

Rationalizing the Defences to Enforcement under the New York Convention 1958

DR. CHRISPAS NYOMBI & DR.
KONSTANTINOS SILIAFIS*

SYNOPSIS

Since the mid-twentieth century, the New York Convention has been a central pillar of international arbitration by facilitating the global recognition and enforcement of international arbitral awards. However, despite half a century of development, there remains a significant gap in local courts' interpretations of the exceptions to recognition and enforcement found under Article V of the Convention. This paper advocates for adopting a narrower and more unified approach to these exceptions, the rationale being that the objective of the exceptions is to protect the attractiveness of the institution of international arbitration as an alternative dispute resolution mechanism independent from national courts. The paper does not delve into the debate on delocalisation; rather, it critically evaluates the grounds available under the Convention for challenging recognition and enforcement of international awards and the issues they create for prospective participants.

* Dr. Chrispas Nyombi and Dr. Konstantinos Siliafis are Senior Lecturers in Law at Canterbury Christ Church University.

INTRODUCTION

The law governing the enforcement and recognition of international arbitration was originally vested in the *Geneva Protocol* of 1923¹ and the *Geneva Convention* of 1927.² In 1958, the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“*New York Convention*”) was introduced by twenty-four signatories, superseding previous international instruments and ushering in a new era of transnational commercial arbitration.³ The *New York Convention* entered into force in order to encourage the resolution of international disputes through arbitration.⁴ It applies to international awards and expressly covers awards made in a State other than the one where enforcement is sought.⁵ Thus, recognition and enforcement of international arbitral awards among member States is a central pillar of the *New York Convention*.⁶ As a result, the *New York Convention* has been described as “the single most important pillar on which the edifice of international arbitration rests”,⁷ which “perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.”⁸ Furthermore, the *New York Convention* is highly influential internationally, as ninety-eight per cent of international arbitral decisions made under the *New York Convention* are recognised and ninety-five per cent of arbitral awards are enforced by local courts.⁹ The high success rate is buttressed by the fact that

¹ *Geneva Protocol on Arbitration Clauses*, 24 September 1923, 27 LTS 157 (entered into force 28 July 1924).

² *Geneva Convention on the Execution of Foreign Arbitral Awards*, 26 September 1927, 92 LNTS 302.

³ *Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38, online: <www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> [*New York Convention*]. As of January 2016, the *Convention* has been ratified by 156 states.

⁴ International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (The Hague: International Council for Commercial Arbitration, 2011) [International Council].

⁵ *New York Convention*, *supra* note 3, art I(1).

⁶ *Ibid*, art III.

⁷ Gillis Wetter, “The present status of the International Court of Arbitration of the ICC: An appraisal” (1990) 1 *Am Rev Intl Arb* 91.

⁸ John Mustill, “Arbitration: History and Background” (1989) 6:2 *J Intl Arb* 43 at 49.

⁹ Albert Jan van den Berg, “The New York Convention of 1958: Its Intended Effects, Its Interpretation, Salient Problem Areas” in Marc Blessing, ed, *The New York Convention of 1958: A Collection of Reports and Materials Delivered at the ASA Conference Held in Zurich 2 February 1996* (Basel, Switzerland: ASA, 1996) 25.

defences to enforcement under the *New York Convention* are construed narrowly “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts.”¹⁰

The aim of this paper is threefold. First, it will explore the essential characteristics of international commercial arbitration with particular emphasis on the conditionality for recognition and enforcement of arbitral awards under the *New York Convention*. Secondly, it will critically examine defences to enforcement found under Article V of the *New York Convention*. Particular emphasis will be given to the approaches taken by national courts with regards to the Article V grounds. Last but not least, a circumspect conclusion will be reached on the direction of future development in this area.

REQUIREMENTS FOR ENFORCEMENT UNDER THE NEW YORK CONVENTION

Enforcement of international arbitral awards is governed by Article III of the *New York Convention*, which indicates that contracting states must recognize arbitral awards made under the *New York Convention* as binding. Without this recognition, arbitral awards would become unpredictable and could have the effect of deterring persons from using arbitration as an alternative dispute resolution mechanism. Furthermore, without the *New York Convention*'s enforcement procedure, arbitration would not have evolved as rapidly as it has in the last thirty years. This argument is supported by an empirical study conducted by Loukas Mistelis, who found that although difficulties arise when the place where the enforcement is sought is different from the place of arbitration (seat); the most cited reason for using arbitration nonetheless is because of its excellent enforcement mechanism.¹¹ None of the applicants in the study cited the *New York Convention*'s enforcement procedure as a major concern.¹²

However, enforcement of arbitral awards poses a number of challenges. These challenges arise in the context of domestic laws influencing the provisions of the *New York Convention* at issue. Article I(1) of the *New York Convention* permits the enforcement of awards considered nondomestic by the

¹⁰ *Scherk v Alberto-Culver Co*, 94 S Ct 2449 at para 15 (1974).

¹¹ Loukas Mistelis, “International Arbitration—Corporate Attitudes and Practices 12 Perceptions Tested: Myths, Data and Analysis Research Report” (2004) 15 *Am Rev Intl Arb* 525 at 544.

¹² *Ibid* at 545.

enforcing State;¹³ however, in the absence of a unilateral definition as to what constitutes “nondomestic”, each contracting State must determine its own definition, which creates inconsistencies. These inconsistencies are clear when comparing the United States [US] and China, for example. As such, a dispute between US citizens with respect to property located abroad or involving the legal system of a foreign state is nondomestic pursuant to the US *Federal Arbitration Act of 1925*.¹⁴ In contrast, the Chinese law views as nondomestic only an award made in a country that is a contracting state of the *New York Convention* and with which China has a bilateral treaty on provision of judicial assistance.¹⁵ This limitation is as a result of the reservations that China made on its ratification of the *New York Convention*. China’s reservations were largely dictated by their general distrust over international arbitration, which is evident from the fact that Chinese parties are reluctant to elect arbitral seats outside China.¹⁶

Enforcement under the *New York Convention* could also be compromised by reciprocity and commercial reservations provided for under Article I(3). Although these reservations limit the *New York Convention*, they nevertheless cannot be construed to act as a barrier to enforcement of arbitral awards. This is because half of the contracting states have selected the reciprocity reservation to deny enforcement of arbitral awards of non-contracting states. Secondly, the *New York Convention* allows contracting states to decide on whether a contract is commercial or not, which widens the scope of the *Convention*. Without a set criterion, commercial reservations will remain a contentious issue.

Furthermore, the *New York Convention* allows a party to vacate or annul an award only in the state where the award was rendered.¹⁷ Consequently, these states have “primary jurisdiction” over the arbitral award.¹⁸ The

¹³ *New York Convention*, *supra* note 3, art I(1).

¹⁴ United States Arbitration Act Pub. L. No. 68-401, 43 Stat. 883 (1925) codified at 9 USC 2, s 202.

¹⁵ Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge: Cambridge University Press, 2017) chap 3; see also Christina Cheung, “The Enforcement Methodology of Non-Domestic Arbitral Awards Rendered in the United States & Foreign-Related Arbitral Awards Rendered in the People’s Republic of China pursuant to Domestic Law and the New York Convention”, Comment, (2012) 11 Santa Clara J Intl L 237.

¹⁶ Michael Moser, *Dispute Resolution in China* (Juris Publishing, 2012) at 337.

¹⁷ *New York Convention*, *supra* note 3, arts V(1)(e), VI.

¹⁸ The concept that the States in which the award was rendered have primary jurisdiction over the arbitral award was reinforced in *M&C Corp*, *infra* note 19.

decision *M&C Corp v Erwin Behr GmbH & Co* (1996) reinforced the rule that a motion to vacate may be heard “only in the courts of the country where the arbitration occurred or in the courts of any country whose procedural law was specifically invoked in the contract calling for arbitration of contractual disputes.”¹⁹ In addition, every state has its own statute of limitations. For instance, the UK allows a limitation period of twenty-eight days to appeal the decision of an arbitral body,²⁰ whereas one month is permitted in France.²¹ There are also a number of other requirements that must be taken into account before an award can be enforced, such as the dispute being of a legal nature.²²

As aforementioned, the *New York Convention* limits the grounds that a party can plead by providing an exhaustive list of defences. Courts are very cautious about overturning international arbitration awards on appeal or setting aside decisions, except in the clearest of cases.²³ This is rooted in the objectives of the *New York Convention* and the courts’ respect for parties’ contractual autonomy; thus, courts exercise their discretion when faced with arbitral appeal.²⁴ The grounds for challenging an arbitral award mainly fall into two broad categories: jurisdiction and procedure. An appeal on jurisdictional grounds raises questions of whether the arbitral body has the authority to hear a particular matter. Typically, a unilateral decision to use a different arbitral institution will be challenged on jurisdiction where a party

¹⁹ *M&C Corp v Erwin Behr GmbH & Co KG*, 87 F (3d) 844 at 847-49 (6th Cir 1996) [*M&C Corp*].

²⁰ *Arbitration Act 1996* (UK), c 23, s 70(3).

²¹ Art 1519 NC proc civ. In the UK, an action to enforce an award must be brought within six years from the date the cause of action occurred: see *Limitation Act 1980* (UK), c 58, s 7. In India the limitation period is three years: see *The Limitation Act*, No. 36, Acts of Parliament, 1963, s 101.

²² *New York Convention*, *supra* note 3, art II(1); see also Stephen M Schwebel, “A Celebration of the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (1996) 12:1 *Arb Intl* 83 [Schwebel]; Catherine A Rogers, “Transparency in International Commercial Arbitration” (2006) 54 *U Kan L Rev* 1301.

²³ Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (Kluwer Law International, 1981) at 41 [van den Berg, “Uniform Interpretation”].

²⁴ Albert Jan van den Berg, “Should the Setting Aside of the Arbitral Award Be Abolished?” (2014) *ICSID Rev* 1 [van den Berg, “Setting Aside”]; Peter Gilles, “Enforcement of International Arbitration Awards: The New York Convention” (2004) 9 *Intl Trade & Business L Rev* 19.

opts to go elsewhere.²⁵ The body named in the arbitration agreement entered into by the parties remains the only authority over the dispute, assuming the dispute comes within the scope of the arbitration clause/agreement. If one party decides to go to another forum without the consent of its counterpart to the arbitration clause, this will give rise to the counterpart's challenge of this other forum's jurisdiction based on the parties' agreement regarding forum in the arbitration clause.²⁶

The right to appeal is also provided for where there is evidence of procedural impropriety. This right is reflected in the seven enumerated defences to enforcement provided under Article V of the *New York Convention*.²⁷ The burden of proving that the ground for appeal falls within the seven defences listed under Article V is always on the party who resists the recognition and enforcement of the award. The party opposing the request for recognition and enforcement has additional grounds to challenge the award under Article V(2).²⁸ These grounds are public policy and the 'non-arbitrability' of the dispute, which means that local courts will refuse recognition and enforcement if such recognition and enforcement contravenes the public policy of the state where the recognition and enforcement is sought, or if the subject-matter of the dispute could not have been referred to arbitration pursuant to the laws of the enforcing state. These challenges to the recognition and enforcement of international arbitration awards are viewed on a case by case basis.²⁹

ARTICLE V DEFENCES TO ENFORCEMENT UNDER THE NEW YORK CONVENTION

Incapacity / Formation of Arbitration Agreement

First and foremost, if the parties were under incapacity at the time the arbitration agreement was made, or the arbitration agreement is not valid under the laws of the country to which the parties have subjected it (or failing such an indication, under the laws of the country where the award was *made*),

²⁵ Schwebel, *supra* note 22 at 83-87; Pieter Sanders, "A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1979) 13:2 Intl Lawyer 269 at 276.

²⁶ Schwebel, *ibid* at 83-86.

²⁷ *New York Convention*, *supra* note 3, art V.

²⁸ *Ibid*, art V(2).

²⁹ Schwebel, *supra* note 22 at 83-88

then enforcement of the award can be denied under Article V(1)(a).³⁰ An individual lacks capacity if they are unable to enter into a contract due to factors that might affect their judgment, such as intoxication at the time of signing the contract.³¹ Furthermore, if the agreement is invalid under the contract laws of the country, then the arbitration agreement and any award originating from such an agreement is not enforceable. For example, in *Dallah v Pakistan*,³² the arbitration agreement was unenforceable as the government was found to not have agreed to it. Thus, at the time of drafting the arbitration clause or agreement, parties must take into account the applicable law that controls the formation of their contract. For example, a contract that provides for the sale of cannabis will be permitted in Amsterdam but will not be enforceable in the UK.³³ Although an arbitration agreement may not be valid under the laws of the state that it is subject to, the arbitration agreement may still be enforceable, as the defence of invalidity under state laws only acts as a persuasive mechanism to annul the award.³⁴

Notice / Ability to Present a Case

The second ground stipulated by the *New York Convention* under which enforcement of an arbitral award may be denied is when a party is given insufficient notice of the arbitration or was otherwise not able to present its case.³⁵ This was reaffirmed in *Iran Aircraft Industries v Avco Corp*,³⁶ where it was held that Avco was not denied the opportunity to present their full case, and thus the arbitral award was enforceable. Typically, there is a very narrow threshold which has to be met in order to rely on this defence. In *Parsons &*

³⁰ *New York Convention*, *supra* note 3, art V(1)(a).

³¹ van den Berg, "Setting Aside", *supra* note 24 at 267.

³² *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 [*Dallah v Pakistan*].

³³ Emmanuel Gaillard, "Enforcement of Annulled Awards: The Dutch Chapter" (2009) NYLJ at 3, online: <<http://www.newyorklawjournal.com/id=1202431190294/International-Arbitration-Law?slreturn=20170701105348>>.

³⁴ According to the language used in Article V, if a defence is breached under Article V the award "may be refused", rather than "will be refused". *New York Convention*, *supra* note 3, art V.

³⁵ *Ibid*, art V(1)(b); Fifi Junita, "'Pro Enforcement Bias' under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview" (2015) 2 *Indonesia L Rev* 140 at 157 [Junita].

³⁶ *Iran Aircraft Industries v Avco Corp*, 980 F (2d) 141 at 143 (2d Cir 1992).

Whittemore Overseas Co,³⁷ the court held that the petitioner was not prohibited from presenting his case where a tribunal refused to accommodate the timing of the presentation of a key witness. The court held that the arbitration tribunal acted within its discretion in declining to reschedule a hearing despite the inconvenience caused to the petitioner's witness, and therefore the award was enforceable. Furthermore, in the case of *Goetech-LizenzAG v Evergreen*,³⁸ the defendant failed to present witnesses at a scheduled arbitration. It was thus argued by the defendants that the arbitrator's award was not valid pursuant to Article V(1)(b); however, it was held that the defendant was not denied the opportunity to present his defence, because he had notice of the arbitration but chose not to respond.

Jurisdiction

Thirdly, under Article V(1)(c), arbitration agreements can be denied enforcement if there are jurisdictional issues present. The *New York Convention* stipulates that the award must deal with issues within the scope of the agreement.³⁹ For example, in *Fertilizer Corp of India v IDI Management*,⁴⁰ the arbitrator awarded consequential damages despite the contract expressly prohibiting such damages. The losing party took the matter to court on the basis that the arbitrator had acted *ultra vires*.⁴¹ However, a US court ruled that the arbitrators acted *intra vires* and that the award was enforceable under the *New York Convention*. Similarly, in *Encyclopaedia Universalis SA v Encyclopaedia Britannica, Inc*, it was initially held that the arbitrator's award was unenforceable because the "arbitrator exceeded their powers" because a third arbitrator was appointed when the agreement expressly provided for only two.⁴²

On appeal, the Second Circuit Court of Appeals affirmed the district court's ruling denying confirmation of the award because the composition of the board of arbitrators was not in accordance with the parties' agreement. However, the court reversed the district court's ruling that the arbitrators

³⁷ *Parsons & Whittemore Overseas Co v Societe Generale De L'Industrie Du Papier*, 508 F (2d) 969 at 975-76 (2d Cir 1974) [*Parsons & Whittemore*].

³⁸ *Goetech-LizenzAG v Evergreen*, 697 F Supp 1248 at 1253 (EDNY 1988).

³⁹ *New York Convention*, *supra* note 3, art V(1)(c).

⁴⁰ *Fertilizer Corp of India v IDI Management Inc*, 517 F Supp 948 at 958-60 (SD Ohio 1981).

⁴¹ RW Fleming, "Arbitrators and the remedy power" (1962) 47:6 Va L Rev 1199 at 1199-1225.

⁴² *Encyclopaedia Universalis SA v Encyclopaedia Britannica Inc*, 403 F (3d) 85 (2d Cir 2005) at 92 [*Encyclopaedia Universalis*].

exceeded their powers because arbitrators acting *ultra vires* is not one of the seven exclusive grounds for denying enforcement of an arbitration award under the *New York Convention*. This exemplifies the uncertainties and unpredictability of the Article V(1)(c) *ultra vires* argument, which contributes to the inconsistency and lack of clarity surrounding the defences under the *New York Convention*.⁴³ What is clear, however, is that courts are likely to refuse granting the defence, except in the clearest of circumstances, such as when a reward is specifically prohibited by a contract, thus demonstrating their narrow construal of the *ultra vires* defence.⁴⁴

This position is unlikely to change due to the “competence-competence doctrine” that allows arbitrators to determine their own jurisdiction, thus making it difficult to challenge the award on jurisdictional grounds.⁴⁵ However, the problem is more likely to arise where the point of law is manifestly wrong, or the question is of general public importance.⁴⁶ The US courts allow a mistake in law to be challenged under Article V of the *New York Convention* if there has been a manifest disregard of the law,⁴⁷ or if it can be proved that the arbitrator purposely misapplied the law.⁴⁸ For example, in *Libyan American Oil Co (LIAMCO) v Socialist People’s Libyan Arab Jamahiriya*, formerly *Libyan Arab Republic*,⁴⁹ an attempt to elevate the issue of awarding consequential damages to an issue of law was rejected despite that the arbitration clause and the fact that the underlying commercial contract excluded any award of consequential damages. The court did not want to second guess the arbitrator’s construction of the parties’ agreement, nor act in the arbitrator’s role and emphasized that “the standard of review of an arbitration award by an American court is extremely narrow”.⁵⁰ Therefore, had this been judged in another country where judicial scrutiny is higher, the outcome might have been different. However, given the influential role

⁴³ Junita, *supra* note 35 at 157.

⁴⁴ However, the award from the case of *Encyclopaedia Universalis* was vacated under Article V(1)(d) defence.

⁴⁵ Robert H Smith, “Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?” (2002) 13 *Am Rev Intl Arb* 19.

⁴⁶ *Arbitration Act 1996* (UK), c 23, s 69 [*English Arbitration Act*]; Edward Powell, “Settlement of Dispute by Arbitration in Fifteenth-Century England” (2011) 2:1 *L & History Rev* at 21-43.

⁴⁷ *Bowen v Amoco Pipeline Co*, 254 F (3d) 925 at 932 (10th Cir 2001).

⁴⁸ *Prudential-Bache v Robert D Tanner et al*, 72 F (3d) 240 (1st Cir 1995).

⁴⁹ “*Libyan American Oil Co (LIAMCO) v Socialist People’s Libyan Arab Jamahiriya*, formerly *Libyan Arab Republic*” (1982) VII YBCA 382.

⁵⁰ *Ibid* at 388.

played by US arbitration, it is likely this defence would be construed narrowly in most other countries. For instance, a German court agreed with the US arbitral tribunal's award of higher interest than was claimed, and found no breach of jurisdiction.⁵¹

Procedure

The next item in Article V, Article V(1)(d), states that if the composition of the arbitral body or the arbitral procedure was not in accordance with the agreement, or was not in accordance with the law of the seat of arbitration, then the award can be invalidated; thus, procedural impropriety could render an award unenforceable.⁵² For instance, in *Encyclopaedia Universalis*,⁵³ the award was vacated because a third arbitrator was appointed in contradiction to the agreement. The decision was reaffirmed in *Indus Risk Insurers v MAN Gutehoffnungshutte GmbH*⁵⁴ where, in contrast to *Encyclopaedia Universalis*, the court held that the panel's incorporation of a late-filed report did not constitute a circumstance where "the arbitral procedure was not in accordance with the agreement of the parties."⁵⁵ Similarly, in *Satyam Computer Services, Ltd v Venture Global Engineering, LLC*,⁵⁶ the respondent argued that the arbitrator violated agreed-upon terms by applying New York law when the agreement contained a provision stating that Michigan law should govern. It was held that there was no procedural impropriety because both laws were similar. The aforementioned court decisions illustrates the very narrow construal of the procedural impropriety defence.⁵⁷

Award not yet binding

Further, under Article V(1)(e), an arbitration award can be denied enforcement if the award had been suspended or set aside. However, this is

⁵¹ "Aloe Vera of America Inc (US) v Asianic Food (S) Pte Ltd (Singapore) and Another" (2007) XXXII YBCA 489.

⁵² David Lipton, "The Standards on Which Arbitrators Base Their Decisions: The SRO's Must Decide" (1988) 16 Sec Reg LJ 3.

⁵³ *Encyclopaedia Universalis*, *supra* note 42.

⁵⁴ *Industrial Risk Insurers v MAN Gutehoffnungshutte GmbH*, 141 F (3d) 1434 at 1442 (11th Cir 1998).

⁵⁵ *Ibid.*

⁵⁶ *Satyam Computer Services, Ltd v Venture Global Engineering LLC*, not reported in F Supp (2d) (6th Cir 2007).

⁵⁷ Junita, *supra* note 35 at 140-64.

controversial because although Article 34(2) of the 2010 UNCITRAL Arbitration Rules indicates that arbitral tribunal awards are binding, nonetheless, some national courts, such as the French court in *Putrabali v Rena*,⁵⁸ investigate whether awards are permissible under their law.⁵⁹ The inclusion of local requirements gives courts at the seat of arbitration the ability to find fraud or corruption in an arbitral tribunal. In *Chromalloy v Egypt*⁶⁰, a US court addressed an arbitration agreement between the Egyptian Air Force and an American company in which the parties had expressly agreed that the losing party would not seek review of the arbitral award. While the American company's petition for enforcement of its award was pending before the district court, Egyptian Air filed an appeal with the Egyptian Court of Appeal to nullify the award. The district court refused to recognise the decision of the Egyptian court, finding that to do so would reward or be in support of Egyptian Air's breach of the express agreement. As a result, the US court enforced the award (that was already set aside in Egypt) by contrasting the permissive nature of Article V with the mandatory nature of Article VII that entitles the use of local laws if they are more favourable for enforcement of arbitral awards than the *New York Convention* itself would be.⁶¹

However, national courts generally decline to enforce annulled awards, and therefore construe the defence narrowly. For example, in *Baker v Chevron*,⁶² and *TermoRio v Electricadora*,⁶³ the US courts did not enforce the awards that had been set aside by the courts at the seat of arbitration. Furthermore, in one case a German court refused to enforce an award that had been set aside in Russia⁶⁴ and in *EDF v Endesa*,⁶⁵ a Chilean court refused to enforce an award set aside in Argentina. While courts generally refuse enforcement of awards set aside in other States, they may be swayed to

⁵⁸ "Societe PT Putrabali Adyamulia v Societe Rena Holding et Societe Mnogutia Est Epices" (2007) Rev Arb 507.

⁵⁹ Albert Jan van den Berg, "The New York Convention of 1958: Its intended effects, its interpretation salient problem areas", in Marc Blessing, ed, *The New York Convention of 1958: A Collection of Reports and Materials Delivered at the ASA Conference Held in Zurich 2 February 1996* (Association Suisse de l'Arbitrage) SA 1996) at 87-88.

⁶⁰ *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996).

⁶¹ *Ibid* at 909-10.

⁶² *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd*, 191 F (3d) 194 (2nd Cir 1999).

⁶³ *TermoRio SA ESP v Electricadora Del Atlantico SA ESP*, 421 F Supp (2d) 87 (DDC 2006).

⁶⁴ "Oberlandsgericht, Rostock, 28 October 1999", (2000) XXV YBCA 717 at 719.

⁶⁵ "EDF Internacional SA v Endesa Internacional SA and YPF SA, Supreme Court of Chile, 8 September 2011" (2012) 5 Arbitraje: Revista de Arbitraje Comercial y de Inversiones 915.

consider such matters where basic notions of justice are challenged.⁶⁶ Nonetheless, the ability to set aside an award, which in theory offers little benefit to either party as it costs time and money, is another example of the uncertainties surrounding the use of this defence. The mere fact that speed and low cost are two of the fundamental advantages of arbitration could mean this defence is contrary to these principles.⁶⁷ Nevertheless, courts have tried to infuse some degree of clarity in this area, as evidenced by the approach taken in *Continental Transfer Technique Ltd v Federal Government of Nigeria*, where it was held that a critical element is the seat of arbitration: “If that place [where the award is sought to be enforced] is in the territory of a party to the Convention, all other Convention States are required to recognise and enforce the award, regardless of the citizenship or domicile of the notice.”⁶⁸

The factors courts take into account when making a determination on whether to stay the request for recognition and enforcement include the general objectives of arbitration, which are the expeditious resolution of disputes and the avoidance of lengthy and expensive litigation.⁶⁹ In addition, courts consider whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review. Furthermore, courts consider the characteristics of the foreign proceedings, such as whether they were brought to enforce an award.⁷⁰ As previously discussed, primary jurisdiction is possessed by courts in the country in which or under whose law the award was made, and these courts can apply domestic law in scrutinizing the award. This means that if a losing party has petitioned a court of the country with primary jurisdiction to vacate an award, a court with secondary jurisdiction (i.e. a country under which law the award was not

⁶⁶ *Corporación Mexicana de Mantenimiento Integral, S De RL de CV v Pemex-Exploración y Producción*, 962 F Supp (2d) 642 (SDNY 2013).

⁶⁷ If an award is set aside, the court automatically gains jurisdiction of the case as the parties cannot re-appeal the decision to arbitration. For further reading, see Jie Lin, “The application of the delocalisation theory in current international commercial arbitration” (2011) 22:12 Intl Co & Com L Rev 383.

⁶⁸ *Creighton Limited v Government of the State of Qatar* 181 F (3d) 118 (DC Cir 1999) citing Restatement of the Law (Third), vol 2, *Foreign Relations Law of the United States* (St Paul, Minn, 1987) at comment b. See also *Continental Transfer Technique Ltd v Federal Government of Nigeria*, 697 F Supp (2d) 46 (DDC 2010); see also *Termorio SA ESP v Electranta SP*, 487 F 3d 928 (DC Cir 2007).

⁶⁹ Richard Garnett, “International Arbitration Law: Progress towards Harmonisation” (2002) 3:2 Melbourne J Intl L 400.

⁷⁰ Gilbert Gaillard, “Enforcement of a Nullified Foreign Award” (1997) 3 NYLJ 218.

rendered) “may, if it considers it proper, adjourn the decision on enforcement of the award and may also, on application of the party claiming enforcement of the award, order the other party to give suitable security”,⁷¹ leaving the final decision of whether to vacate the award to the court of primary jurisdiction.

Arbitrability of Dispute

Under Article V(2)(a), an arbitration agreement can be denied enforcement if the subject-matter of the dispute is not arbitrable under the law of the country where enforcement is sought. This concept is known as the ‘arbitrability’ concept. It means that in contrast to commercial contracts, fair adjudication of public interest matters - such as family, criminal or bankruptcy disputes - cannot be done in a private arbitration forum, where the ability of courts to control the process, the decision making power, and the application of the law is strictly limited. These public law issues have to be raised and tried before an open/public court. On these grounds, for example, a Russian court declined to enforce an arbitral award holding that corporate governance matters are not arbitrable.⁷² The court stated that some matters concerning public interest must be resolved through a public domain. Like other defences, and despite the existence of this defence, it is rarely successful in practice.⁷³

Public Policy

Finally, the *New York Convention* provides that if recognition or enforcement of an award would be contrary to the public policy of the country where enforcement is sought, then the award can be set aside.⁷⁴ However, the *New York Convention* does not define “public policy,” leaving the definition broad and open to interpretation. For example, in *Parsons & Whittemore Overseas Co Inc v Societe Generale de L’Industrie du Papier*,⁷⁵ public policy was held to be applicable only where enforcement would violate the

⁷¹ *New York Convention*, *supra* note 3, art VI.

⁷² *Maximov v Novolipetsky Metallurgicheskiy Kombinat* [Ruling of the Supreme Commercial Arbitration Court] 2012, No. N VAS-15384/11 (Russia).

⁷³ William W Park, “Private Adjudicators and the public interest: the expanding scope of International Arbitration” (1986) 12 *Brook J Intl L* 629.

⁷⁴ *New York Convention*, *supra* note 3, art V(2)(b).

⁷⁵ *Parsons & Whittemore*, *supra* note 37.

State's most basic notions of morality and justice. A basic notion of Saudi Arabian public policy is that the award of monetary interest, *riba*, is forbidden, thus enforcement of an interest award would be contrary to Saudi public policy.⁷⁶ Furthermore, in *Karaha Bodas Co v Perusahaan Pertambangabn*, District Judge Rosenthal stressed that "the general pro-enforcement bias informing the Convention points to a narrow reading of the public policy defence."⁷⁷ This case is significant because it provides a clear example where a court is directly endorsing the narrow approach.

English courts have also construed this defence narrowly, with one commentator remarking that the defence may never be applied.⁷⁸ However, in *Soleimany v Soleimany*,⁷⁹ the English courts applied the public policy defence broadly to prevent arbitration facilitating illegal contracts.⁸⁰ Even though the public policy defence was successful in *Soleimany*, it was nevertheless construed narrowly in *Westacre Investment Inc v Jugoiimport-SPDR Holding Co Ltd*⁸¹ where the court rejected the allegation that the award could not be enforced due to fraud and corruption as this issue was already *res judicata*.⁸² The court suggested that they were in support of arbitration and less inclined to venture into public policy issues pertaining to corruption.⁸³ Furthermore, the US court in *Sonatrach (Algeria) v Distrigas (United States District Council)*⁸⁴ also suggested that public policy defences should be construed narrowly, because in an increasingly interconnected world parties should be able to

⁷⁶ Interest means money paid regularly at a particular rate for the use of money lent, or for delaying the repayment of a debt. See Kristin T Ray, "The New York Convention and Saudi Arabia: Can a Country Use The Public Policy Defence To Refuse Enforcement of Non Domestic Arbitral Awards?" (1995) 18 *Fordham Intl LJ* 920.

⁷⁷*Karaha Bodas Co v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F (3d) 274 at 288 (5th Cir 2004). On Chinese public policy, see *Hemofarm et al v Yongning*, Min Si Ta Zi No. 11, People's Court Press, 2009 (Supreme People's Court of China, June 2008).

⁷⁸ The *English Arbitration Act* provides that a party may challenge an award based on "serious irregularity affecting the tribunal, the proceedings or the award". *English Arbitration Act*, *supra* note 46, s 68.

⁷⁹ *Soleimany v Soleimany* (1998), [1999] QB 785 (CA Eng).

⁸⁰ *Ibid.*

⁸¹ *Westacre Investment Inc v Jugoiimport-SPDR Holding Co Ltd* (1999), [1999] CLC 1176 (CA Eng) [*Westacre*].

⁸² A matter that has already been adjudicated and can no longer be pursued by the parties involved.

⁸³ Jan Paulsson, "Delocalisation of International Commercial Arbitration: When and Why it Matters" (1983) 32 *ICLQ* 53.

⁸⁴ *Sonatrach (Algeria) v Distrigas Corporation*, 80 BR 606 (Massachusetts 1987).

freely negotiate internationally recognized and binding agreements.⁸⁵ Thus, the US endorses the view that a foreign award would have to violate a State's most basic concepts of morals and justice in order to deny enforcement.⁸⁶ Similarly, Indian courts have endorsed this approach by emphasizing that public policy defences should only apply to matters of national interest or justice and morality.⁸⁷

It is, however, difficult to make a determination on whether this defence is uniformly construed narrowly, as States have differing interpretations of public policy and not all States have construed the public policy defence narrowly. For instance, the UAE has extended the public policy defence to ownership rights over property.⁸⁸ Russian courts have used public policy to decline enforcement of awards where damages are disproportionate to the breach.⁸⁹ Under the Chinese law, public policy includes social interests in addition to legal principles.⁹⁰ This approach is reinforced by an obligation on the Chinese courts to consider public policy factors, which are wide, in every case.⁹¹ For example, in the famous *Heavy Metal* case,⁹² a Chinese court rejected enforcement of an arbitral award because the performance of heavy metal music went contrary to national sentiments as well as societal interests. It follows that an award could be denied enforcement where one State does

⁸⁵ *Ibid* at 612; *Federal Arbitration Act*, USC 9 (1925), ss 10(a) outlines criteria as where: (1) "the award was procured by corruption, fraud or undue means (2) there was evident partiality or corruption in the arbitrators, (3) the arbitrators were guilty of misconduct ...or...other misbehaviour by which the rights of any party have been prejudiced."; Roberts S Matlin, "The Federal Courts and the Enforcement of Foreign Arbitral Awards" (1984) 5 Pace L Rev 215 at 179.

⁸⁶ *Parsons & Whittemore*, *supra* note 37 at 974.

⁸⁷ "Renusagar Power Co Ltd (India) v General Electric Co (US)" (1995) XX YBCA 681 at 702, para 66.

⁸⁸ *Baiti Real Estate Development v Dynasty Zarooni Inc*, Petition No. 14 (Dubai Court of Cassation 2012) (United Arab Emirates).

⁸⁹ Presidium of Supreme Commercial Arbitazh Court, Information Letter No 156, 26 February 2013, s 6 (Russia).

⁹⁰ Lanfang Fei, "Public Policy as a bar to enforcement of international arbitral awards: A review of the Chinese approach" (2010) 26 Arb Intl 301 at 303 [Fei].

⁹¹ Randal Peerenboom, "Seek truth from the facts: An empirical study of enforcement of arbitral awards in the PRC" (2001) 49 Am J Comp L 39; Explanations on and Answers to Practical Questions in the Trial of Foreign-Related Commercial and Maritime Cases No 1, (Issued by the Supreme People's Court, April 8 2004), art 43 (China).

⁹² Fei, *supra* note 90 at 307, citing *American Production Co and Tom Flight Co v Chinese Women's Travel Agency Ta*, 1997 No. 35 (Sup. People's Ct. reply, issued on 26 December 1997) [*Heavy Metal*].

not tolerate a behaviour that it considers contrary to societal interest while such an award remains enforced in another State despite allegations of fraud and impropriety, as in *Westacre*. Although respect for a State's culture is understandable, public policy should not be used as a barrier to enforcement of arbitral awards for seemingly archaic matters. A line must be drawn between social factors and threats to a nation's justice and security.

Proper Forum for Collecting under the Award

Upon securing an award, a winning party will seek to collect. Commonly, the award is enforced under the *New York Convention* provided that the debtor has assets within the State where the enforcement is sought. However, in an event where a State has no jurisdiction over the debtor, it would not be appropriate under the principle of *forum non conveniens* ('not a convenient or appropriate forum') to grant enforcement where an adequate alternative forum exists.⁹³ Although the *forum non conveniens* principle is construed narrowly for the purposes of recognition and enforcement of international awards, it can nonetheless be problematic and lead to uncertainty. For example, in *Base Metal Trading Ltd v OJSC Novokuznetsky Aluminum Factory*, it was held that the property against which the collection under the award was sought had to relate to the claimants' cause of action,⁹⁴ while in *Glencore Grain Rotterdam BV v Shivnath Rai Harnarain* it did not have to be so related.⁹⁵ Thus, the principle of *forum non conveniens* adds another domestic law consideration for the enforceability of awards.

Estoppel

Estoppel has been raised as an additional ground for refusing recognition and enforcement of an award. A party may be found to have waived its right to oppose a recognition and enforcement request if it did not act on an

⁹³ See Victor Bonnin Reynes, "Forum non conveniens: A Hidden Ground to Refuse Enforcement of Arbitral Awards in the United States" (2013) 30:2 J Intl Arb 165 at 165-77.

⁹⁴ *Base Metal Trading, Ltd v OJSC Novokuznetsky Aluminum Factory*, 283 F (3d) 208 (CA 4th Cir 2002).

⁹⁵ *Glencore Grain Rotterdam BV v Shivnath Rai Harnarain Co*, 284 F (3d) 1114 (CA 9th Cir 2002); see also *Monegasque de Reassurances v Nak Naftogaz of Ukraine and State of Ukraine*, 311 F (3d) 488 (CA 2nd Cir 2002). In this case there was uncertainty as to whether the correct party was before the court and since it was determined that Ukrainian law could resolve the issue, the matter was resolved in a Ukraine court.

alleged impropriety despite becoming aware of it during the arbitral process. Estoppel was argued, for example, in *AAOT v Trade Services Inc*, where the party did not raise the alleged procedural impropriety until after the award was rendered.⁹⁶ The court found that the party's failure to act at the time was fatal to the argument.

Furthermore, in *La Societe Nationale Pour la Recherche La Production, Le Transport, La Transformation et La Commercialisation des Hydrocarbures v Shaheen Natural Resources Company Inc*, Shaheen lost its objection over the "alleged untimeliness of the award" because it was not raised before the tribunal in a timely manner.⁹⁷ The court concluded in this case that refusal of the arbitral award at this stage would go contrary to the goal and the purpose of the *New York Convention*.

THE WAY FORWARD

The above analysis has shown that grounds for refusing recognition and enforcement under the *New York Convention* are numerous, and can be subject to different interpretation by the courts of the country where an award is sought to be enforced. The differences in interpretation contribute to the absence of a uniform international approach to Article V.

A number of academic commentators have made suggestions on ways of reforming enforcement under the *New York Convention* in order to create a uniform approach. Lu made a similar observation by arguing that arbitration panels are free to choose how they conduct hearings because the *New York Convention* is too vague.⁹⁸ Lu's criticism gives rise to a proposal for a non-exhaustive international list outlining minimum standards to be met by international arbitration panels. Developing uniform standards will prevent recurring inconsistencies generated by domestic interpretation. It will provide guidelines for parties to follow, leading to predictability and fair outcomes.

⁹⁶ *AAOT Foreign Econ Association (VO) Technostroyexport v International Development & Trade Services Inc*, 139 F (3d) 980 (CA 2nd Cir 1998).

⁹⁷ *La Societe Nationale Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialisation des Hydrocarbures v Shaheen Natural Resources Company Inc*, 585 F Supp 57, 62, 65 (SDNY 1983).

⁹⁸ May Lu, "The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defences to oppose Enforcement in the United States and England" (2006) 23:3 *Ariz J Intl & Comp L* 747 at 755.

Wheless further argued that in order to encourage the use of arbitration, arbitral tribunals should adhere to procedural rules.⁹⁹ Quigley agrees with Wheless, that justice is at the heart of the grounds for refusing recognition and enforcement under the *New York Convention* because they embody the basic notion of due process.¹⁰⁰ This is reasonable, and ought to be adopted as a universal *modus operandi*. Furthermore, Mehren argues that the grounds for refusing enforcement are wide and cover all eventual irregularities, thus promoting fairness and equality to those who choose arbitration.¹⁰¹ The privilege of taking the matter to court helps to overcome the involvement of the arbitration panel and provides the parties to arbitration with confidence of achieving justice from an impartial body. However, the whole purpose of arbitration is to avoid court intervention; therefore, broad application of the defences could undermine the whole process.

Paulson does not support the arbitration process being scrutinized with court intervention, but concedes that this is unavoidable because when an arbitration award requires enforcement or appeal, the parties have no choice but to resort to courts.¹⁰² Parties can limit courts' intervention by relying on limitation or reservation clauses in the arbitration agreement. A limitation clause would provide parties the opportunity to decide on a course of action in the event of an appeal or any challenge with respect to the award. For example, on the occurrence of such a challenge, parties can agree in advance to take the matter to another panel of arbitrators. This option will enable parties to avoid their matters automatically going to a local court.

Furthermore, with the continuing growth of arbitration comes an influx of complex cases, which involve multiple contracts with multiple parties from various States. Although domestic courts are competent and authoritative adjudicators, the logistics and complexity of local procedures can be an

⁹⁹ Elise P Wheless, "Recent Development Article V(1)(b) of the New York Convention" (1993) 7 *Emory Intl L Rev* 805 at 826.

¹⁰⁰ Leonard V Quigley, "Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards" (1961) 70:7 *Yale LJ* 1049, online: <<http://www.jstor.org.uml.idm.oclc.org/stable/pdf/794350.pdf>>.

¹⁰¹ Robert Mehren, "Enforcement of Foreign Arbitral Awards in the United States" (1998) 771 *Nw J Intl L & Bus* 147 at 156-57, online: <<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1113&context=njlilb>>.

¹⁰² Jan Paulson, "Delocalisation and International Commercial Arbitration: When and Why it matters" (1983) 32:1 *ICLQ* 53 at 58, online: <<http://heinonline.org.uml.idm.oclc.org/HOL/Page?public=false&handle=hein.journals/inco1q32&page=53&collection=journals>>.

impediment to handling a process that was designed to be streamlined and responsive to the commercial reality. Moreover, participation of a State as a party opposing the recognition and enforcement process in its local court adds an extra layer of complexity and may pose a challenge to the adjudicator, especially in countries where the rule of law is less developed. It would therefore be in the interests of justice if adjudication of challenges to arbitral awards were done in an international court forum. As a way forward, the creation of a world court of arbitration that has exclusive jurisdiction to assess whether the grounds under Article V are properly invoked is desirable and merits serious consideration.

On that analysis, it is clear that grounds to refuse recognition and enforcement under the *New York Convention* are constructed narrowly within its parameters. In fact, the reasons to refuse enforcement should be grounded in the principles of fundamental justice as the only persuasive grounds for challenging arbitral awards.¹⁰³ Although the majority of local courts appear to agree with this concept, some States use public policy as a means of limiting enforcement of arbitral awards. On balance, however, it is reasonable to conclude that the *New York Convention* is internationally respected and adhered to given that courts endorse ninety-five per cent of international arbitral awards.

CONCLUSION

In conclusion, there seems to be a consensus amongst member States on the approach that should be used to interpret the enumerated grounds invoked to deny recognition and enforcement of international arbitral awards under the *New York Convention*. Courts encourage narrow application of the defences in order to preserve the autonomy of arbitration and promote it as an alternative dispute resolution mechanism. However, a lack of uniformity and consistency in arbitral practice remains a major challenge. This calls for greater international cooperation and consultation among judiciaries and international arbitral tribunals in order to achieve uniformity and consistency in international arbitration.

¹⁰³ van den Berg, "Uniform Interpretation", *supra* note 23 at 268.

