Recognition and enforcement of foreign arbitral awards under the New York Convention of 1958: Is there uniformity of interpretation or is there need for reform?

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1. Introduction

Arbitration is a form of alternative dispute resolution in which parties refer disputes between them to be resolved by one or more arbitrators, which render a legally binding decision. Arbitration has become the principal way of resolving disputes in international commerce.\(^1\) It provides an efficient, confidential and impartial process driven by the power of party autonomy. It is in international business sometimes referred to as the “only truly neutral method” and as “the only viable option”.\(^2\) The overall success of arbitration is largely owed to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the Convention”).

The Convention was adopted by the United Nations on June 10 1958 and establishes rules which are aimed at granting recognition and enforcement of arbitral awards. To this effect, the Convention binds the Member States to ensure that arbitration agreements and arbitral awards are recognized and enforced within their territories. As prescribed in Article III, the Contracting States “shall recognize arbitral awards as binding and enforce them”.

With 149 Member States as of December 2013,\(^3\) the Convention is an unparalleled success. The wide recognition and acceptance means that arbitral awards are enforceable almost anywhere in the world. This global acceptance of the Convention is the main reason for the popularity of arbitration as a dispute resolution mechanism within international commerce, and therefore the greatest achievement of the Convention itself. By contrast, there exist no equivalent instrument for the recognition and enforcement of court decisions.

The New York Convention replaced the Geneva Convention of 1927 which in turn replaced the Geneva Protocol of 1923. These two conventions represented the beginning of enforcement of arbitral awards. They were, however, far from arbitration friendly. The Geneva Convention contained broad grounds for non-recognition as well as a requirement of double exequatur.

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\(^1\) Redfern/Hunter, 1.
Additionally it placed the burden of proof on the party seeking to enforce an award. The New York Convention sought to remedy these shortcomings and to provide efficient and simple enforcement proceedings.

The Convention seeks to provide the highest level of predictability and efficiency in the recognition and enforcement of arbitral awards. To this end, a fundamental objective of the Convention is that it is uniformly applied across all Contracting States. The continued success of the Convention depends on such uniform application by national courts worldwide.

Now 55 years of age, it is inevitable that questions of modernization arise. The Convention has been criticized for being too short, incomplete and a product of too much compromise. This combined with its age has led to much discussion on whether the Convention is in need of reform and modernization.

The Convention provides an exclusive and exhaustive list of grounds under which national courts may refuse recognition and enforcement of arbitral awards. The grounds are contained within Article V, making it one of the most significant articles of the Convention. The grounds functions as a safety valve as well as boundaries for the parties and arbitrators. Any arbitral award which does not fall within one of the listed grounds of non-recognition must be recognized and enforced. It therefore provides an international framework for non-recognition. The need of uniformity of interpretation is of fundamental importance to these grounds of non-recognition and directly connected to the success of the Convention in its entirety. Some of the exceptions are ambiguous, leaving room for alternative, but equally justifiable, interpretations. A question therefore arises if Article V is successful in achieving such uniformity.

This paper aspires to explore the problem of uniformity within the context of Article V. Due to the vast nature of this topic; selected problems under each exception will be presented. While this paper will not attempt to identify all possible reasons for non-recognition under each ground, global case-law will provide a framework for considering key matters. The selected
cases will be analyzed and compared to illustrate and uncover potential differences in interpretation. Based on these findings, the author will attempt to assess the gravity of existing problems of uniformity under Article V. The ultimate goal of the paper is to establish whether these findings support a need to reform Article V or whether any issues of uniformity is outweighed by the global benefits of the Convention.

In the following, Article V will be presented in detail, followed by individual sections for each of the seven grounds for non-recognition. The problem of uniformity and need for reform will be commented upon in each of these individual sections. The final section will provide an evaluation of the current state of uniformity and a conclusion as to the necessity of reform.

2. Grounds for non-recognition: Article V

Article V of the Convention lists the grounds under which national courts may refuse to recognize and refuse to enforce a foreign arbitral award. The Article is divided into two sections. Section V(1) contains five grounds which may be raised by the resisting party, while section V(2) contain two additional grounds which may be raised by the court ex officio.

In light of the aim of this paper, it is of interest to identify which grounds are most commonly relied upon by resisting parties. Although no global surveys have been conducted, a recent study from Switzerland offers guidance. The ground most often relied upon before Swiss courts was that of public policy in V(2)(b) followed by V(1)(d), V(1)(c) and V(1)(b). While not globally representative, it comes as no surprise that the wide exception of public policy is frequently used, as will be seen below.

The exhaustive nature of the grounds means that courts may not refuse to enforce an award due to mistakes of law or fact. As already mentioned, the general rule is that the Contracting States shall recognize and enforce arbitral awards. All grounds for non-recognition should be construed narrowly in in the light of the Convention’s aim to endeavor recognizable and

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4 Borris/Hennecke in Wolff, 239.
5 See section 2.7.
enforceable awards. As said by a renowned commentator on the New York Convention: “they have to be construed narrowly”. National courts have largely recognized this need for narrow interpretations, which will be seen in the sections below.

Article V(1) reads that recognition and enforcement “may” be refused. The wording grants national courts discretion as to whether recognition or enforcement should be refused. The wording is “permissive, not mandatory”. A Hong Kong judge quite accurately described this discretion: “[T]he grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing Court to achieve a just result in all the circumstances.” This discretion may seem misplaced in light of the aim of uniformity. In Germany “may” has been interpreted as “shall”, leaving no discretion to the courts. French Courts also lack such discretion. In practice, these differences in discretion appear to have no impact on the practice in the Member States.

Under the Convention, the burden of proof is on the party resisting recognition or enforcement. This can be read directly out of Article V(1). It is one of the most important components to facilitate efficiency and enforceability of arbitral awards and one of the most significant improvements compared to the Geneva Convention.

The UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) has been designed to help States in reforming and modernizing their domestic arbitration laws. The law covers all stages of the arbitral process and is parallel to the Convention. It aims to provide for harmonization of domestic legislation and thus international uniformity within the field of

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7 Redfern/Hunter, 640.
8 Ibid, 639.
10 Kronke/Nacimiento/Otto/Port, 208.
11 Ibid., 209.
12 Ibid., 209.
international commercial arbitration. Legislation based on the Model Law has been adopted by a large number of jurisdictions.\textsuperscript{14} The grounds to set aside an award under the Model Law are parallel to Article V of the Convention.\textsuperscript{15} The Model Law therefore compliments the Convention and helps its effectiveness. Due to the large similarities between the text of the Convention and the Model Law, examples from the latter will be used in this paper.

The grounds set forth in Article V(1) of the Convention deal with procedural issues, enabling national courts to oversee that basic principles of procedure has been respected through the course of arbitration. The Convention therefore serves the important function of imposing a framework of minimum procedural requirements on international arbitrators. In the following, the seven grounds set forth in Article V will be presented individually in sections 2.1 through 2.7.

\textbf{2.1 Article V(1)(a)}

Article V(1)(a) prescribes the first grounds for non-recognition. Where a party was under some “\textit{incapacity}” or where “\textit{the agreement is not valid}”, an award may be refused recognition or enforcement. The term “[\textit{A}greement]” refers to is the arbitration agreement, shown through the reference to Article II. The parties may be physical or legal persons as well as states and state entities.\textsuperscript{16} Particular problems arise when dealing with states. This problem will be given more attention, below.

The two grounds will be dealt with in the following, focusing on issues which has given rise to difference in interpretation.

\textbf{2.1.1 Incapacity}

Incapacity refers to a party’s lack of legal capacity to submit to arbitration\textsuperscript{17}. The wording “[\textit{t}he

\textsuperscript{15} See Article 34 of the Model Law.
\textsuperscript{16} See Article I(1).
\textsuperscript{17} Nacimiento in Kronke/Nacimiento/Otto/Port, 218.
*parties* may indicate that both parties was under some incapacity. Such a solution appears unsatisfactory. It is enough that one party lacked the legal capacity to conclude the arbitration agreement. The general rule is that any party with the capacity to conclude a contract also has the capacity to conclude an arbitration agreement.\textsuperscript{18}

The Article uses the past tense, prescribing that the parties “were [...] under some incapacity”. The wording refers to the parties having the necessary capacity at the time of concluding the agreement to arbitrate.\textsuperscript{19} In Seung Woo Lee the U.S. Ninth Circuit Court of Appeals explicitly stated that incapacity must be present at the time of consummation of the agreement.\textsuperscript{20} This is an internationally undisputed matter today.

In the U.S., the New York County Supreme Court commented that: “*incapacity [...] [is] to be narrowly read and refers to ‘internationally recognized [defences] such as duress, mistake fraud or waiver’*.\textsuperscript{21} In Canada, the courts have accepted a line of argument suggesting that oppression, high pressure tactics or misrepresentation may justify a finding of incapacity.\textsuperscript{22} Incapacity may additionally be found when a party lacks special permissions needed for foreign trade or when a person without sufficient authority signed the arbitration agreement.\textsuperscript{23}

The question of incapacity is to be determined under “*the law applicable to them*”. The Convention does not prescribe which choice-of-law rules that should determine the applicable law. This question must be resolved through the application of the conflict-of-law rules of the jurisdiction where the award is sought enforced.\textsuperscript{24} Private international law is a national matter, and solutions vary from jurisdiction to jurisdiction. National variation may lead to unexpected results, and some important differences exist in this regard. Such differences affect uniformity of interpretation.

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\textsuperscript{18} Redfern/Hunter, 95.
\textsuperscript{19} Wilske/Fox in Wolff, 272.
\textsuperscript{20} Seung Woo Lee v Imaging3 Inc., No. 06-55993, 283 Fed. App 490 (9th Cir. 2007)
\textsuperscript{21} Corcoran v. AIG Multi-Line Syndicate, Inc., 143 Misc. 2d 62 (1989)
\textsuperscript{23} Lew/Mistelis/Kröll, 708.
\textsuperscript{24} van den Berg, 276.
In common-law jurisdictions, the personal law of individuals is the law of the place of residence. This differs from civil-law jurisdictions, where nationality is the decisive factor.\textsuperscript{25} As to corporations, legal capacity to enter into contracts is generally governed by the law of the place of the seat in civil law jurisdictions, and at the place of incorporation in common law jurisdictions.\textsuperscript{26} In these situations the determination of the applicable law is generally unproblematic.

States and state-owned entities create difficulties which require further comment. States and state-entities may claim to lack the capacity to arbitrate through its own legislation. It may be that the state law altogether prohibits the state or state-entities from entering into arbitration agreements, or that approvals from certain national authorities are needed in order to do so.\textsuperscript{27}

Some national arbitration laws have attempted to altogether remove this issue. Article 2(2) of the Spanish Arbitration Act prescribes that, within the field of international arbitration, a “\textit{State or company, organization or enterprise controlled by a State, shall not be able to invoke the prerogatives of its own law in order to avoid the obligations arising from the arbitration agreement.}” A provision to the same effect also exists in Switzerland.\textsuperscript{28}

On the other hand, the Model Law and numerous other national arbitration laws do not deal with the issue. It has been addressed by courts on numerous occasions. Courts have generally declined arguments of incapacity or lack of subject-matter arbitrability. The defense may be considered a violation of good faith or breach of the principle of \textit{pacta sunt servanda}.\textsuperscript{29} It has also been found that the entering of an arbitration agreement may be considered a waiver of any claims of sovereign immunity. It is clearly unfortunate when a State claims incapacity or immunity at the time of enforcement.

\begin{footnotesize}
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\item\textsuperscript{25} Born, 2785.
\item\textsuperscript{26} Wilske/Fox in Wolff, 274.
\item\textsuperscript{27} Redfern/Hunter, 97.
\item\textsuperscript{28} Article 177(2) of the Swiss Private International Law Act.
\item\textsuperscript{29} Nacimiento in Kronke/Nacimiento/Otto/Port, 220.
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The Swedish Court of Appeal commented that: “it is shocking per se that one of the contracting parties later refuses to ... respect a duly rendered award. When a state is concerned, it is therefore a natural interpretation to consider, in accepting the arbitration clause, committed itself not to obstruct the arbitral proceedings or their consequences, by invoking immunity.”

The French courts introduced a rule stating that lack of subject-matter arbitrability may not be invoked to invalidate contracts in international trade. The stance taken by the two mentioned jurisdictions helps strengthen the efficiency of the Convention regarding arbitration agreements involving states or state-entities.

Disregarding these arguments, certain jurisdictions claim absolute state immunity. An important recent case from Hong Kong (“HK”) illustrates how the principle of absolute state immunity complicates arbitration agreements involving states or state entities.

In this landmark decision, a financing agreement between Energoinvest and the Democratic Republic of the Congo (“DRC”) led to a default by the latter. International Chamber of Commerce (“ICC”) arbitration was initiated and two awards were rendered in favor of Energoinvest. Initially being granted enforcement in HK, the DRC appealed, claiming sovereign immunity. Energoinvest argued that HK common law of restricted immunity applied and that the DRC in all cases had waived its state immunity by agreeing to arbitrate.

The question for the Court of Final Appeal was what scope of state immunity the courts of HK should recognize. Should the Court apply the traditional common law rule of restricted immunity that applied before the return of HK to mainland China on 1 July 1997? Or should the court now apply the absolute immunity applied in China? The majority applied the Basic Law of the People’s Republic of China (the “Basic Law”), under which absolute immunity, without exceptions, is the undisputed rule. Prior to 1997, HK followed the United Kingdom’s State

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31 Nacimiento in Kronke/Nacimiento/Otto/Port, 220.
32 *Democratic Republic of the Congo & Others v FG Hemisphere Associates LLC* [2011] HKCFA 41
Immunity Act 1978, which included a commercial exception to state immunity. The Court found that this Act could no longer apply as common law principles on state immunity had to be modified by the Basic Law, in light of HK’s special administrative region status within the People’s Republic of China as of 1997. Having found this, the Court concluded that the DRC had clearly not submitted to the jurisdiction of HK courts. The award could thus not be enforced in HK. However, the Court found that, under the Basic Law, HK courts does not have final jurisdiction over state and foreign affairs, and that sovereign immunity is such a matter. The Basic Law leaves such matters to the Central People’s Government and the Standing Committee of the National People’s Congress (the “SCNPC“). The HK Court, therefore, sought an interpretation from the SCNPC, which confirmed the majority view.\(^{33}\)

The judgment has given rise to large debate as it affirms absolute state immunity without a commercial exception. The judgment therefore limits the effectiveness of international commercial arbitration in Hong Kong and mainland China where states or state entities are involved. It is a blow to the general international trend of rejecting immunity claims in enforcement proceedings. In consequence, this has a negative impact on uniformity. It is a difference in interpretation which raises some concern. A practicable remedy today is for parties to exercise care in entering into agreements with states, such as including waivers of sovereign immunity in contracts with states and additionally seek enforcement in arbitration friendly jurisdictions. Although harmful to overall uniformity, the problem must not be exaggerated. Few Member States practice absolute state immunity, giving the matter limited practical impact.

\subsection*{2.1.2 Invalidity of arbitration agreement}

The second ground for non-recognition under Article V(1)(a) concerns the validity of the arbitration agreement. It is an important provision, as arbitration is based solely on the agreement to arbitrate. While the majority of decisions deny claims of invalidity,\(^ {34}\) a particularly unfortunate set of decisions will be presented which illustrates how the interaction of different

\(^{33}\) Democratic Republic of the Congo & Others v FG Hemisphere Associates LLC [2011] HKCFA 66

\(^{34}\) Born, 2779.
domestic courts may lead to results harmful to the Convention.

Article II(1) to (3) sets forth the conditions under which an agreement is considered valid. It is recognized that Article II governs the formal validity requirements of the arbitration agreement under Article V(1)(a), as it is explicitly referred to in the wording of the provision. The requirement of writing contained in Article II has been debated, as national laws as well as the Model Law better reflects modern ways of communication, relaxing the formal requirements. In practice almost all arbitration agreements are written, and this problem will not be given more attention here.

This section of Article V(1)(a) contains a choice-of-law rule, prescribing party autonomy as the general rule. Namely that validity is to be reviewed in accordance with the law chosen by the parties. If the agreement contains no such agreement, the law of the country where the award was made will be considered the applicable law. This is almost without exception the law where the arbitral tribunal had its seat.

The mentioned unfortunate judgments dealing with the validity of an arbitration agreement are the recent Dallah decisions from the Paris Court of Appeals and the UK Supreme Court.

Dallah Real Estate and Tourism Holding ("Dallah") entered into an agreement with a Trust which had been established by the Pakistani Government after negotiations between the two. Problems quickly arose. All communications were between Dallah and Government officials, on Government letterhead. The Trust ceased to exist as the Government did not renew it. Government officials wrote to Dallah, terminating the agreement. The Trust initially sued Dallah in Pakistan, but the claim was dismissed as the Trust was no longer in existence. Dallah initiated ICC arbitration against Pakistan. Pakistan claimed, inter alia, that it was not a party and that


36 Article 25(3) of the ICC Rules and Article §§ 52(5) and 53 of the English Arbitration Act of 1996.
there could be no valid arbitration agreement. The arbitrators applied French arbitration law, finding that Pakistan was the alter ego of the Trust and that there was a valid agreement to arbitrate. The Tribunal rendered an award in favor of Dallah.

Dallah sought enforcement in England and recognition in France. Pakistan resisted in both jurisdictions, maintaining that there was no valid agreement to arbitrate.

Applying French law, the UK Court applied a principle of common intention in determining whether Pakistan was a party to the agreement. The test allows for a non-signatory party to be bound if the facts show that there was a common intention to be bound by the said agreement. Although the arbitral tribunal had established its jurisdiction, the English Court held that it was not bound or restricted by such a decision. In its own review of the principle of common intention, the Court found that there was no common intention between Pakistan and Dallah. The Court commented that a “proper application of French law” showed no material sufficient to justify the arbitrator’s conclusion that the Government was a true party to the Agreement. According to the Court, the “intention was that the parties were to be Dallah and the Trust”. With these findings, the Court concluded that there was no valid arbitration agreement and refused enforcement.

In the Paris Court of Appeal decision a few months later, the French court applied the same principles of French law. Unlike the UK Court, The Paris Court of Appeal established that Pakistan had an intention to be bound by the agreement, looking to the conduct of the Government from the pre-contractual stage, to the creation of the Trust and subsequent

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37 Including Lord Mustill, a retired English House of Lords judge and leading expert on international arbitration.
39 Ibid., para. 31 and 32.
40 Ibid., para. 145.
41 Ibid., para. 145.
communications.\textsuperscript{43} The Government had acted as if the contract was its own. Pakistan was considered as the alter ego of the Trust and the arbitral award was upheld.

Applying the same principles of French law, the courts reached different conclusions. The development is unfortunate in light of the Conventions aim of uniformity and efficiency. One apparent issue was that the UK Court corrected the tribunal’s award, an award which was binding and final upon the parties. In addition, Article VI allows for a stay of proceedings where annulment proceedings have been initiated in the place of arbitration. The UK court did not make use of the provision, although it was made aware of the French proceedings. It is particularly remarkable as the case had strong ties to France and French law. Having followed such procedures, this unfortunate situation could have been avoided altogether. Born also criticizes the UK Supreme Court for not having “applied the real substance of the French standards when evaluating the parties’ actual conduct and agreements.”\textsuperscript{44} The cases illustrate how the use of foreign law in enforcement proceedings may lead to unfortunate results. Looking at the Convention, it would, if followed, have prevented the event in question.\textsuperscript{45} Uniformity would therefore have been achieved, would the Convention have been applied correctly. While these decisions do not reflect a failure in the Convention itself, they do harm arbitration and indirectly the efficiency and legitimacy of the Convention.

2.2 Article V(1)(b)

Article V(1)(b) prescribes two alternative grounds for refusing recognition or enforcement of an arbitral award. While the first part is a strictly formal matter, the second part of the provision refers to the basic right to a fair hearing. It is aimed at ensuring that the arbitral proceedings conform to the requirements of due process, permitting defenses of “grave procedural unfairness”.\textsuperscript{46} It provides a “fundamental basis for the integrity of dispute resolution

\textsuperscript{44} Ibid.
\textsuperscript{45} See Article VI.
\textsuperscript{46} Born, 2737.
In a recent global study of 136 enforcement decisions in which the resisting party claimed a V(1)(b) defense, only 14 succeeded. The low level of successful claims indicates that courts generally follow the Convention’s pro enforcement bias. It should, and correctly so, be narrowly construed as the other grounds contained within Article V. In light of party autonomy and the arbitrators’ discretion, only the most evident and fundamental breaches of due process should lead to refusal of recognition or enforcement.

It is widely accepted that awards may only be refused enforcement or recognition if the procedural flaws had a probable effect on the tribunal’s decision. Put in other words: would the tribunal have reached a different result absent the procedural flaw?

Having made these introductory remarks, let us consider the two grounds further.

2.2.1 Proper notice

The requirement of proper notice applies to the appointment of the arbitrators as well as the arbitration proceedings. A notice is generally considered proper if it contains adequate form and language and if it is served in a timely manner on the correct addressee(s). Due to the straightforward nature of such claims and the overall uniformity of approach, these questions will not be discussed further.

2.2.2 Procedural fairness

This second alternative contains a broader right to a fair hearing. As the wording shows, it deals with all procedural issues.

The Convention gives no reference as to which law is to govern the determination of procedural

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47 Scherer in Wolff, 280.
48 See Jana/Armer/Kranenberg in Kronke/Nacimiento/Otto/Port, 233.
49 Born, 2763.
50 Scherer in Wolff, 294.
fairness. This silence has led to international differences. A dominating approach exists however, an approach which the author believes to be advantageous.

In Whittemore, the U.S. Court of Appeals for the Second Circuit stated that the provision “essentially sanctions the application of the Forum State's standards of due process.” U.S. courts thus apply the due process standards of the enforcing court. They do not however, apply the regular domestic standard of due process. Instead a minimum standard of fairness is applied, which aims at preventing only fundamental breaches of procedural fairness. As shown in a decision from the Seventh Circuit, the parties must have had a meaningful opportunity to be heard, but “should not expect the same procedures they would find in [the] judicial arena.” Other decisions contain similar statements. While applying the law of the enforcing court, a distinction is drawn between domestic procedure and procedural standards under the Convention. This minimum procedural standard has found wide acceptance in the Member States, and has been adopted by Germany, France, Switzerland and Spain, to mention some.

While the general procedural standards of different jurisdictions differ, the wide adoption of the minimum standard approach helps lessen such differences. It also shows that national courts acknowledge the importance of the Convention as an international instrument with special requirements regarding procedure. Additionally the large adoption of the UNCITRAL Model Law helps ambitions of a uniform approach to the matter of procedural fairness.

Let us move on to address a couple of judgments dealing with procedural fairness and assess whether there exist any notable domestic variations which has an effect on uniformity.

In an English Court of Appeal decision, the respondent was unable to attend the oral hearing due to serious illness. The claimant made serious accusations of fraud against the respondent at

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51 Parsons & Whittemore Overseas Co., Societe Generale de L'Industrie du Papier, 508 F.2d 696 (2d Cir. 1974)
52 Generica Limited v Pharmaceuticals Basics Inc., 125 F.3d 1123 (7th Cir.1997) on 1130.
53 See for example Parsons & Whittemore, on page 975.
54 Scherer in Wolff, 284.
55 Kanoria and others v Guinness [2006] EWCA Civ 222
this hearing. The tribunal rendered a decision based on these accusations. The English Court noted that the evidence presented “greatly” altered the nature of the case and that it was clear that the respondent was unable to present his case. The party seeking enforcement argued that recognition should be given due to the discretionary wording of Article V(1). The judge held that “[t]his is an extreme case of potential injustice.” Lord Justice May added that it was an “exceptional case, as I see it, where no notice was given of an allegation of fraud.” Enforcement was subsequently refused. The case presents a procedural right which would be acknowledged in almost any jurisdiction. Serious procedural flaws as the above rarely occur, and the case is quite correctly described as both exceptional and extreme. As mentioned, the numbers of cases accepting due process defenses are few, making the decision an example of how fundamental a procedural flaw must be to justify non-recognition or non-enforcement.

A far more common example is found in the previously mentioned case of Generica Limited. 56 As shown above, the Court specified that the parties to arbitration could not expect the same procedures they would find through domestic litigation. The judge exemplified that the minimal fairness standard included adequate notice, a hearing on the evidence and an impartial decision by the arbitrators. The claimants reduced right to witness cross-examination was not a fundamental breach of U.S. due process or the Convention. Enforcement was granted. As with most Article V(1)(b) defenses, it was rejected by the court. While the importance of procedural fairness should not be understated, it is equally important to the Convention that only fundamental flaws lead to non-enforcement.

Enforcing courts will review claims of procedural fairness to ensure that the arbitration respected the parties’ rights and equality. Regardless of jurisdiction, domestic courts leave the arbitrators a substantial level of discretion concerning procedural matters. Although different courts operate with different requirements to procedural fairness, the practical consequences of these differences are small. National courts will only refuse recognition in cases containing fundamental procedural flaws that have had an impact on the outcome of the award. Practice in

56 Generica Limited v Pharmaceuticals Basics Inc., 125 F.3d 1123 (7th Cir. 1997)
the Member States appears to be in line with the Convention’s purposes, which is positive in ways of achieving uniformity of interpretation. As suggested in theory, existing differences may be reduced even further through an international standard of minimal procedural fairness. While such a standard might help further limit existing differences, it is equally likely to bring with it new complications. The continued support of the already existing and accepted minimum procedural standard based on domestic procedural laws appears to be a viable solution which helps achieve international uniformity.

2.3 Article V(1)(c)

The third ground for non-recognition covers two situations. The first deals with “a difference not contemplated by” or “not falling within” the terms of submission. In this situation the tribunal rendered a decision beyond its jurisdiction or without jurisdiction. The tribunal did something else. In the second situation the tribunal rendered an award “beyond the scope” of the submission to arbitration, exceeding its given jurisdiction. The tribunal did too much.

The issue in both situations is whether the tribunal acted within its sphere of authority. The agreement between the parties sets the boundaries for this sphere, a result of the principle of party autonomy. The parties are the masters of the arbitral process and the tribunal derives its authority from the parties’ agreement.

Courts rarely recognize a V(1)(c) defense, even if the arbitral body goes beyond the formal requests, as long as the award is within the limits of the agreement to arbitrate. It is common that arbitration agreements contain broad submissions, referring “any and all disputes” to arbitration. Such clauses leave substantial discretion to the arbitrators. As long as no explicit limitations are contained within the agreement or submission, courts will generally not second-guess the body’s decisions as to its authority. In addition, most jurisdictions operate with a presumption that an arbitral award was rendered within the scope of authority. In the Whittemore-decision, the judge described this presumption. There is a “powerful presumption that the arbitral body acted within its powers” and that “the Convention [...] does not sanction

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57 Port/Bowers/Davis/Noll in Kronke/Nacimiento/Otto/Port, 261.
second-guessing the arbitrator’s construction of the parties’ agreement”. The court cannot “ignore this limitation on its decision-making powers and usurp the arbitrator’s role.”58 The last statement also emphasizes the importance of the court not re-examining the merits of the arbitral award. It may only decide whether the tribunal construed the scope of the arbitration agreement properly. As will be seen, this determination sometimes proves to be difficult.

Having made these introductory remarks, let us consider the grounds further.

2.3.1 Matters outside the tribunal’s jurisdiction

The scope of submission is determined by the arbitration agreement. The agreement needs to be interpreted in order to establish the intention of the parties. The parties’ intention provides the legitimate jurisdiction of the arbitrators. The first question is which law should govern this interpretation.

If the parties have chosen a law to govern the arbitration, this law must be applied in accordance with the principle of party autonomy. Mandatory provisions of the law in question must be taken into account. If the parties have not chosen a law, Article V(1)(c) does not provide which law should govern the interpretation. Applying a analogical interpretation of Article V(1)(a), the law of the place of arbitration should govern.

Due to the case-specific nature of determining whether the parties intended for an issue to be included in the arbitration, this paper will not attempt to list different situations which may lead to excess of jurisdiction. More important in the context of this paper is that excess of authority defenses rarely succeed. However, a recent U.S. decision has created a potential loophole under which undesirable awards may be refused recognition or enforcement. This decision deserves comment.

The case of Stolt-Nielsen concerns the Federal Arbitration Act (“FAA”) which contains a defense

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largely similar to that of the Convention.\textsuperscript{59} AnimalFeeds filed an antitrust class action lawsuit against, among others, Stolt-Nielsen. The arbitral tribunal, although the contract was silent on the issue of class action, decided to permit it. In the enforcement proceedings, Stolt-Nielsen claimed that the tribunal had acted in excess of jurisdiction. The District Court accepted the defense, but the Second Circuit reversed. The question for the Supreme Court was whether imposing a class action is permissible under the FAA when the contract is silent. The majority reasoned that the arbitral tribunal exceeded its powers by applying its own policy instead of a rule derived from FAA or other applicable law. It emphasized consent as the fundamental principle of arbitration, which it found was non-existing in the case in question. The Supreme Court thus reversed. The dissenting judges took an arbitration friendly approach, focusing on the strict limitations to judicial review under the FAA. The dissenting approach better corresponds with earlier US practice dealing with the Convention.\textsuperscript{60}

The case has given rise to debate in the U.S. The Supreme Court essentially found that silence in the agreement meant that it was not the intention of the parties. It has in the opinion of Moses, “breathed new life into the “excess of authority” ground for vacatur”.\textsuperscript{61} The gravest concern to the Convention is whether the decision may be used analogically on Article V(1)(c). Moses suggests this as a possibility.\textsuperscript{62} While some concern may be justified, U.S. practice generally shows deference to the arbitrators. In other jurisdictions the issue is less likely to arise, as class action is a U.S. phenomenon. Globally there has been remarkably little inconsistency to this ground of non-recognition.

The next topic deals with the second ground under the provision, namely that the award contains decisions on matters \textit{beyond the scope of the submission} to arbitration.

\textbf{2.3.2 The tribunal exceeded its authority}

A typical excess of authority occurs in relation to the law applicable to the substance of the agreement.

\begin{itemize}
  \item \textsuperscript{59} Stolt-Nielsen v. AnimalFeeds International Corp. S. Ct. 1758 (2010)
  \item \textsuperscript{60} See for example Parsons & Whittemore.
  \item \textsuperscript{61} Moses, 221.
  \item \textsuperscript{62} Ibid., 222.
\end{itemize}
dispute. A variety of situations may arise in this regard. If the tribunal has disregarded a choice of law by the parties, this may be an excess of authority under Article V(1)(c). Any experienced arbitral body respects the parties’ choice of law, giving the matter little practical importance. However, more ambiguous situations may occur. What law should be applicable if the parties refer to international law or general principles of international law?

Courts have generally acknowledged that arbitral tribunal’s have wide discretion in this regard. The U.S. Ninth Circuit Court of Appeals did not find an excess of authority where the ICC tribunal applied the UNIDROIT Principles of International Commercial Contracts and principles of good faith and fair dealing as the parties had agreed to “application of general principles of international law and trade usages”. In addition, such defenses may be rejected on the basis of waiver. Objections should be raised during the arbitral proceedings. This is the case under German law. Similarly, under Article V(2) of the European Convention on International Commercial Arbitration, a party may not invoke a lack of jurisdiction defense if it was not raised during the arbitral proceedings.

Excess of authority also occurs when the tribunal goes beyond the parties’ requests for relief. The resisting party may claim that the tribunal issued an award prescribing broader relief than requested, and thus going beyond its competence. This is known as ultra petita. Different courts have largely maintained the restricted and narrow approach seen above.

A straightforward example of ultra petita is found in a Paris Court of Appeal decision. The arbitral tribunal had doubled the claimed amount of interest in its decision. According to the Paris Court the award clearly contained decisions on matters beyond the scope of the submission.

The law of the seat of arbitration and the law chosen by the parties may lead to different results.

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64 Port/Bowers/Davis/Noll in Kronke/Nacimiento/Otto/Port, 273.
65 Borris/Hennecke in Wolff, 325.
Where such law allows it, a tribunal may be allowed to award such relief. An important example is that of punitive damages, which may be substantial. In Mastrobuono the U.S. Supreme Court found that awarded punitive damages, beyond the amount claimed, was not an excess of power by the tribunal as applicable New York law permitted such damages. The court looked to the agreement, which stipulated that “any controversy” was to be governed by the laws of the State of New York. The Court had no trouble concluding that wide arbitration clauses would justify any relief in accordance with the chosen rules. The judgment is a manifestation of the deference shown to the arbitrators and the importance of arbitration. In another US decision the court held that judicial review is limited to cases where the terms of the award are “completely irrational”.

The above shows that the boundaries for the arbitrators’ competence may be hard to predict for the parties. Parties should for the highest levels of predictability explicitly limit the tribunal’s authority in their contracts and carefully consider any chosen arbitration rules. It is from the above visible that the problem arise out of the agreement to arbitrate and the applicable arbitration rules. The parties include wide and unlimited arbitration clauses which gives the arbitrators the widest level of discretion. While the result of such clauses may come as a surprise to the losing party, it is a matter of contract drafting and not a consequence of domestic differences of interpretation. The Convention itself has been successful in striking a balance between procedural fairness and accommodating effective enforcement and recognition of arbitral awards. In ways of uniformity there are no compelling reasons to modify Article V(1)(c) of the Convention.

2.4 Article V(1)(d)

The fourth ground prescribes that recognition may be refused if the composition of the tribunal or procedure was not in accordance with the agreement of the parties, or, failing such agreement, with the law of the country where the arbitration took place.

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The wording overlaps with Article V(1)(b) which sets standards for due process and proper notice. Given the experience of most arbitrators, the issue of composition and procedure rarely arise in practice. It is uncommon for such trivial flaws to occur.

Only if the parties have not made a choice of law may the enforcing court apply the “law of the country where the arbitration took place”. The words used are vague, unlike those used in Article V(1)(a), which refers to the “law of the country where the award was made”. Arbitral proceedings sometimes take place in multiple countries. In practice the interpretation has been the same as under Article V(1)(a), meaning that the law applicable is that of the seat of arbitration.

The laws of the place of arbitration will often become relevant in the arbitration process through its mandatory laws, which may restrict party autonomy. An award contrary to such provisions may be set aside at the place of arbitration and subsequently be refused recognition and enforcement under V(1)(e). Should the tribunal disregard party autonomy and instead apply mandatory rules however, this choice may violate the rule of party autonomy in V(1)(d) and lead to the award being refused recognition. This friction is quite clearly problematic and may put the arbitrators in difficult situations. This seemingly inner contradiction is unfortunate and of great importance to the question of uniformity. How may this problem best be solved?

An important question is how far the enforcing court should respect and enforce such foreign mandatory rules at the time of enforcement. Article V(1)(d) explicitly gives priority to party autonomy. Foreign procedure is of little value in the recognition and enforcement proceedings in a third state. The state has no obligation to enforce mandatory laws of the seat of arbitration and neither should it attempt to do so. The law of the place of arbitration has deliberately been given a secondary and supplementary position under the provision, which should be respected. More importantly, the resisting party may seek annulment at the seat of arbitration. A failure to do so may thus be considered an act of waiver which should not have an effect at the

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68 See section 2.5, below.
enforcement stage. This view appears to have been widely adapted in theory, meaning the agreement of the parties should prevail even if it violated mandatory rules of the place of arbitration.\textsuperscript{69} Consequently, an award in line with the parties’ agreement but in breach of mandatory rules will rarely be refused enforcement by national courts.

Domestic law may also become relevant where the parties have made a choice of law, if the chosen procedural rules are incomplete. Domestic law may supplement and fill gaps in the rules chosen by the parties. This approach is common and has been adapted in, among others, the ICC Rules of Arbitration (the “ICC Rules”).\textsuperscript{70}

While the first alternative of the provision deals with the composition of the arbitral authority, the second alternative deals with all sides of the arbitral procedure. Despite the wide grasp of the wording, reviewing courts show deference to the arbitral authority. Procedural defects under both alternatives must have affected the decision; the losing party must have been prejudiced. Most domestic courts operate with such a requirement.\textsuperscript{71}

The procedure stretches from the filing of the action to the rendering of the award. Procedural flaws can occur at any stage of the proceedings and will depend on the applicable procedural rules. Here, a selection of cases will be used to illustrate the abovementioned elements of the provision.

In a Hong Kong decision,\textsuperscript{72} the question was whether the court should refuse enforcement of an award based on Article 36(1)(iv) of the Model Law, which contains the same wording as Article V(1)(d). The party resisting enforcement held that the composition of the tribunal was not in accordance with the agreement, which stipulated arbitration before the China International Economic and Trade Arbitration Commission (“CIETAC”), Beijing. The award had been rendered by CIETAC Shenzhen. The court found that CIETAC Shenzhen lacked jurisdiction to render an

\textsuperscript{69} See Borris/Hennecke in Wolff, 333 and Born, 2768-2769.
\textsuperscript{70} Article 15.
\textsuperscript{71} See Borris/Hennecke in Wolff, 346.
\textsuperscript{72} China Nanhai Oil Joint Service Corp, Shenzhen Branch v Gee Tai Holdings Co Ltd, 2 HKLR (1995).
award, which should have been referred to CIETAC Beijing. However, the defendant had participated in the proceedings and had not reserved its right to object. Based on this finding, the court concluded that the defendant had waived its right to object at the time of enforcement. Supporting this conclusion, the Court added that CIETAC Shenzhen provided CIETAC arbitration using the CIETAC Rules which were essential components of the parties’ agreement. The Supreme Court of Hong Kong ruled that the award was enforceable. As seen, the court correctly made a judgment based on the intent of the parties. The Court’s decision to make use of waiver and estoppel shows how HK courts strive to achieve the aim for enforceable awards, although grounds of non-recognition are present.

A decision from Italy\(^\text{73}\) illustrates the role of national law as well as a problem of tribunal composition. The agreement prescribed for three arbitrators, one appointed by each party and the third appointed by the arbitrators. The defendant failed to appoint its arbitrator and the sole arbitrator rendered an award in favor of the claimant, in accordance with English law. The Italian court ruled that the use of English law was permitted to supplement the agreement, which was silent on the problem. In a similar Italian decision,\(^\text{74}\) the parties’ agreement prescribed for proceedings with three arbitrators. The award was made by two arbitrators on the basis of English practice. The Court rejected this approach as the parties’ had explicitly agreed to arbitration with three arbitrators. The above decisions show the supplementary role of national law and the priority given to the parties’ agreement. It is as in the Hong Kong decision clear that the court respect party autonomy and attempt to reach decisions which best reflect the intention of the parties.

Parties may have chosen to have pre-arbitral dispute resolution to avoid arbitration altogether. Failure to comply with such an agreement may lead to non-recognition. In a German decision,\(^\text{75}\) the Court rejected the defense as the agreement merely provided that the parties should attempt to reach a settlement prior to initiating any arbitration proceedings. Such attempts had

\(^{73}\) See Born, 2772.


\(^{75}\) Oberlandesgericht Celle, 31 May 2007, Case No. 8 Sch 06/06 in Nacimiento in Kronke/Nacimiento/Otto/Port, 295.
been made and there were no other formal requirements for the pre-arbitration negotiations.

From the above decisions it is visible that party autonomy is given priority by both the arbitrators and the reviewing courts. The number of cases dealing with the V(1)(d) defence are few. Arbitrators are usually experienced and professional and rarely make such mistakes. The arbitrators will go far to adapt to the will of parties, leaving less room for such objections at the stage of enforcement. Domestic courts are generally left with matters which are straightforward and based on the agreement to arbitrate. Article V(1)(d) defences therefore seldom cause issues for enforcing courts. The provision itself leaves little ambiguity and appears to be applied consistently and uniformly across the Member States.

2.5 Article V(1)(e)

The final ground for non-recognition under the first paragraph prescribes three grounds under which recognition or enforcement may be refused. Where the award has not become “binding”, where it has been “set aside” and where it has been “suspended” by a “competent authority of the country in which, or under the law of which, that award was made.”

The provision has a drafting history which is essential to understanding its purpose and existing differences in interpretation.

Under the Geneva Convention, a decision had to be “final” in order to be enforced. 76 This requirement of finality meant that the national courts at the seat of arbitration had to finalize an award before enforcement could be sought in a foreign country. This requirement of double exequatur was heavily criticized due to its negative impact on the efficiency of arbitration. One consequence of the requirement was that the losing party could easily obstruct the enforcement of an award and that domestic rules influenced the arbitral process. 77 In addition,

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76 Article 1(d) of the Geneva Convention of 1927.
77 The party resisting enforcement could contest the validity of an award in the country where it was made under Article 1(2)(d) of the Geneva Convention.
the burden of proof was on the party seeking enforcement,\textsuperscript{78} and left the courts no discretion. This made enforcement difficult, expensive and time consuming. In making Article V(1)(e), the drafters sought to remove these elements, in accordance with the pro-enforcement basis of the Convention.\textsuperscript{79}

As previously mentioned, the wording of Article V(1) explicitly states that the courts “\textit{may}” refuse enforcement of an award, granting courts discretion. As will be shown however, this discretion has led to debate under Article V(1)(e).

Two alternative authorities are considered “\textit{competent}” within the meaning of V(1)(e): the authority at the place of arbitration and the authority of the country of the chosen procedural law.\textsuperscript{80} It is quite uncommon that the procedural law of a third state is chosen. The competent authority is therefore, with very few exceptions, the courts of the country where the arbitration took place.

Having made these introductory remarks, let us have a closer look at the grounds.

2.5.1 A binding award

The requirement of finality was replaced by “\textit{binding}” in an attempt to abandon the requirement of double exequatur. Although the drafters hoped to liberalize and advance the enforcement of awards, there has been much discussion as to when an award is to be considered binding. The term has, as its predecessor, been criticized for “\textit{inviting domestic enforcement standards into an international law realm}”.\textsuperscript{81}

The expression is not defined in the Convention. As commented by H. Gharavi: “\textit{the meaning of

\textsuperscript{78} Article 4(2) of the Geneva Convention.
\textsuperscript{80} Darwazeh in Kronke/Nacimiento/Otto/Port, 321.
\textsuperscript{81} Liebscher in Wolff, 356 referring to van den Berg and Paulsson.
this term has always been a mystery”.\textsuperscript{82} Pieter Sanders, a central figure in the drafting process, also foresaw the complications of the wording: “The term is the result of a compromise and will, I fear, cause a diversity of interpretations in countries where enforcement is sought”.\textsuperscript{83} The ambiguity has led to the emergence of two alternative interpretations. The first alternative defines binding as an autonomous expression, while the second applies the standard of the country where the award was made.\textsuperscript{84}

The first approach has sparked two alternative views. An award will be considered binding if it cannot be subjected to ordinary recourse proceedings in the country of origin. The determining factor is whether or not the arbitral award may be appealed on its merits or on procedural grounds.\textsuperscript{85} The second interpretation considers an award binding if it may not be judicially reviewed by a higher arbitral tribunal. The approach is based on party autonomy. The determining factor of whether an award is binding depends solely on the arbitration agreement. The absence of such agreement results in a binding award. If the parties have not agreed that an award may be appealed, it will be considered binding, regardless of domestic laws suggesting the contrary. Parties may also explicitly agree that an award will be binding and final to make their intentions clear.

The Swedish Supreme Court recognized an autonomous approach, giving effect to the agreement of the parties in determining the question of whether the award was binding.\textsuperscript{86} The parties had agreed to ICC arbitration, under which there was no right to appeal. The Supreme Court found that the award was binding from the moment it was rendered. Having done so, the Court chose not to investigate whether the award was binding under French law, which the resisting party argued. Party autonomy was thus given priority.

\begin{flushleft}
\textsuperscript{82} Gharavi, 59.
\textsuperscript{84} See Darwazeh in Kronke/Nacimiento/Otto/Port, 311 and Born, 2818.
\textsuperscript{85} Liebscher in Wolff, 360.
\end{flushleft}
In a Belgian decision, the Cours d’Appel de Bruxelles ruled that an award is binding in accordance with the agreement between the parties.\(^\text{87}\) The agreement in the specific case stipulated that an award would be final and binding upon being rendered, which the Belgian Court enforced.

The second approach refers the determination to the applicable arbitration law. The applicable arbitration law may be the law of the country of origin, institutional rules or tailored procedural rules. Once the applicable rules have been identified, the enforcing court determines if the award is binding under the relevant rules. Different sets of rules contain different requirements. While some acknowledge the award as binding when rendered, other countries operate with formalities or recourse. Jurisdictions which operate with this second approach must thus correctly identify and apply the relevant requirements for a binding award under the applicable arbitration rules. It is clear that this approach invites more domestic elements into the determination.

French courts follow this approach. In the case of Saint Gobain,\(^\text{88}\) the party resisting enforcement held that Indian law required the award to be confirmed by the Indian courts in order to be binding. The French Court stated that an award is binding when it is without irregularities and complies with required formalities in the country of origin. The French court rejected the defence however, as a requirement of confirmation would be a requirement of double exequatur. Italian courts apply the same approach, maintaining that an awards binding effect must be determined under the law which the award was made.\(^\text{89}\)

The question is what approach is favorable. Born supports a uniform international definition to which the parties’ agreement to arbitrate should be used regardless of possible judicial


\(^{88}\) Saint Gobain v. Fertilizer Corp. Of India Ltd, Cour d’appel de Paris, 10 May 1971.

\(^{89}\) Liebscher in Wolff, 359.
challenges, when this agreement provides that the award is binding. In support of this view is the drafting history of Article V(1)(e) which aims to remove the requirement of double exequatur. Formal requirements and confirmation in the country of origin leads to a preservation of this requirement. On the other hand, the French decision illustrates that the application of domestic law does not necessarily mean that requirements of double exequatur will be accepted. It would be unfortunate if national requirements to make an award binding would have an effect on the recognition and enforcement of an international arbitration award. It is also convincing that awards cannot exist without legal systems which recognize its legal effects. This supports the view that the applicable arbitration law should be applied. Nonetheless, the role of the arbitral seat was of far greater importance when the Convention was drafted. Much time has passed since the Convention’s drafting and a modern view of international awards support an enforced acceptance of party autonomy. Reliance on party autonomy ensures efficiency and simplifies enforcement proceedings significantly. The parties to arbitration would with an autonomous interpretation avoid unexpected domestic requirements and achieve a greater degree of predictability. In the author’s opinion, the autonomous approach is more favorable in the light of the aim of the Convention as well as the intention of the drafters. This issue may be addressed in a future reform.

2.5.2 Annulment and setting aside

A question that has given rise to much disagreement and thus variations in interpretation is what effect the annulment of an award should have on the enforcement in a third state. The effect of annulment is that the award loses its legal effect in the state of annulment. In short, the award seizes to exist. A difference of interpretation has arisen as to the effect of such annulment. As will be seen, the dominating view is that the enforcing courts will respect an annulment by a competent authority. However, certain courts have chosen to enforce such awards. This difference causes difficulty as both solutions fall within the wording of V(1)(e).

The two approaches are known as the territorial approach and the delocalized approach.

90 Born, 2818 and 2819.
respectively. The two will be examined and analyzed in the following. Finally, a conclusion will be offered as to the gravity of the difference and which is the more favorable approach.

Under the territorial approach, the court in the country enforcement will generally respect an annulment and therefore refuse recognition and enforcement where an award has been set aside in the country of origin. This view has long been dominant among the Member States.\textsuperscript{91} The reasoning behind the approach is that arbitration awards are valid and given legal effects through national rules. By choosing a particular country the parties to arbitration must also submit to the arbitration laws of that country. In addition, followers of the territorial approach point to uniformity of interpretation in defense of the approach. It is unsatisfactory if annulment proceedings and enforcement proceedings lead to opposite conclusions.

In China, Article 260 of the Civil Procedure Law prescribes that a court “\textit{shall ... make a written order not to allow the enforcement of the award}” if the court finds that one of the listed grounds are present.\textsuperscript{92} In relation to Article V(1)(e) this means that the Chinese courts are given no discretion if the competent authority at the place of origin has set the award aside. The same approach in applied in Germany and Sweden, to mention some. The territorial approach is by far the most used solution in the Contracting States.

The alternative approach considers arbitration an international phenomenon where the place of arbitration is usually of little to no importance. The arbitration proceedings are considered detached or delocalized from the forum, making a national annulment of an award irrelevant to the enforcement in a third state. The approach finds justification in the wording of Article V which leaves discretion to the courts.

Only France has so fully adapted this delocalized approach. The development in France happened over time. Two central French decisions will be used to illustrate this development.

\footnote{\textsuperscript{91} Darwazeh in Kronke/Nacimiento/Otto/Port, 325.}
\footnote{\textsuperscript{92} Civil Procedure Law of the People’s Republic of China, Article 260(2) available on: http://www.china.org.cn/english/government/207339.htm (last visited on 15.10.2013)}
In the first case, an English company, Hilmarton, provided assistance to OTV in a bid to acquire and perform a contract in Algeria. Disputes arose in relation to the commission and Hilmarton initiated ICC arbitration in Switzerland. The ICC tribunal rejected the claim and OTV sought to have the decision enforced in France. At the same time, Hilmarton sought to set the award aside in Switzerland. Both parties were successful and Hilmarton appealed the French decision on the basis of the annulment in Switzerland. In its reasoning, the lower court relied upon the more favorable rights provision in Article VII of the Convention, arguing that a French judge could not refuse enforcement unless prescribed in domestic law. Going into the relevant national provision, Article 1502 of the New Code of Civil Procedure, it was found that the setting aside of an award was not listed as a ground for non-recognition. The Supreme Court affirmed the reasoning, holding that the award existed despite of its annulment in Switzerland and that enforcement in France was not contrary to international public policy.

In Chromalloy an American company and the State of Egypt entered into a contract in which Chromalloy was to maintain and repair helicopters. A dispute arose and arbitration proceedings commenced in Egypt, resulting in an award in favor of Chromalloy. Egypt sought to have the award set aside in Egypt and succeeded. In France, the lower court, despite the annulment, enforced the award, in line with the Hilmarton decision. Egypt appealed. In affirming the lower courts decision, the Paris Cour d’Appel confirmed that French courts may not refuse recognition or enforcement based on an annulment in the country of origin.

As seen from the two above decisions, French law does not permit awards to be refused enforcement or recognition, although it has been set aside by a competent authority. The reasoning is based on the more favorable rights provision of the Convention, which enables national law to be applied where it is more favorable than the Convention. In this sense, the reasoning of the French courts is well-founded. The decisions have nevertheless been heavily

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93 Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV), Cour de Cassation, 23 March 1994.
criticized due to the conflicting practice of most Member States.

In the U.S., practice has been inconsistent. The development is particularly interesting in the context of achieving uniformity.

In Chromalloy,95 the same award as above, Chromalloy initiated enforcement proceedings in the U.S. As in France, Egypt contested that enforcement should be refused as the award had been set aside in Egypt. The U.S. Court decided to enforce the award. The judge emphasized in his reasoning that the court “must” grant recognition and enforcement unless a ground of non-recognition is found. And if so found, “the Court may, at its discretion, decline to enforce the award.”96 Chromalloy held that Article VII of the Convention enabled them to invoke the FAA, which prescribed that the Court must consider Chromalloy’s claims under applicable U.S. law. Under the FAA, enforcement could not be denied on the ground that the award had been annulled in the place of origin. Consequently the court granted enforcement, despite of the award being set-aside in Egypt. The District Court here showed that U.S. Courts can and will enforce foreign arbitral awards, even if they have been set-aside. The decision has been criticized in theory and in later practice.

In a later decision,97 Baker Marine (“Baker”) entered into an agreement to provide barge services for Chevron in Nigeria. A dispute of breach of contact arose, and Baker initiated arbitration proceedings in Nigeria. The arbitrators held that Baker was to be awarded damages from two defendants. The losing parties applied to have the decision set-aside before the courts of Nigeria, an action which succeeded. Baker sought enforcement in New York. The New York Court denied Baker’s petition to have the award enforced. Unlike the above decision, the judge stated that it would “not be proper to enforce a foreign arbitral award under the Convention when such an award has been set aside by the Nigerian courts.” Baker attempted to argue, as Chromalloy, that Article VII of the Convention must apply and lead to the application of U.S. law.

96 Ibid., 909.
97 Baker Marine Ltd v Chevron Ltd, 191 F 3d 194 (US Court of Appeals 2d Cir. 1999)
which rejects the annulment in Nigeria as a reason for non-enforcement in the U.S. The Court rejected this reasoning, holding that the parties agreed to have their disputes arbitrated under Nigerian law and that nothing suggested that the parties intended to apply U.S. domestic law. The Court accepted that it had discretion, but concluded that Baker had “shown no reason for refusing to recognize the judgments of the Nigerian court.”

In a 2007 decision, the Court of Appeals for the D.C. Circuit largely followed the reasoning in Baker. 98 An arbitral award rendered in Columbia had been annulled by Columbian courts as it violated Columbian law. TermoRio sought recognition and enforcement of the award in the District of Columbia. The lower court refused recognition and the Court of Appeals affirmed. The Court commented that the Convention does not “endorse a regime in which secondary states ... second-guess the judgment of a primary State, when the court in the primary State has lawfully acted pursuant to “competent authority” to “set aside” an arbitration award made in its country.” 99 The defense of U.S. domestic law was explicitly rejected, while the court stated that it “must be very careful in weighing notions of “public policy” in determining whether to credit the judgment of a court in the primary State vacating an arbitration award.” 100 Such breach of public policy was not found.

As seen from these above decisions, the U.S. courts have had conflicting views on the problem of set-aside and annulled awards. The development does indicate however, that the courts are stepping away from the delocalized approach in favor of greater deference to the competent authority in the country where the award was made. Although Chromalloy has not been directly overruled, it appears to have lost any influence. With this development, U.S. practice is consistent with the practice of most Member States, a step in the right direction in achieving a greater level of uniformity internationally.

France remains the only jurisdiction which explicitly recognizes and follows the delocalized

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98 TermoRio SA, E.S.P. v Electranta SP, 487 F 3d 928 (US Court of Appeals, DC Cir., 2007)
99 TermoRio, 17.
100 TermoRio, 18.
approach. The difference is, as seen, made possible by the ambiguity of the Convention, rendering both interpretations valid. With France as the only major exception however, the severity of the problem is equally limited. Substantial practice exists to the question, with a clear majority view. The situation is quite clearly satisfactory is light of the vast number of member states. This minor difference is therefore, in the opinion of the author, a non-issue in the context of overall uniformity.

2.6 Article V(2)(a)

The first ground under Article V(2) enables the reviewing court to refuse recognition or enforcement if the subject-matter of an award is not arbitrable.

Arbitrability refers to whether a dispute may be resolved through arbitration. Party autonomy is the general rule, making any dispute arbitrable. As explicitly stated in the provision, the law of the place of enforcement determines whether a dispute is capable of settlement through arbitration. The purpose of the exception is to leave the Member States a “safety-valve” in prescribing that certain disputes fall within the exclusive domain of its domestic courts of law. The reasoning behind this is apparent. Arbitration is a private dispute resolution mechanism between the parties to the agreement. Agreements affecting third parties or state issues such as political and social matters may be considered unsuitable for settlement through arbitration. The exception is closely related to that of public policy. Ultimately each nation, through its domestic law, determines which disputes will remain exclusively within the sphere of its domestic courts.

In drafting the Convention, it was feared that the exception would invite domestic rules into the sphere of international dispute resolution. Such a fear has proven unfounded, as the exception has had minimal practical significance. The Yearbook of Commercial Arbitration, which has published judgments on the New York Convention since 1976, only contains 3 cases

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101 Quinke in Wolff, 381.
in which recognition and enforcement has been refused under V(2)(a). Due to its limited importance, only a few general national trends of relevance to international uniformity will be pointed out in this section.

Competition and antitrust disputes were in the U.S. and elsewhere a field reserved for domestic courts. It was considered improper to settle such disputes through arbitration and thus prohibited.

This long dominating view changed with the Mitsubishi decision. A joint venture was entered into between Chrysler International and Mitsubishi Heavy Industries. Soler Chrysler-Plymouth, Inc. entered into a distribution agreement with Chrysler International and a sales procedure agreement with Mitsubishi and Chrysler International for the purpose of selling cars in Puerto Rico. The contract contained an arbitration clause calling for arbitration in Japan. A dispute arose and Mitsubishi started an action before the federal district court. It filed a request for an order to arbitrate in Japan. Soler claimed, inter alia, that Mitsubishi and Chrysler International had “conspired to divide the markets in restraint of trade”, in other words, that the dispute was not capable of settlement through arbitration.

The Supreme Court had “to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction.” The Court first held that the parties had agreed to include antitrust claims in the arbitration clause and then moved on to the question if the “antitrust claims are nonarbitrable even though it has agreed to arbitrate them.” The Court rejected long standing arguments against the arbitration of antitrust claims, holding that there is “no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism

\[\text{Quinke in Wolff, 380.}\]
\[\text{Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985)}\]
\[\text{Mitsubishi Motors, 3350.}\]
\[\text{Mitsubishi Motors, 3355.}\]
“resolve antitrust issues].” Having permitted arbitration of antitrust claims, the Supreme Court added that “the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.” It would “not require intrusive inquiry [at the enforcing stage] to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.”

Known as the second-look doctrine, this reservation allows for a minimal control at the time of enforcement of whether the applicable competition law was applied and considered. Should this not be the case, an award may be refused recognition and enforcement under the public policy exception. The Court concluded that the matter was arbitrable and referred the dispute to arbitration. This case is not alone in applying a wide concept of arbitrability, and instead leaving the matter to public policy.

A similar stance has been taken in the European Union. In the Eco Swiss decision, the European Court of Justice ruled that an arbitration agreement containing EU competition law claims was valid and enforceable. As in Mitsubishi, the Court included a reservation of judicial review through annulment as well as in enforcement proceedings. The decision has been followed by most EU member states, many which have subsequently opened the door for arbitration of domestic competition law. This development in both the EU and U.S. is part of a clear trend in which the exception of arbitrability has largely been noted. Although widely held, not all jurisdictions are as willing to allow arbitration of competition matters.

While certain countries exclude certain categories of disputes from arbitration, there is no doubt that number of matters considered non-arbitrable is low. As already pointed out, the defence has barely had practical consequences. There appears to be international willingness to have a wide concept of arbitrability and the existing differences have had no notable impact on

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108 Mitsubishi Motors, 3359.
109 Ibid., 3360.
111 Born, 794.
112 For example India. See Otto/Elwan in Kronke/Nacimiento/Otto/Port, 358.
the Convention’s aim of uniformity. In this context, the exception is a success which leaves little need for change.

2.7 Article V(2)(b)

Finally, the exequatur Court may refuse recognition and enforcement of arbitral awards if it would be “contrary to the public policy of that country”. The wording explicitly prescribes that it is the public policy of the enforcing state that is relevant. Public policy is not defined in the Convention and therefore opens the door for national variation. It has led to great controversy in terms of both application and interpretation and is consequently the most problematic ground for non-recognition under the Convention in ways of achieving uniformity and predictability.

In an almost 200 year old decision, an English Judge commented upon the defense of public policy that: “It is never argued at all but where other points fail”. This has proven to be inaccurate. Consistent with the Swiss study referred to above, Born comments that it is “[o]ne of the most frequently invoked bases for refusing to recognize an international arbitral award.” The answer to this development no doubt lies in the ambiguity and wide nature of the concept of public policy. In drafting the Convention, the exception originally included a reference to principles of law, in addition to public policy. In an attempt to limit the scope of the exception to the largest possible extent, the reference was omitted. It was intended that the provision should be given a narrow scope of interpretation. Despite such intention, the ground leaves plenty of room for national peculiarities and thus causes great difficulty in relation to uniformity. The question in the following is whether the exception has turned into a loophole for national courts to exploit and so undermines the aims of the Convention.

In 1998, the exception of public policy was used to refuse recognition of an award in England in

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114 Richardson v. Mellish (1824) 2 Bing 229 130 E.R. 294.
115 See section 2.
116 Born, 2827.
117 Ibid.
118 van den Berg, 361.
the decision of Soleimany v Soleimany. A father and son engaged in a carpet export business, in which carpets were exported from Iran to England. Iranian law prohibited such export. A dispute arose between the two as to the proceeds of sale and the dispute was submitted to arbitration by the Beth Din, applying Jewish law. The Beth Din gave no effect to the illegality of the smuggling and made an award in favor of the son. In enforcement proceedings in England, the father claimed that the illegality was contrary to English public policy. The English judge stated that the parties “cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it”. Under English law the contract itself would be considered an illegality. It was thus necessary for the Court to refuse enforcement of the award. The facts of the case are extreme, and it illustrates the fundamental nature of the concept of public policy.

In the much mentioned case of Parsons & Whittemore, Overseas raised the defense that the enforcement of the arbitral award would be contrary to U.S. public policy. The claim was based on a collapse in diplomatic relations between Egypt and the U.S., which led to Overseas leaving Egypt and failing to perform its contractual obligations. An arbitral award was rendered in favor of the claimant, RAKTA. In the enforcement proceedings, the U.S. Court stated that the provision concerning public policy offered “no certain guidelines to its construction”. It moved on to look to the drafting and the opinions of commentators, without finding guidance. Instead the Court looked to the history of the Convention as a whole. It put weight to the “pro-enforcement bias” sought by the drafters in replacing the Geneva Convention and stated that it “points toward a narrow reading of the public policy defense.” Any other interpretation would according to the court “vitiate the Convention’s basic effort to remove pre-existing obstacles of enforcement.” The Court went on to conclude that “the Convention’s public policy defense should be construed narrowly” and that enforcement of foreign arbitral awards may only be denied where it would “violate the forum state’s most basic notions of morality and justice.” On these grounds, the Court found that the public policy defense could “easily be dismissed” and that denying enforcement because of the United States’ falling out with Egypt would convert

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the defense into a “major loophole in the Convention’s mechanism for enforcement”. The award was enforced. The opinion has been upheld in subsequent practice and has gained wide acceptance.\textsuperscript{121}

As seen from the judgment, the U.S. Court put substantial weight to the purpose of the Convention, allowing only the most fundamental breaches of public policy. In so doing, the Court applied an international form of U.S. public policy, different from that applied to domestic disputes. This international public policy is clearly far more narrow and mild in its application. Through this now widely accepted distinction, the matters falling under public policy has been reduced significantly. As will be seen, this concept of international public policy, as opposed to domestic public policy, has been adopted in a majority of the Member States.

The Court of Appeal of Celle in Germany commented upon the issue in a case where the winning party sought to enforce an award from the International Commercial Arbitration Court.\textsuperscript{122} The defendant claimed that enforcement would be a violation of public policy as the award contained procedural flaws and because the award contained a contractual penalty which the defendant found disproportionate. The German judge held that “[T]here must be a violation of international public policy” and that international public policy “is a rule subject to a less strict regime than domestic arbitral decisions.” To this effect the Court concluded that “[T]here is a violation of international public policy only when the consequences of the application of foreign law in a concrete case is so at odds with German provisions as to be unacceptable according to German principles. This is not the case here.”\textsuperscript{123}

The interpretation of the French Cour de Cassation also corresponds with the two above decisions.\textsuperscript{124} The Court drew a clear distinction between domestic and international public policy. The defendant argued that the arbitral award, having applied EC Competition Law, was

\textsuperscript{121} See \textit{Copal Co. Ltd. v. Fotochrome Inc.}, 517 F.2d 512 (2d Cir. 1975)
\textsuperscript{122} Oberlandesgericht, Celle, 6 October 2005, Case No. 8 Sch 06/05 in ICCA Guide to the NYC, 108.
\textsuperscript{123} As translated in the ICCA Guide to the NYC, 108.
not permitted to do so and thus breached public policy. The French judge commented that only “flagrant, effective and concrete” violations of international public policy may be relevant and made reference to fundamental concepts of morality and justice. Through this reference, the judge reserved the exception for only the most serious breaches of French legal principles.

In a Hong Kong decision, the Court of Final Appeal held that the exception of public policy must be interpreted narrowly and cover only situations “contrary to fundamental conceptions of morality and justice of the forum”. The choice of words in the mentioned jurisdictions is largely similar.

The above judgments therefore support a general tendency of interpreting the public policy exception narrowly in respect of the history and purpose of the Convention through the application of international public policy. Only fundamental breaches of national legal principles will lead to an award being refused. Such public policy may include fundamental mandatory rules of procedural or material nature. The approach is however not entirely uniform. In certain jurisdictions the concept of public policy has been given a wider meaning, opening the exception to unfortunate national peculiarities.

In China, a decision from 1997 shows how the exception of public policy may lead to unexpected and unfortunate results. A U.S. heavy metal rock band had been awarded compensation for lost income by CIETAC. The bands upcoming performance in China had been banned by the Chinese Ministry of Culture which had found that the band performed outrageous acts on its concerts. In the enforcement proceedings, the Supreme People’s Court (the “SPC”) concluded that the award was contrary to national sentiments and contrary to social and public interests. As seen from this reference, the SPC clearly applied a wide definition of the public policy exception, in sharp contrast with the above decisions. In China the decision “gave rise to considerable concern that a floodgate would be open for a charitable application [of the

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125 Hebei Import & Export Corp v Polytek Engineering Co Ltd [1999] 1 HKLRD 665
126 In the “Heavy Metal” decision of the Supreme People’s Court [1997] Jing Ta No. 35.
The decision stands in sharp contrast to the international public policy approach.

In an attempt to remedy the inconsistent refusal of foreign arbitral awards, the SPC issued a notice prescribing a system of automatic appeal. Should a People’s Court consider refusing enforcement of a foreign arbitral award, the decision must be submitted to a High People’s Court. In turn the High People’s Court must, if it wishes to refuse enforcement, submit its opinion to the SPC. Only after such approval from the SPC may the award be refused recognition or enforcement. This system has clear disadvantages in ways of efficiency. The appeal process takes substantial time, and harms the Convention’s aim of efficient enforcement of foreign awards. On the other hand, the system has had a positive effect in sense of the supervisory role of the SPC, leading to greater uniformity. As pointed out by Xia Xiaohong, the system has made refusals more difficult. Between 2002 and 2006, 4 out of 9 awards submitted for review by the SPC, were recognized and enforced. Out of these, only one case was refused enforcement under the public policy exception. The heavy metal decision remains the only known case where recognition was refused on grounds of national sentiments. As seen by the above, the world’s most populous country as well as major exporter has made great attempts at reaching more Convention-friendly results. Although Chinese courts have made no reference to international public policy, it is apparent that the SPC is careful in its application of the exception.

Turkey remains an unfortunate example of how public policy may be used to stop undesirable awards. In this well-known decision, the arbitrators in Zurich applied Turkish law to the merits and Swiss procedural law. In its 1995 decision, the Turkish Supreme Court found that the ICC

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127 Friven Yeoh in Moser, 274.
129 Xia, Xiaohong, 21.
130 Friven Yeoh in Moser, 274.
had violated Turkish public policy by not applying Turkish law to both the substance and procedure, despite the fact that the choice of procedural law had no influence on the outcome of the decision. From an international perspective, the decision has been deemed incorrect, unfortunate and unjustified.\textsuperscript{132} It remains an example of the potential consequences of the exception’s ambiguity and domestic public policy. It is however, and luckily so, very uncommon for such abuse to occur.

The exception of public policy may potentially be unpredictable and lead to decisions advancing local interests and policy. In the words of the English judge, the exception may be “\textit{a very unruly horse, and when you get astride it you never know where it will carry you.}”\textsuperscript{133} However, there is room for optimism. The exception has given national courts opportunity to give the provision a wide meaning and thus limit the effectiveness of the Convention. Despite this possibility of abuse, most national courts usually only refuse enforcement in exceptional cases. Through reference to international public policy and fundamental principles of morality and justice, most Member States apply a narrow interpretation and Convention-friendly approach. Looking to China, it is clearly visible how the Supreme People’s Court has attempted to adapt to this position. Countries are ultimately interested in being considered a viable and attractive venue for arbitration. To achieve such status among parties to international commerce, it is essential that the grounds for non-recognition are interpreted and used in line with the Convention and its purpose. Countries loyal to the purpose of the Convention will always be preferred to those that are not. This international pressure to be arbitration friendly undoubtedly helps iron out some of the differences in application of Article V(2)(b). While it is inevitable that certain courts will misuse the exception in order to prevent enforcement of judgments which it may find unfavorable, the limited amount of such misuse leads to the conclusion that the public policy exception has indeed not turned into a black hole in which national courts may freely dispose of undesirable arbitral awards.

\textsuperscript{132} See Redfern/Hunter, 659; Born, 2859 and Moses, 228.
\textsuperscript{133} \textit{Richardson v. Mellish} (1824) 2 Bing 229 130 E.R. 294
3. A need for reform?

The question this paper has attempted to answer is whether Article V of The New York Convention needs to be reformed or whether the global benefits of the Convention outweigh such a need. Throughout this paper, individual conclusions have been provided under each section. The overall need for reform will be considered here.

Achieving uniformity is a problem for any international convention or agreement. The EU is an example which illustrates the complexity of the issue. With 28 Member States and 28 sets of national courts trying to give a consistent interpretation of EU law, problems of uniformity are inevitable. The courts of the EU Member States have the benefit of guidance from the European Court of Justice. There is no similar mechanism under the New York Convention and neither can there be one. With the example of the EU in mind, it is easy to see how problems of uniformity arise with the 149 members to the New York Convention. While such problems of uniformity exist under Article V in particular, they do not necessarily justify reform.

The Convention is of fundamental importance within the field of international arbitration. In the words of Veeder: “it [the Convention] is the lubricating super-oil for the complex machinery which has made the explosion of global trade possible over the last 50 years.”\textsuperscript{134} It is short and simplistic, with its only 16 Articles. It is respected and applied, with some exceptions, in light of its purpose of ensuring recognition and enforcement of foreign arbitral awards. In 1958, arbitration had a far simpler place in international commerce. Should the Convention be amended today, states and organizations alike would undoubtedly stop at nothing to add their own ideas and suggestions. The process would be highly time consuming and equally problematic. A likely outcome of such a process would be an increase in both Articles and words. As seen above, the few words already used have caused great debate and problems. The addition of more words would be likely to leave far more room for domestic differences. Too many words, and worse yet, the wrong words, would quite possibly do more harm than good. The importance of Article V makes it a natural victim of such a process.

\textsuperscript{134} V.V. Veeder, "Is There a Need to Revise the New York Convention?" in E. Gaillard (ed.), The Review of International Arbitral Awards (Keynote Speech, IAI Forum, Dijon, 2008), 185.
Summarizing the above sections, the grounds set forth in Article V appears to have achieved reasonable balance between enforceability and procedural safety. The seven exceptions have not prevented parties to arbitration from having their awards enforced, but has helped remove the most unfortunate awards and given arbitrators an incentive to strive for the highest standards in rendering awards. It equally encourages parties to create accurate and sophisticated arbitration agreements which will be enforced. While the grounds contained within Article V hold plenty of domestic differences, overall uniformity appears surprisingly present.

Article V(2)(b), which leaves domestic courts large discretion, has been abused by some states. While such abuse will occur in the future, the severity of the problem should not be exaggerated. Most courts will attempt to apply a Convention friendly approach, otherwise risking the distrust and criticism of other jurisdictions as well as the international business community. In addition, consistent and widespread practice does have an effect on other Member States, slowly spreading to dissenting jurisdictions. Ultimately this helps increase the uniformity across all Member States. In this sense, the Convention has been largely self-regulating, leaving room for optimism. Through now five decades of practice, there has been great development through legislative interpretation. In light of the judgments used throughout this paper, the author believes this positive development will continue.

The originally bare words of the Convention have grown into powerful tools, creating a strong and well-tested instrument. Attempting to reform this instrument may shatter it. The hard earned international trust and respect has come through years of practice and is just as easily taken away, should too many changes be presented. The result of the development of the Convention is that arbitral awards are enforced and recognized, making arbitration the most effective way of resolving international commercial disputes. The Convention’s overall success would be put at risk through reform, a reform which does not seem necessary in light of the current state of Article V. This author believes that the overall success of the Convention as well
as the benefits of existing practice, outweigh the need for reform.
4. Sources

Articles


Books


Blackaby Nigel, Hunter Martin, Redfern Alan, Partasides Constantine, *Redfern and Hunter on*


Electronic publications

Born Gary, Dallah and the New York Convention:
Websites


Other Sources

Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953:

Judgments

Belgium
- *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d’Investissements*,
  Cour de Cassation, 5 June 1998

Canada

China
- [1997] Jing Ta No. 35

England
- *Kanoria and others v Guinness* [2006] EWCA Civ 222
- *Richardson v. Mellish* (1824) 2 Bing 229 130 E.R. 294
- *Soleimany v. Soleimany* [1999] Q.B. 785

**European Court of Justice**


**France**

- *Saint Gobain v. Fertilizer Corp. of India Ltd*, Cour d’Appel de Paris, 10 May 1971
- *SNF sas v. Cytec Industries BV*, Cour de Cassation, 4 June 2008
- *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)*, Cour de Cassation, 23 March 1994

**Germany**

- Oberlandesgericht Celle, 31 May 2007, Case No. 8 Sch 06/06
- Oberlandesgericht, Celle, 6 October 2005, Case No. 8 Sch 06/05

**Hong Kong**

- *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665

**Italy**


**Sweden**

- *Götaverken Arendal AB v. Libyan General Maritime Transport Co*, Swedish Supreme Court, 13 August 1979
Turkey
- Osuuskunta METEX Andelslag V.S. v. Türkiye Elektrik Kurumu Genel Müdürlüğü General Directorate, Ankara, Court of Appeals, 15th Legal Division, 1 February 1996

United States
- Baker Marine Ltd v Chevron Ltd, 191 F.3d 194 (US Court of Appeals 2d Cir. 1999)
- Copal Co. Ltd. v. Fotochrome Inc., 517 F.2d 512 (2d Cir. 1975)
- Generica Limited v Pharmaceuticals Basics Inc., 125 F.3d 1123 (7th Cir.1997)
- Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems Inc., 495 F.3d 1024, 1028 (9th Cir. 1998)
- Parsons & Whittemore Overseas Co., Societe Generale de L’Industrie du Papier, 508 F.2d 696 (2d Cir. 1974)
- Seung Woo Lee v Imaging3 Inc., No. 06-55993, 283 Fed. App 490 (9th Cir. 2007)
- TermoRio SA, E.S.P. v Electranta SP, 487 F.3d 928 (US Court of Appeals, DC Cir. 2007)