitration agreement, also came within the scope of the Regulation. Thus the question of the Italian court's lack of jurisdiction was a matter exclusively for that court. The English court could not issue an injunction restraining a party from commencing or continuing proceedings before the courts of another member state on the grounds that such proceedings would be contrary to an arbitration agreement.

- But could one seek a pre-emptive blow by seeking a declaration in the English Court that there is an arbitration agreement. This was one of the remedies

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proceedings in a local court to obtain provisional measures (under Art 24) in support of arbitration. The ECJ held that such measures were not, in principle, ancillary to arbitration proceedings, but were parallel to it and concerned the protection of other rights, the nature of those rights determining the place of such orders in the scope of the convention. and that these measures were within the Convention. The ECJ held that the court that had jurisdiction over the substance of a case under one of the heads of jurisdiction in the Convention, eg Art 5 (1) also had jurisdiction to order provisional or protective measures without that jurisdiction being subject to further conditions. But in the case of an arbitration agreement, no State court had jurisdiction over the substance of the case. In consequence it was only under Art 24 that a court might be empowered to order provisional or protective measures and then only if: (a) there was a real connecting link between the measure sought and the territorial jurisdiction of the contracting state in whose court those measures were sought and (b) the measures were of a mere provisional and protective character (interim payment of a contractual entitlement was not a provisional measure under art 24 unless repayment to the defendant is guaranteed if the claimant was unsuccessful on the merits); (b) the measure sought related to specific assets of the defendant located or to be located within the territorial jurisdiction of the court concerned.

140 **ABCI:** Point not dealt with by the CA [1997] 1 Lloyd's Rep 531.

sought in Navigation Maritime Bulgare v. Rustal Trading [2002] 2 Lloyd's Rep 106.[141]

97. What is the status of a court decision made in a Convention/Regulation State concerning the validity of an arbitration agreement. Consider:

- The Heidberg [1994] 2 Lloyd's Rep 287[142] (entitled to recognition as within the Convention), doubted in Navigation Maritime Bulgare v. Rustal Trading [2002] 2 Lloyd's Rep 106.[143]

98. What is the status of a court judgement on the merits made in breach of an arbitration agreement, but following a failed application to stay legal proceedings before it, under that State's equivalent to article II of the New York Convention?[144]

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141 **Bulgare**: Proceedings in English Court for declaration that parties had agreed to arbitrate, and for injunction to restrain proceedings previously commenced in French Court. Held: The essential subject matter of the claim was the validity of the arbitration agreement, thus Brussels Convention, in particular Art 21 did not apply.

142 **Heidberg**: Held that the decision of a French Court that a Bill of Lading did not incorporate an arbitration agreement was entitled to recognition in England.

143 Phillip Alexander v. Banhergen [1997] 1 Lloyd's Rep 79, 115 (CA) (within the convention but note opposite conclusion reached) Philip Alexander: Against public policy to require recognition of or to enforce a judgement obtained in a foreign court in disobedience of an injunction not to pursue the proceedings before that court. (note public policy defence to recognition and enforcement does not apply to Scottish and Northern Irish Judgements). Note judges in The Heidberg and Phillip Alexander (?) agree that a judgement of a court on the merits notwithstanding an arbitration agreement is a Convention Judgement. But in Phillip Alexander, the judge considered that recognition could be refused under Art 28(3) on grounds of public policy, since public policy was not restricted to jurisdictional issues. The breach of the arbitration agreement being the public policy issue, at least were an anti-suit injunction was ignored or where there was a blatant breach of that agreement.

144 Note art 57 of the Brussels Convention, which provides that the Convention does not affect any Conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition and enforcement of judgements. Is not the NYC (in particular art. II) such a convention. If so, a court's negative view as to the validity of an arbitration agreement could be denied enforcement/recognition in another contracting state under article 57. Some commentators, eg. J-P Beraudo, *The Arbitration Exception in the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgements*, Journal of International Arbitration (2001) 18(1), 13; consider that this is a better argument than reliance on art 27 of the Brussels Convention, which provides a public policy exception to recognition, argument does not make sense because suggests that what is being done is to ask whether the judgement was against the public policy of the state in which made, not the issue under art 27. In a nutshell, the court lacks jurisdiction because of art II of the NYC, not because of the Brussels Convention, eg art 17 (position where the parties have agreed that courts of a Contracting State are to have jurisdiction). But note Dicey and Morris [14-192). Is a court

99. For more on these topics, see D Hascher, *Recognition and Enforcement of Judgements on the Existence and Validity of an Arbitration Clause under the Brussels Convention*, Arbitration International, (1997) 13(1), 33; J-P Beraudo, *The Arbitration Exception in the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgements*, Journal of International Arbitration (2001) 18(1), 13; J van Haersolte-van Hof, *The Arbitration Exception in the Brussels Convention: Further Comment*, Journal of International Arbitration (2001) 18(1), 27.

PART 3: OBTAINING RECOGNITION AND ENFORCEMENT OF AN AWARD OTHER THAN AT THE SEAT OF ARBITRATION (THE NEWYORK CONVENTION)

100. The need for recognition arises where a court is asked to dismiss proceedings before it on the grounds that the claims or issues in those proceedings have already been determined by arbitral award. This raises questions of *res judicata*. The need for enforcement arises where an award is not complied with voluntarily, and a court in a place where the losing party has assets is asked to order that the award to be complied in that jurisdiction. If it is not, there will then be a need for execution of the court's order against those assets, though, for example, seizure or charging.

101. The principal international treaty concerned with the recognition and enforcement of arbitral awards, the New York Convention,[145] says nothing about execution.[146] For a good review of recent (up to 1998) cases, including those referred to in these notes, concerning enforcement under the NYC, see AJ van den Berg, *Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few*, ICC Bulletin – Special Supplement 1998, 75 (This suggests that only in about 10% of reported cases in the Year Books involving the NYC (up to 1998) has a court refused reinforcement of a foreign arbitral award). For a comparative study of case law up to 1994, see The New YorkConvention of 1958: Towards a Uniform Judicial

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judgement in one Regulation State as to the validity of an arbitration agreement entitled to recognition under the Regulations? If defendant has submitted to the foreign court to determine the merits of the dispute, yes, but otherwise not. Note: if a defendant to foreign proceedings challenges the jurisdiction of the foreign court, this is not a submission to the jurisdiction of that court, s. 33, CJJA 1982. But, if goes on to contest the merits of the dispute, that is a submission to the court's jurisdiction. This was what happened in the Mark Rich case where the Swiss Company served pleadings on the merits in the Italian proceedings. See The Atlantic Emperor (No 2) [1992] 1 Lloyd's Rep 624 (CA). The service of these pleadings amounted to a submission to the Italian Court's jurisdiction in respect of the entire claim, including in respect of its interlocutory decision as to the validity of the arbitration agreement. Thus the Swiss Company was not entitled to an anti-suit injunction to restrain those proceedings.

145 Review on the merits by enforcing court not permitted. Note article VII allows more liberal criteria for enforceability than in NYC

146 As with the execution of court judgements, it may be possible for a recalcitrant party to avoid execution for many years, especially if the only assets are in its home state.

Interpretation" AJ van den Berg, Kluwer (1994). For more recent developments, see the commentaries in the Year Books of Commercial Arbitration.

What awards are encompassed by the New York Convention

102. (Article 1) For an award to be susceptible to recognition and enforcement under the New York Convention, the State in which recognition and enforcement is sought (the enforcing State) must have ratified (or acceded to) the Convention (a ContractingState) and (art. 1):

- It must be an arbitral[147] award. Consider Splosna Plovba v. Agrelak Steamship(Australia) YB Comm Arb I, 204.[148] There is some uncertainty about whether consent awards enforceable under the NYC. A mere declaration that the parties have settled, without any orders on costs or otherwise may not be enforceable. But note Article 30 UNCITRAL which gives full award status to consent Awards, does art 26 ICC do the same? What of interim awards? The ICC test is: does it finally settle aspects of a disputed claim presented in the arbitration. There may be problems with enforcement of certain treaty awards, eg NAFTA and Energy Charter Treaty Awards under the NYC because these are not based on agreement but on state's offer to arbitration under the treaty and investors consent by commencing arbitration under the treaty. This is not a problem if the award is subject to Washington Convention.

- It must be made in the territory of a State other than the State where recognition and enforcement is sought or, for some other reason, not be considered as a domestic award under the law of the latter State.

- It must arise out of differences[149] between persons whether physical or legal.

- (Where the enforcing State has made such a reservation at the relevant time) It must be made in the territory of another Contracting State.[150]

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147 The process leading to the award must be an arbitration. This can give problems due to the growing multiplicity of dispute resolution processes.

148 **Splosna**: Tribunal in USA issued an Interim Arbitration Order and Award enjoining the respondent from carrying out activities related to the agreement in dispute during the pendency of the arbitration. Australian court refused to enforce holding that it was not an arbitral award within the meaning of the Convention. Note, since a partial award finally determines an aspect of the merits, it should be enforceable. The problem lies in the concept of an interim award as one that is only to be effective for a period of time.

149 Merck & Co Inc v. Tecnoquímicas SA(Columbia: Corte Suprema de Justicia 26 January and 1st March 1999) YB Comm Arb XXVI, 755. The Supreme Court of Columbia, while it refused to "enforce" an ICC awardon jurisdiction on the ground that it was not an award within the meaning of the New York Convention, since it did not finally decide a dispute concerning the subject matter of the action,

150 Difficulties caused by the reciprocity reservation are decreasing as more countries ratify the NYC. But there are different views on whether the Convention has retrospective effect which although now largely academic can cause problems where, under laws of a ratifying

- (Where the enforcing State has made such a reservation at the relevant time) The differences must arise out of a legal relationship, whether contractual or not, which is considered as commercial under the law of the enforcing State. See, for example, on what might be regarded as commercial or not; RM Investment v. Boeing (India) YB Comm Arb XXII, 710;[151] Taie Haddad v. Société d'Investisment Kal (Tunisia) YB Comm Arb XXIII, 770.[152] There are, however, a diminishing number of jurisdictions that take a narrow view of what constitutes a commercial dispute.

Forum shopping on enforcement

103. There is nothing in the Convention that prevents a party forum shopping on enforcement proceedings; for instance, seeking enforcement in more than one jurisdiction or, having failed in one State, seeking enforcement in another. There are, however, unresolved conceptual problems with this, such as concerning doctrines of merger of judgements, and issue estoppel.[153] Consider Karaha Boas Co v. Perusahaan Pertambangan, etc (Hong Kong) YB Comm Arb XXVIII,[154] 752; Karaha Boas Co v.

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state, the Convention is only effective after implementing legislation, and this is not implemented for years after ratification. Note, there is no reciprocity reservation in the Model law, but it only concerns international commercial arbitration.

151 **RM Investment**: (Supreme Court of India). The court rejected earlier decisions holding that agreements for technical assistance and know how were regarded as non-commercial as they did not involve a transaction between merchants and traders, and held that a contract for services was commercial in nature.

152 **Taie**: (Supreme Court of Tunisia). The court held that a contract for architectural services did not fall within the scope of the Tunisian Commercial Code and that, in consequence, was not commercial according to Tunisian law. Because of the commercial reservation by Tunisia, the award not enforceable there.

153 For example, does the award merge with the judgement enforcing it, particularly if enforcement has already been obtained at the seat. What is the status of a court's determination of the grounds relied on to resist enforcement, in the court of another country, particularly if both are bound by treaty to recognise and enforce court judgements. One view is that the doctrine of merger of judgements has no extra-territorial effect. But contrast Nedera v. Moretti, YB Comm Arb XX, 450 (Italy), where the court refused to enforce an English Award that was subject to the special case procedure, holding that the applicant was entitled to money not by virtue of the award, but because of the court's decision on a special case. Rederi v. srl Temarea YB Comm Arb X, 453 (Italy): A party, having been refused enforcement in Italy on the grounds that the constitution of tribunal was not in accordance with parties' agreement, obtained judgement on award in England and sought to enforce the court judgement in Italy. The Italian court concluded that the judgement was not an autonomous judgement capable of enforcement under Brussels Convention, but was assimilated into the arbitral award. Thus, enforcement refused under that Convention (because of arbitration exception).

154 Karaha: (Hong Kong: High Court, 27th March 2003):.One of the principal issues, on an application to enforce a Swiss award in Hong Kong, was whether the Jakarta court, which had annulled the awards, was a court of competent authority for the purpose of article V(1)(e). It was

Perusahaan Pertambangan, etc. (United States) YB Comm Arb XXVIII, 908;[155] Good Challenger v. Metalexportimport SA [2004] 1 Lloyd's Rep 67 (England CA).[156]

104. The SC touched on this problem in #Dallah Real Estate v. Pakistan [2010] UKSC 46, para. 29:

> "Further, what matters, self-evidently, to both parties is the enforceability of the award in the country where enforcement is sought. Since Dallah has chosen to seek to enforce in England, it does not lie well in its mouth to complain that the Government ought to have taken steps in France. It is true that successful resistance by the Government to enforcement in England would not have the effect of setting aside the award in France. But that says nothing about whether

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held not to be because Indonesia was not the seat of the arbitration, thus (presumably) could not give rise to an issue estoppel. But the court also held that, since the jurisdictional and other objections to the award with which it was concerned had been argued unsuccessfully on enforcement proceedings in the United States, the respondent was precluded by issue estoppel from raising them again on enforcement proceedings in Hong Kong. But, if so, does this mean that the Hong Kong court would have held that the decision of the Jakarta court bound the parties by issue estoppel had it upheld the respondents' objections to the award in the context of an application to enforce it in Indonesia, rather than on an application to set it aside.

155 **Karaha**: (US Court of Appeals 5th Circuit, 18 June 2003). The court considered that, since the New York Convention envisages forum shopping, enforcement proceedings under its provisions in one jurisdiction do not necessarily have *res judicata* effect in other jurisdictions. In Good Challenger Navegante SA v. Metalexportimport SA [2004] 1 Lloyd's Rep 67 (CA), the English Court of Appeal doubted that a foreign judgment concerning the enforcement of an arbitral award could give rise to a cause of action estoppel. But it did accept that, applying the principles in The Sennar (No 2) [1985] 1 WLR 490 (HL) it might give rise to an issue estoppel.

156 **Good Challenger**: Arbitrator's award of 1983, in dispute between owner and charterer, awarded sums to the owner. Enforcement sought in Romania, where court refused to enforce on grounds that time barred under Romanian law, article 176 of the relevant Code. But during course of judgment the Romanian court also concluded that time barred under English Law, a finding which was relevant to its decision that the Award was no longer executory. The Court of Appeal held that, in order to establish an issue estoppel, four conditions must be satisfied: (1) that the judgment must be given by a foreign court of competent jurisdiction; (2) that the judgment must be final and conclusive and on the merits; (3) that there must be identity of parties; and (4) that there must be identity of subject matter, which means that the issue decided by the foreign court must be the same as that arising in the English proceedings: see, in particular Carl Zeiss Stiftung v Rayner C Keeler Ltd (No 2)[1967] 1 AC 853 ("the *Carl Zeiss*" case), The Sennar (No 2) [1985] 1 WLR 490, especially per Lord Brandon at p 499, and Desert Sun Loan Corporation v Hill [1996] 2 All ER 847. Thus, the decision of the Romanian court could create an issue estoppel preventing the owner re-litigating that question. But, on the facts, the Romanian Court's decision on the English limitation point was *obiter*, and thus did not give rise to an issue estoppel.

there was actually any agreement by the Government to arbitrate in France or about whether the French award would actually prove binding in France if and when that question were to be examined there. Whether it is binding in France could only be decided in French court proceedings to recognise or enforce, such as those which Dallah has now begun. I note, however, that an English judgment holding that the award is not valid could prove significant in relation to such proceedings, if French courts recognise any principle similar to the English principle of issue estoppel (as to which see The Sennar (No. 2) [1985] 1 WLR 490). But that is a matter for the French courts to decide."

105. The Paris CA does not appear to have risen to the challenge. See Gouverment du Pakistan v. Société Dallah (Feb 2011, Paris CA) where Pakistan's subsequent attempt to set the awards aside failed. An appeal is pending.

Pre-conditions to recognition and enforcement[157] under the NYC

106. (Article IV) The party seeking recognition and enforcement must supply at the time of its application (with certified translations if not in an official language of the enforcing country):

- The duly authenticated original award or a duly certified copy of it.

- The original agreement referred to in article II or a duly certified copy of it.[158]

107. Article II(1) provides that Contracting States shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. Agreement in writing is defined, in article II(2), as including an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. This extremely narrow definition does not, however, preclude the enforcing court from assessing the requirement for writing in the light of more relaxed formalities, if applicable under the local law (art. VII)(1)).

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157 Note double *exequatur* requirement in 1927 Geneva Convention on the Execution of Foreign Arbitral Awards (now superseded). For enforcement, an award had to be final in its country of origin, that is not open to any form of recourse, nor the subject of pending proceedings contesting its validity. The only feasible way to show this was to obtain *exequatur* in the country of origin before seeking exequatur elsewhere. The NYC does not require proof of finality in country of origin, thus removing the requirement for double *exequatur*. Instead, article V(1)(e) provides that annulment in the place of the award may be a ground to refuse enforcement (unless law of enforcement forum provides otherwise, art VII).

158 Different jurisdictions have different views about what is necessary to satisfy the formalities. For example, see Sodime v. Scbuurams, YB Comm Arb XXI (1996) 607 (Italy). The existence of these conditions is a matter for procedural law of the enforcing state, see Art III. Award not enforced because only two of the three arbitrators' signatures were authenticated, (sufficient in England and Wales). Under law of Italy all three had to be authenticated.

- In 2006 UNCITRAL, by resolution, recommended: 1. that article II, paragraph 2, be applied recognising that the circumstances described therein are not exhaustive and that Article VII, paragraph 1, be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

108. It is generally accepted that it is for the party seeking enforcement to satisfy the requirement of article IV, in order for the court to have (the US refers to this as subject matter) jurisdiction to consider the application. But there is an unresolved debate as to how articles IV and II interrelate to each other and to article V(1)(a).

- At one end of the spectrum are those jurisdictions that do not regard establishing compliance with article II as part of the requirements imposed by article IV. Consider China Minmetals v. Chi Mei Corporation (USA) 334 F 3d 274;[159] Dardana Ltd v. Yukos Oil Co [2002] 2 Lloyd's Rep 327 (CA).[160]

- At the other, are those jurisdictions that require the enforcing party to satisfy the formal and/or substantive requirements of articles IV and II, in particular articles II(1) and II(2). This raises the further difficulty (considered previously) as to which law should apply in determine the formal and/or substantive validity of the arbitration agreement. Consider A Ltd v. BAG(Switzerland) YB Comm Arb XXVIII, 835;[161] Peter Cremer GmbH & Co v. Co-operative

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159 **China**: Case concerned the enforcement of a Chinese award in New Jersey). Federal Court of Appeal considered that what was required under art IV was to provide the purported arbitration agreement and, if disputed, establishing that the parties had agreed to the evidenced terms as a matter of contract law, not by reference to article II(2). The minority opinion, Alito CJ, was that a party seeking enforcement had not merely to provide, under article IV(1)(b), a document purporting to be an arbitration agreement, but to prove that the document was, in fact, an agreement in writing within the meaning of article II(2).

160 **Dardana**: The case concerned the enforcement of a Swedish award in England and Wales. The court held that all that the applicant had to provide was apparently valid documentation containing an arbitration clause by reference to which the arbitrators had accepted that the parties had agreed to arbitration. Documentation that the arbitrators had accepted recorded an agreement to arbitrate made with the parties' authority. Challenges to the existence or validity of the arbitration agreement had to be pursued simply and solely under AA1996, s. 103(2)(b)(equivalent to that part of article V(1)(a) of the New York Convention concerned with the validity of the alleged agreement).

161 **A Ltd**: Bundesgericht, 31 May 2002). One of the grounds for refusing an application to enforce a London arbitral award in Switzerland was that the documents provided by the applicant did not satisfy the formal requirements of art II(2). These documents were, principally, an unsigned charter party, which referred to the applicant's general conditions of contract, the general conditions themselves, which contained an arbitration clause, and correspondence concerning the charter party which did not mention the special conditions or the arbitration clause. In reaching its conclusion, the court appears to have applied Swiss law since it did not consider whether the reference

Molasses Traders Ltd [1985] ILRM 564;[162] Planavergne SA v. Kalle Bergander (Sweden) YB Comm Arb XXVII, 554;[163] Czarina LLC v. WF Poe Syndicate, 4th February 2004, XXIX YB Comm. Arb. 1200 (USA F 11th).[164]

- Consider China Minmetals v. Chi Mei Corp (2003) 334 F 3d 274.[165] a case concerning the enforcement of a Chinese award in New Jersey, where the majority accepted the distinction between satisfying the formal requirements of

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in the charter party to the general conditions would have been sufficient, under the law of England and Wales, to incorporate the arbitration clause in those conditions and thus bind the parties (This possibility could not have been ignored had the issue of validity been dealt with under article V(1)(a), not under article II).

162 **Peter Cremer**: (Ireland: Supreme Court. The case concerned the enforcement of an English award in the Republic of Ireland. Held: If disputed, the court had to be satisfied that there was a binding arbitration agreement between the parties before entering on the application to enforce the award.

163 **Planavergne**: (Svea Court of Appeal, 7 September 2001). Considering ss. 48, 54, and 58 of the Swedish Arbitration Act 1999, which, unlike article II of the New York Convention, deal separately with questions of agreement, capacity, and validity and the laws applicable to those questions. The case concerned enforcement of a French award in Sweden. Held, under s. 58 of the Swedish Arbitration Act 1999 (the equivalent of article II of the Convention) the party seeking enforcement had to show that the arbitration agreement had been entered into in accordance with the law applicable to that agreement (here French law). Planavergne had done so because, according to the findings of the arbitral tribunal, it must be assumed to have established that an agreement to arbitrate existed between the parties.

164 The US Court of Appeals, 11th Circuit applied similar reasoning in *Czarina LLC v. WF Poe Syndicate*, 4th February 2004, *XXIX YB Comm. Arb.* 1200, but, like Alito C.J., regarded Art. IV(1)(b) as embodying a requirement to prove that the exhibited terms had been agreed. The advantage, for the enforcing court, of using either Art.IV or Art.V(2) as the basis for this review is that it avoids the presumption in favour of enforcement in Art. V and the requirement to apply, under Art. V(1)(a), the law to which the alleged agreement was subject, or failing any indication of what that was, the law of the country were the Award was made

165 **China Minemetals**: (XXIX YB Comm. Arb. 1003), applying the reasoning in *First Options of Chicago Inc.* v. *Kaplan* 514 US 938 (US Supreme Court). The contention was that the arbitration agreement was void *ab initio*, the allegation being that the documents provided were forged,Alito C.J. dissented on this saying that the party seeking enforcement had not merely to provide, under Art. IV(1)(b), a document purporting to be an arbitration agreement, but to prove that the document was, in fact, an agreement in writing within the meaning of Art. II(2). The US Court of Appeals, 11th Circuit applied similar reasoning in *Czarina LLC v. WF Poe Syndicate*, 4th February 2004, *XXIX YB Comm. Arb.* 1200, but, like Alito C.J., regarded Art. IV(1)(b) as embodying a requirement to prove that the exhibited terms had been agreed. The advantage, for the enforcing court, of using either Art.IV or Art.V(2) as the basis for this review is that it avoids the presumption in favour of enforcement in Art. V and the requirement to apply, under Art. V(1)(a), the law to which the alleged agreement was subject, or failing any indication of what that was, the law of the country were the Award was made.

> Article IV(1)(b) by providing a copy of the purported arbitration agreement and, if disputed, establishing that the parties actually agreed to the evidenced terms, a matter to be determined under the law of contract, not by reference to Article II(2). But court held that, where enforcement was resisted on the grounds that the alleged arbitration agreement had never been madethe enforcing court should, unless the parties had agreed to the tribunal deciding arbitrability (used in the US sense), or the objecting party had waived its objection, make an independent determination, applying the law of the state, in the United States, where the party was domiciled, of whether the parties had agreed to arbitrate.[166]

109. Enforcement and recognition may be refused where there are problems with the identity of a party. But this may also raise issues which are not readily encompassed by the article II(2) requirements: For instance because they concern laws of agency, succession, or concepts, such as the group of companies doctrine accepted in some legal system.[167] Whatever law applies to decide these issues, it is difficult to see why these are matters for the law of the enforcing state?

Rebutting the presumption in favour of recognition and enforcement[168]

110. Article V of the New York Convention sets out a number of grounds on which recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked.[169] These are for the party resisting enforcement to

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166 The court was not bound by the tribunal's decision on that question, even if, as was the case here, the tribunal had, under the applicable CITAC rules, power to rule on its own jurisdiction, since the issue was whether the parties had ever agreed to the arbitration clause incorporating those rules. It may be that had the issue been subsequent invalidity, that the arbitration agreement was voidable, not void, a US court would have considered this to be a matter for the tribunal to decide.

167 If a court concludes that a person against whom enforcement is sought was not a party to the arbitration agreement, it will not enforce, see Chios Charm v. Rionda, YB Comm Arb XX, 950 (USA). Enforcement sought against three parties, court determined that two had not been parties to the arbitration agreement, thus refused to enforce against them. Keck Seng v. KS Edible Oil YB Comm Arb VII, 347 (Netherlands) Court refused to enforce against one of the respondents on the grounds that it did not appear from the documents that it had agreed to arbitrate the disputes that had arisen with the applicant. Solofl v. GPVO, YB Comm Arb XIII, 742 (Russia). Court denied Sokofl Inc, Panama, enforcement of award made in London in favour of Sokofl Ltd, Panama on proof that there was no entity Solfol Ltd registered in Panama.

168 Article V attempts, more successfully than articles II or IV, a division of labour between the law of the seat and law of the place of enforcement.

169 The general view is that the grounds for not enforcing are exhaustive. But this was not accepted by the Supreme Court of Queensland, applying s. 8(2) of the International Commercial Arbitration Act 1974, the wording of which suggested unlike the NYC, a residual discretion as to whether or not to enforce, even if none of the NYC grounds made out; Resort Condominiums v. Ray Bolwell YB Comm Arb XX. 628.

prove.[170]

Incapacity of the parties or invalidity of the arbitration agreement

- Article V(1)(a): The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

- Difficulties with this provision include its relationship between Article II, and whether disputes as to the (initial) existence of the agreement and compliance with formalities are matters for this article or article IV or II. Also, whether questions of capacity to arbitrate are to be determined under the law of the place of domicile/nationality (possible under article IV or II) or the law of the arbitration agreement or the curial law of the arbitration (the *lex arbitri*), as under this article.

- Consider refusals of enforcement in, for example: Agrimpex SA v. JF Braun, YB Comm Arb IV, 269 (Greece) Lack of a written power of attorney to conclude the arbitration agreement; IMP v. Aeroimp, YB Comm Arb XXIII, 745 (Russia) Arbitration agreement not validly assigned to the claimant; Fougerolle v. Syria, YB Comm Arb XV (1990) 515 (Syria) Syrian Ministry lacked capacity to agree to arbitration, since it had not obtained prior advice on the referral of the dispute to arbitration as required under Syrian law (Note: if a matter for the*lex arbitri*, the doctrine of waiver might preclude this defence); Creighton v. Qatar YB Comm Arb XXV, 1001 (USA) Quarter held not to have waived sovereign immunity by agreeing to arbitrate in France (Qatar not a signatory to the Convention).

- Consider enforcement in, for example, X v. Y (Germany) YB Comm Arb XXVIa, 645 (agreement valid because it complied with the requirements for writing under the*lex arbitri*, AA1996, s. 5(1)).[171] Contrast #Dallah Real Estate v. Pakistan [2010] UKSC 46 concerning the enforcing of a French Award in England. Pakistan, apart from providing some submissions on jurisdiction

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170 Hence the desire of parties resisting enforcement to contend that issues as to validity (does this include existence) of the arbitration agreement are matters for the court under articles IV and II, not article V. Thus, courts may, occasionally, put burden of proving existence and validity of arbitration clause on enforcing party, Vicre Livio v. Prodexport, YB Comm Arb VIII (1982) 354 (Italian Supreme Court); Charterer v. Shipowner, YB Comm Arb XII (1986) 500 (Greece)(party failed to provide the relevant statutory provisions showing validity under law of NY State, and a Greek translation.

171 **X v. Y**: (Court of Appeal of Bavaria, 17th September 1998) The case concerned enforcement of an English Award in Germany. The Court rejected an argument that the arbitration was not in writing on the basis that it was valid under English law, in particular s. 5(2) of the 1996 Act, the law on which the parties had agreed. In reaching this conclusion, the court appears to have regarded questions as to the required form of an arbitration agreement as matters to considered under article V(1)(a), not article IV or II of the Convention.

under protest, took no part in the arbitration contending that it was not a party to the arbitration agreement. The SC noted (perhaps with a raised eyebrow?) that it was common ground that the issue was to be decided under Art. V(1)(a), no attempt being made to distinguish Dardana Limited v Yukos. Applying French Law, the position being the same in English law, it held that can arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal, this principle being the same when the court was concerned with enforcing a foreign arbitral award. In making its determination, the Court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them, nor was it relevant that Pakistan had not challenged the award on jurisdictional grounds in the French courts. The SC found that the tribunal had not applied the correct principles of French law in deciding whether Pakistan was a party and applying what it found were the correct principles concluded it was not.

- Contrast: Gouverment du Pakistan v. Société Dallah (Feb 2011, Paris CA) where Pakistan's attempt to set the awards aside failed. The CA concluded that under French law: "the implication of [Pakistan]... together with its behaviour during the pre-contractual negotiations, confirm that the creation of the Trust was a pure formality and that [Pakistan]… behaved as if it were the true Pakistani party during the economic operation." Thus Pakistan was a party. The French court also considered that it was entitled to fully review the question but, in practice only reviewed the factual and legal elementsconsidered by the arbitrators.

- A similar approach has recently been adopted by the German Federal Supreme Court in in S v. M (DecisionIII ZB 100/09, December 2010). It held that enforcement under the NYC could be resisted on the ground that the tribunal lacked jurisdiction even though the defendant had not initiated set aside proceedings at the seat (France), at any rate where the issue concerned where there was a valid arbitration agreement.

Violation of due process[172]

- Article V(1)(b): The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

- Note Parsons v. Société Générale, YB Comm Arb I, 205 (USA) "This provision essentially sanctions the application of the forum state's standards of due process"; Bauer v. Fratelli, YB Comm Arb X, 461 (Italy). Enforcement refused on grounds that a notice period of one month given to the Italian respondent to attend the hearing in Vienna was insufficient (during this period,

[172] Many countries, eg France/Germany/England, apply less stringent standards of due process to foreign awards than to domestic awards. The basic requirements are equal and fair treatment of the parties and an equal opportunity to each party to be heard in adversarial proceeding so as to explain its case and respond to its opponent's case.

the place where respondent based was hit by major earthquake; GWL Gersten v. Société Comerciale, YB Comm Arb XIX, 708 (Netherlands). The claimant submitted a statement of claim to tribunal without it being copied to Dutch defendant either by Claimant or by tribunal. This violated a fundamental procedural right, award not enforced.

Excess of jurisdiction

- Article V(1)(c): The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.

- General Organization v. SpA Simer, YB Comm Arb VIII, 386 (Italy). Syrian award not enforced in part, because it dealt with both technical and not technical matters although arbitration agreement provided that only non-technical matters were to be arbitrated in Syria; technical matters to be arbitrated under ICC in Paris; Paklito v. Klockner, YB Comm Arb XIX, 664 (Hong Kong). Award of damages for failing to open a letter of credit not enforced, as arbitral agreement only encompassed quality disputes.

- Also interesting in this context is Lesotho Highlands v. Impregilo [2005] 2 Lloyd's Rep 310 (HL), where the HL held that a tribunal erred in law, but had not exceeded itsjurisdiction, in deciding that s. 48(4) AA1996,by conferring a wide discretion, gave it power to disregard the substantive law (Lesotho) concerning the currency of payment.

Improperly constituted tribunal and procedural irregularity

- Article V(1)(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

- Rederi v. Srl Temarea, YB Comm Arb IV, 294 (Italy).[173] English award by tribunal of two not enforced as agreement provided for tribunal of three; Metex v. Turkiye Electrik YB Comm Arb XXIII, 807 (Turkey)[174] Award not enforced because arbitrators had failed to apply the agreed procedural law.

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173 **Rederi**: The arbitration agreement provided for arbitration in London in accordance with the laws relating to arbitration there if force, before a board of three persons, one appointed by each party and one chosen by those appointed. The two appointed arbitrators decided not to appoint the third, concluding that under s. 9(1) AA 1950 the agreement (as it did under that provision) took effect as if it provided for an Umpire, an Umpire being unnecessary since the two arbitrators were minded to agree. The court held that the parties agreement prevailed over the law of the forum.

174 **Metex**: Arbitration in Switzerland pursuant to an arbitration agreement that provided that the Tribunal "was to take as base the provision of this Contact and Turkish laws in force". The tribunal concluded that this refereed to substantive not procedural law. The

Pending or successful challenges at the seat of arbitration

- Article V(1)(e): The award has not yet become binding[175] 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. Note article VI (if a pending challenge at the seat, the enforcing court can suspend the application to enforce and can order the party resisting enforcement to give security).

- There is an ongoing debate[176] as to whether an award which has been set aside (nullified) on a challenge at the seat of arbitration can nevertheless be enforced under the Convention or under a more favourable enforcement regime, if available. See, for example, J Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment*, ICC International Court of Arbitration, Bulletin (1998) 9(1), 14.

- The norm is not to enforce: Claud Clair v. Louis Berardi, YB Comm Arb VII, 319 (France). Enforcement of a Geneva award refused as had been set aside in Geneva on ground that it was arbitrary (a valid ground to set aside under Swiss law, at the time); Maritime International v. Guinea, YB Comm Arb XII, 514 (Switzerland) (award not binding so not enforceable);[177] Creighton v. Qatar YB Comm Arb XXI, 751 (USA).[178] Enforcement of an award that was subject to a pending application to set aside at the seat, Paris, refused. Contrast Soleh

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Turkish Court of Appeal refused enforcement on the grounds that the tribunal should have applied Turkish procedural law as well.

175 Note: under the Geneva Convention 1927 the award has to be final in the country of origin, this was interpreted to mean that leave for enforcement (exequatur) had to have been obtained in the court of that country before it could be enforced elsewhere, the double exequatur rule. Hence, the word binding used in the NYC, which effectively abolished this rule. Some courts investigate the applicable law to find out whether the award has become binding under that law, others interpret the word without reference to an applicable law, as meaning that it is no longer open to appeal on the merits to an internal tribunal or a court.

176 Paulsson suggests that enforcement should only be refused where the ground of annulment is one recognised by the NYC (an international standard annulment) and that local standard annulments should not be grounds to refuse enforcement. Others argue that an annulled award has no existence, thus nothing to enforce. This principal is necessary to enable an award to be annulled once and for all, rather than having to be attacked in each enforcing jurisdiction.

177 **Maritime**: USA court declined to enforce AAA award made in USA on grounds that tribunal had no jurisdiction over the subject matter. Thereafter Maritime commenced ICSID arbitration but, in the meantime sought to enforce the AAA ward in Switzerland. Court decided that whether or not award was binding is first of all a question for the procedural law of the arbitration and that since Maritime had commenced ICSID arbitration it had acknowledged that the Award was of no binding effect. Thus, enforcement refused.

178 **Creighton (USA)**: Held the question of whether an award suspended had to be determined by the law of the country were the award made. The effect of Art 1502 of the NCCP was to suspend, by operation of law, the enforcement of the award. But is suspension by operation of law, suspension by a competent authority?

Boneh Int v. Republic of Uganda [1993] 2 Lloyds' Rep 298. If invalidity of award subject to a pending challenge is seriously arguable, order security rather than enforcement.[179]

- In a few exceptional cases enforcement has been allowed: Hilmarton Ltd v. Omnium de Traitement YB Comm Arb 655 (France)[180] Swiss award set aside by court in Switzerland granted *exequatur*, annulment not a ground for not doing so under NCCP, art 1502; Chromalloy v. Egypt YB Comm Arb XXII, 1001 (USA)[181] Egyptian award that had been set aside in Egypt on ground that the tribunal had made a mistake of or misapplication of the law, this being an allowable ground for setting aside under the applicable Egyptian law, enforced. Chromalloy v. Egypt YB Comm Arb XXII, 691 (France)[182] award also enforced there. See "Enforcing arbitral awards notwithstanding a local standard annulment", J Paulsson (1998) 9 ICC Bulletin 14.

The enforcing court may, in two cases, refuse to recognise and enforce an award of its own motion.

111. Article V(2)(a): Where the court finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country (the law of the enforcing state).

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179 M Turpin "Staying Enforcement of Arbitral Awards under the New York Convection, (1997) 3 Arb Int 209, 222 (stay denied in 3 out of 5 cases).

180 This more liberal regime was preserved by NYC, art. VII. Note: Omnium v. Hilmarton YB Comm Arb XXII, 696 (France), subsequent attempt to enforce second award of tribunal and obtain recognition of the Swiss courts' annulment of the first award failed. Cour de Cassation held that the earlier decision was final and thus created an obstacle to the recognition and enforcement sought

181 **Chromallloy**: USA District Court (first instance) concluded that Article V grounds not to enforce were discretionary. Also considered that the effect of Art VII(1) of NYC was to incorporate FAA Chapter 1 into the NYC and thus the enforcing party full rights under the domestic law of the enforcing country. This view departed from in Yusuf Ahmed v. Toys "R" Us 126 F.3d 14 (2d Cir. (1997), permission to appeal subsequently refused. While domestic law applied to international arbitration awards rendered in USA, it did not apply to enforcement of foreign awards. Baker v. Chevron, 191 F. 3D 194 (2d Cir 1999), US Court refused to enforce Nigerian award rendered under Nigerian law after nullification by Nigerian court. Note in Spier v. Calzturificio 1999 W1 970137, US court refused to enforce Italian arbitration award rendered under Italian law after its nullification by Italian Court, although agreed that Article V(I)(e) discretionary, but would not be exercised here as no contractual waiver of the right of recourse to the Italian Court, the grounds for the foreign challenge were acceptable under the FAA, and there was no reference to US law in the underlying agreement.

182 **Chromalloy** (France): Under the more favourable right to enforce in French law NCCP, art 1502). The award was an international award and was thus not integrated in the Egyptian legal order. Although annulled in Egypt it remained in existence and its enforcement in France not a violation of international public policy (test under art 1502). It contained reasons and these were not contradictory.

- SG Agima v. Smith Industries, YB Comm Arb VIII, 360 (Belgium)[183] Award not enforced where the issue it decided was reserved to the national courts by statute.

112. Article V(2) (b): The recognition or enforcement of the award would be contrary to the public policy of that country (the enforcing state).

- There is a growing tendency for enforcing courts to look to international rather than domestic public policy when deciding whether these grounds are made out, but this is not universally accepted, given the wording of this provision. See, for example,#"Public policy and the enforcement of International arbitration awards …", J Harris et al (1998) LMCLQ 568;#"Public policy as a bar to enforcement …", L Fei (2010) 26 Arb. Int. 301. See also the discussion of Lugana v. OAO Ryazan (Russia SCC, February 2010) at (2010) Int ALR N-37 (Public policy as a ground to resist enforcement in Russia). This approach has, recently been accepted in India; Penn Racquet Sports v Mayor International Ltd(Delhi HC) EX.P. 386/08 (The expression 'public policy' under Section 48(2)(b) of the 1996 Arbitration and Conciliation Act (enforcement of foreign awards) has a narrower meaning than the same expression in Section 34(2)(b)(ii) (enforcement of domestic awards).

- A v. B YB Comm Arb X 421 (Austria). Enforcement of Dutch award because it violated Austrian law prohibiting purchase on margin and, thus, Austrian public policy; COSID v. Steel Authority of India, YB Comm Arb XI, 502 (India). The court rejected the distinction between domestic and international public policy and refused to enforce and English award on grounds of public policy because the tribunal had rejected the Indian Party's defence of *force majeure* arising from Indian export prohibition (enforcement had been granted in England). Note also Eco Swiss China Time v. Benetton International1999 ECR 1-3055 (ECJ).[184] European antitrust law is part of the public policy of

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183 **SG Agima**: The court refused to enforce a foreign arbitration award on the ground that disputes arising out of an exclusive distributorship where the exclusive distributor is in Belgium cannot be referred to arbitration by operation of the Belgian Law of 1962 concerning the Unilateral Termination of Concessions for Exclusive Distributorships of an Indefinite Time.

184 **Eco**: Licensing agreement between Netherlands Company and Hong Kong Company provided for arbitration in the Netherlands with arbitrators to apply Netherlands law. First part award concluded that Benetton should pay damages to Eco for terminating the agreement. Second award determined quantum (the art 85 point was not raised before the tribunal). Benetton then applied for annulment of both on grounds of public policy (a statutory ground for annulment – but with a three month period to apply) contending that the license agreement was invalid under art 85 (now art 81) Treaty of Rome. Held: Where national court had power to annul an award for failure to observe national rules of public policy, it must also grant such an application where it was founded on a failure to comply with the prohibition in art 85. This may also be regarded as a matter of public policy within the meaning of the NYC. Questions concerning the prohibition in art 85 should be open to examination by national courts when asked to determine the validity of an arbitration award,

member states which, where relevant to the decision, must be applied by arbitrators. But do they have to get it right; consider Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc (1985) YB Comm Arb XI, 555 (US Supreme Court).[185] But note, Baxter International v. Abbott Laboratories 315 F.3d 827 (7th Cir 2003).[186] Contrast Claro v. Centro Movil[2006] ECR I-10421, where

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court must grant annulment if it considers the award is contrary to art. 85. But Community Law does not require a national court to refrain from applying domestic rules where award has become final because no application to annul within applicable time limits. The Advocate-General also considered that, since European antitrust law was part of the public policy of member states of the EU, it had, where relevant, to be applied by arbitrators, even if not raised by the parties. But the ECJ did not have to decide this question. It is often difficult to distinguish national public policy from international public policy, the latter always affects the enforceability of awards, the former may do so if enforcement is sought in the country with that policy.

185 **Mitsubishi**: (555 473 US 614 (1985)). Soler's (USA company) agreement with Mitsubishi (Japan) required Soler to sell cars exclusively in Puerto Rico, not elsewhere in USA. The agreement provided for arbitration in Japan and for the proper law of the contract to be Swiss Soler sold cars on the mainland contending that the agreement was contrary to the Sherman Act and commenced legal proceedings for damages (triple) under that Act against Mitsubishi. Soler resisted Mitsubishi's application to stay the proceedings to arbitration, arguing that the dispute about the application of the Sherman Act was not arbitrable in the forum of enforcement, the USA. The Supreme Court ordered arbitration, noting that it was accepted that the choice of law clause did not preclude the Sherman Act claim, and that the courts of the USA would be able to ensure, at the enforcement stage, that the legitimate interest in the enforcement of the USA's mandatory anti-trust laws had been addressed. This is known as the second look doctrine, see Art V(2)(b) NYC. Note: If the agreement had provided for arbitration in USA, the court might well have held that the dispute was not arbitrable. The Swiss court takes a similar view, VspA (Italy) v. G SA Belgium)(1993) YB Com Arb XVIII, 143 (Tribunal Federal, 28th April 1992). Article 85 (now art 81) of the Treaty (prohibits all agreements between undertakings etc which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market) and Regulation 17 do not preclude an arbitral tribunal from examining the validity of a contract said to be in breach of those provisions. The tribunal had wrongly concluded it did not have jurisdiction to do so. Thus its award was set aside under Art 109(2)(b) PILA because it wrongly declared itself not to have jurisdiction.

186 **Baxter**: Baxter granted exclusive world-wide licence to make and sell a product (sevoflurane) to Maruishi of Japan. Maruishi granted a sub-licence to market and sell it in various countries including USA. At time of sub-licence all three entered into a dispute resolution agreement providing for arbitration. Baxter began to market a related product in USA and Abbott contended in arbitration that, by doing so, Baxter was in breach of the licence. Baxter contended, inter alia, that the exclusivity provision contravened s. 1 of the Sherman Act. The tribunal rejected this argument and held that Baxter was enjoined from selling the related product for the duration of the Baxter-Maruishi Agreement (which was to last until 2005). Baxter applied to vacate the award, Abbot for confirmation. The

the ECJ held that courts should decline to enforce awards founded on a failure to observe EU rules of public policy, in that case those concernedwith unfair terms in consumer contracts.[187]

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arbitration proceedings were international, thus recognition was under the NYC. Court held that since the tribunal had considered and decided the antitrust claims its answer was conclusive, a mistake of law was not a ground to set aside an award. The dissenting judgement was to the effect that, where public rights were at stake, the enforcing court should review the tribunal's decision which, since it commanded illegal conduct on the part of Baxter and Abbott under the Sherman act was unenforceable under article V(2) – public policy. The difference is over whether the tribunal is required to reach the right result. See Ellins and Withers, *Judicial Deference to the Authorities of Arbitrators, etc*, (2001) 12 Am Rev Int Arb 387.

[187] **Claro**. Although not a point noted by the ECJ, it may be that, in regard to whether or not the court must establish that the tribunal is right, there is a distinction between EU public policy that goes to a tribunal's jurisdiction and EU public policy that is within jurisdiction.