United Nations A/CN.9/786

General Assembly

Distr.: General
29 May 2013

Original: English

United Nations Commission on International Trade Law
Forty-sixth session
Vienna, 8-26 July 2013

Settlement of commercial disputes

UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): Excerpt, guide on article VII

Note by the Secretariat

1. At its forty-first session, in 2008, the Commission agreed that work should be undertaken to eliminate or limit the effect of legal disharmony regarding the interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the Convention"). The Commission requested the Secretariat to study the feasibility of preparing a guide on the Convention, with a view to promoting a uniform interpretation and application of the Convention, thus avoiding uncertainty resulting from its imperfect or partial implementation and limiting the risk that practices of States diverge from the spirit of the Convention. Also, at that session, the Commission agreed that, resources permitting, the activities of the Secretariat in the context of its technical assistance programme could include dissemination of information on the judicial interpretation of the New York Convention, which would usefully complement other activities in support of the Convention.[1] At its forty-fourth and forty-fifth sessions, in 2011 and 2012, the Commission had been informed that the Secretariat was carrying out the project related to the preparation of a guide on the Convention, in close cooperation with G. Bermann (Columbia University School of Law) and E. Gaillard (Sciences Po School of Law), who had established research teams to work on the project. The Commission was informed that a website (www.newyorkconvention1958.org) had been established in order to make the information gathered in preparation of the guide on the New York Convention

[1] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 and corrigendum* (A/63/17 and Corr.1), paras. 355 and 360.

V.13-83819 (E) 040613 050613

publicly available.[2] The annex hereto contains an excerpt of the guide on the New York Convention for the consideration of the Commission. The Commission may wish to note that, resources permitting, the guide should be completed by December 2013.

[2] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 252; and ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 135.

Annex: UNCITRAL Guide on the New York Convention

Excerpt — article VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

TRAVAUX PRÉPARATOIRES ON ARTICLE VII

The *travaux préparatoires* on article VII are contained in the following documents:

Draft Convention on the Recognition and enforcement of Foreign Arbitral Awards and comments by Governments and Organizations:

- Report of the Committee on the Enforcement of International Arbitral Awards: E/2704 and annex.
- Comments by Governments and Organizations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: E/2822, annexes I-II; E/2822/Add.1, annex I.

United Nations Conference on International Commercial Arbitration:

- Amendments to the Draft Convention Submitted by Governmental Delegations: E/Conf. 26/7; E/Conf. 26/L.16; E/Conf. 26/L.44.

Summary records:

- Summary Records of the Eighteenth, Nineteenth and Twentieth Meetings of the United Nations Conference on International Commercial Arbitration: E/CONF.26/SR.18; E/CONF.26/SR.19; E/CONF.26/SR.20.
- Summary Record of the Eighth Meeting of the Committee on the Enforcement of International Arbitral Awards: E/AC.42/SR.8. See also E/AC.42/4/Rev.1.

(Available on the Internet at www.uncitral.org).

ARTICLE VII(1)

INTRODUCTION

1. Article VII(1) governs the relationship of the New York Convention with other treaties and domestic law and is considered to be one of the cornerstones of the

Convention.[1] By stipulating that the Convention shall not affect the validity of other treaties concerning the recognition and enforcement of arbitral awards, and facilitating the application of rules on recognition and enforcement that may be more liberal than the Convention, article VII(1) ensures the Convention's compatibility with other international instruments as well as its durability, with the result that foreign arbitral awards are recognized and enforced to the greatest extent possible.

2. By virtue of article VII(1), Contracting States will not be in breach of the Convention by enforcing arbitral awards pursuant to provisions of domestic laws or treaties that are more favourable to enforcement. This reflects the notion that the New York Convention sets a "ceiling", or the maximum level of control, which national courts of the Contracting States may exert over the recognition and enforcement of arbitral awards.[2]

3. Article VII(1) was based on the text of Article 5 of the Convention on the Execution of Foreign Arbitral Awards (done in Geneva, 26 September 1927) (the "Geneva Convention"). Article 5 of the Geneva Convention granted an interested party the right to avail itself of an arbitral award in the manner and to the extent allowed by the law or treaties of the State where the award was sought to be relied upon.[3]

4. The drafters of the New York Convention built on Article 5 of the Geneva Convention by adding the rule that the provisions of the Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of awards entered into by the Contracting States.[4] This first part of article VII(1) has been referred to as "the compatibility provision". The second part of article VII(1), which allows an interested party to rely on a more favourable treaty or domestic law concerning recognition or enforcement instead of the Convention, has become widely known as the "more-favourable-right" provision.[5]

---

[1] One commentator has described this provision as "the treasure, the ingenious idea" of the New York Convention. See Philippe Fouchard, *Suggestions pour accroître l'efficacité internationale des sentences arbitrales*, 1998 REV. ARB. 653, at 663.

[2] See Philippe Fouchard, *La portée internationale de l'annulation de la sentence arbitrale dans le pays d'origine*, 1997 REV. ARB. 329; Emmanuel Gaillard, *Enforcement of Awards Set Aside in the Country of Origin: The French Experience*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION (A. J. van den Berg ed., 1999); Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, in ICCA CONGRESS SERIES NO. 14, 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 689 (A. J. van den Berg ed., 2009).

[3] For the legislative history of article VII(1) of the New York Convention and Article 5 of the 1927 Geneva Convention, see Gerald H. Pointon, *The Origins of Article VII.1 of the New York Convention 1958*, in LIBER AMICORUM EN L'HONNEUR DE SERGE LAZAREFF 499 (L. Lévy, Y. Derains eds., 2011).

[4] *Travaux préparatoires*, Report of the Committee on the Enforcement of International Arbitral Awards, E/AC.42/4/Rev.1, p. 15.

[5] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 81; Emmanuel Gaillard, *The Relationship of the New York Convention with other Treaties and with Domestic Law*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL

5. While it may be useful for certain analytical purposes to bisect the paragraph into two parts, article VII(1), when read as a whole, enshrines the notion of "more favourable right". The first part of article VII(1) is merely a precursor to the second part, confirming that the validity of other treaties is not affected by the Convention, such that they can be relied upon by an interested party if more favourable. Thus, article VII(1) ensures that whenever the New York Convention proves to be less favourable than the provisions of another treaty or law of the country where recognition or enforcement is sought by a party seeking "to avail himself of an arbitral award", the more favourable rules shall prevail over the rules of the New York Convention.

ANALYSIS

A. General principles

a. Meaning of "interested party"

6. Article VII(1) provides that, in addition to the New York Convention, any "interested party" shall not be deprived of the right to rely on a more favourable domestic law or treaty.

7. A Swiss court has confirmed that the term "interested party" refers only to the party seeking enforcement of an award, and not to the party resisting enforcement.[6] In a case where an Italian party sought enforcement of an arbitral award against a Swiss party, the Zurich Court of First Instance rejected the argument of the Swiss party that it was, in application of article VII(1), entitled to rely on the more stringent conditions of the Swiss-Italian bilateral treaty on the Recognition and Enforcement of Judgments of 1933 to resist enforcement of the award. In the words of the Court, "the more-favourable-right principle does not provide the party opposing enforcement with further grounds for refusal than are listed in the Convention."

8. As leading commentators have noted, allowing a respondent to assert the more stringent conditions of another law or treaty would run counter to the pro-enforcement basis of the New York Convention.[7]

9. According to the *travaux préparatoires* to the New York Convention, an "interested party" may also be a Contracting State. During the negotiation of the Convention, the State delegates considered that to expressly stipulate this eventuality would be superfluous, as it was self-evident from the text of

---

AWARDS: THE NEW YORK CONVENTION IN PRACTICE (E. Gaillard, D. Di Pietro eds., 2008), at 70.

[6] *Italian party v. Swiss company*, Bezirksgericht, Zurich, Switzerland, 14 February 2003.

[7] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 333-34; Emmanuel Gaillard, *The Relationship of the New York Convention with other Treaties and with Domestic Law*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE (E. Gaillard, D. Di Pietro eds., 2008), at 74-75.

article VII(1).[8] At the date of this Guide, there is, however, no publicly available case law where a State has sought to rely on article VII(1).

b. Subject matter of more favourable right

10. Article VII(1) refers without restriction to "any right" allowed by the laws or the treaties of the country where such award is sought to be relied upon. The German Federal Court of Justice has confirmed that, in application of article VII(1), an enforcing court may take into account the domestic law's conflict-of-laws rules, which may result in the application of a foreign law more favourable to recognition and enforcement than the New York Convention.[9]

c. Party request not necessary

11. Article VII(1) provides that the Convention shall not deprive any "interested party" from "availing" itself of an arbitral award.

12. Most courts have adopted the view that an interested party need not explicitly request recognition or enforcement on the basis of laws or treaties that are more favourable to enforcement.[10] As a court will not be in breach of the New York Convention by applying more liberal rules on recognition and enforcement, it may rely on article VII(1) of its own motion. The French Court of Cassation, accordingly, has stated that "[t]he judge cannot refuse enforcement when its own national system permits it, and (…) he should, even *sua sponte*, research the matter if such is the case."[11]

d. Multiple enforcement regimes permissible

13. In certain decisions, German courts have considered that a party seeking to rely on another treaty or domestic law by virtue of article VII(1) must rely on it in its entirety, to the exclusion of the New York Convention.[12] According to these decisions, it would not be permissible for a party to base a request for enforcement on the Convention and, at the same time, rely on the more liberal formal requirements for an arbitration agreement under German law.

---

[8] *Travaux préparatoires*, Report of the Committee on the Enforcement of International Arbitral Awards, E/AC.42/4/Rev.1, p. 15.

[9] Bundesgerichtshof, Germany, III ZB 18/05, 21 September 2005, SchiedsVZ 2005, 306, where the application of German conflict-of-laws rules via article VII(1) of the Convention directed the Court to apply Dutch law, which contained more liberal formal requirements for an arbitration agreement than those under article II of the Convention.

[10] *Société Pabalk Ticaret Sirketi v. Société Anonyme Norsolor*, Court of Cassation, France, 83-11.355, 9 October 1984, with English translation in 24 ILM 360 (1985). German courts have adopted the same view. See Bundergerichtshof, Germany, III ZB 50/05, 23 February 2006, SchiedsVZ 2006, 161. The Swiss Federal Supreme Court has deviated from this view, without discussion. *Sudan Oil Seeds Co. Ltd. (U.K.) v. Tracomin S.A. (Switz.)* Federal Supreme Court, Switzerland, 5 November 1985, Arrêts du Tribunal Fédéral (1985) 111 Ib 253.

[11] *Société Pabalk Ticaret Sirketi v. Société Anonyme Norsolor*, Court of Cassation, France, 83-11.355, 9 October 1984, with English translation in 24 ILM 360 (1985) at 363.

[12] Bundesgerichtshof, Germany, III ZB 18/05, 21 September 2005; Bundesgerichtshof, Germany, III ZB 50/05, 23 February 2006; Bundesgerichtshof, Germany, III ZB 68/02, 25 September 2003. See also Albert Jan Van den Berg, *The German Arbitration Act 1998 and the New York Convention 1958*, in LIBER AMICORUM KARL-HEINZ BOCKSTIEGEL (Robert Briner et al. eds., 2001).

14. A view advanced by a number of other German courts[13] is that the pro-enforcement policy of the Convention would permit an interested party to select the more favourable rules and combine them with the provisions of the New York Convention.[14] For instance, a Higher Regional Court has enforced an award pursuant to procedural requirements under German domestic law, which are more favourable than article IV of the Convention, while applying article V of the Convention in respect of possible grounds for refusal to enforce.[15] A court in the United States of America has also granted enforcement to a foreign arbitral award by combining elements of the New York Convention and more favourable domestic law.[16]

15. Furthermore, as described at para. 17 below, the Swiss Federal Supreme Court has held that where competing legal provisions concerning recognition and enforcement apply to the enforcement of an arbitral award, precedence should be given to "the provision that allows for making such recognition and enforcement easier," thus implicitly accepting a fragmented application of two systems.[17]

B. Interaction of the Convention with other treaties

16. Certain arbitral awards or agreements may fall under the field of application of the New York Convention as well as the field of application of a multilateral or bilateral treaty. Article VII(1) provides the basic rule that the Convention shall not affect the validity of multilateral or bilateral treaties concerning the recognition and enforcement of arbitral awards entered into by the Contracting States to the Convention, and that an interested party may rely on those treaties if they are more favourable to enforcement than the Convention. This is in keeping with the broader objective of the New York Convention to provide for the recognition and enforcement of arbitral awards and agreements whenever possible, either on the basis of its own provisions or those of another instrument.

17. As the Swiss Federal Supreme Court has confirmed, article VII(1) thus derogates from the rules that normally govern the application of conflicting provisions of treaties, namely that a later legal rule prevails over a prior inconsistent legal rule ("*lex posterior derogat legi priori*") and that wherever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific ("*lex specialis derogat legi generali*"). As the Court explained, the Convention replaces these rules with the principle of maximum effectiveness ("*règle d'efficacité maximale*") by providing that the instrument which prevails is neither the more recent nor the more specific, but instead that which is the more

---

[13] For instance, Oberlandesgericht, Celle, 8 Sch 06/06, 31 May 2007; Oberlandesgericht, Karlsruhe, 9 Sch 02/07, 14 September 2007; Oberlandesgericht, Köln, Germany, 9 Sch 01-03, 23 April 2004; Oberlandesgericht, München, Germany, 34 Sch 31/06, 23 February 2007.

[14] JULIAN LEW AND LOUKAS A. MISTELIS, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, at 697-698 (2003); FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, at 350 (E. Gaillard, J. Savage eds., 1996).

[15] Oberlandesgericht, Köln, Germany, 9 Sch 01-03, 23 April 2004.

[16] *Chromalloy Aeroservices Inc. v. Ministry of Defence of the Republic of Egypt*, 939 F. Supp. 907 (D.D.C.1996).

[17] *Denysiana S.A. v. Jassica S.A.*, Federal Supreme Court, Switzerland, March 14, 1984, Arrêts du Tribunal Fédéral 110 Ib 191, 194.

favourable to the enforcement of the foreign arbitral award. In the words of the Court, "[t]his solution corresponds to the so-called rule of maximum effectiveness (…). According to this rule, in case of discrepancies between provisions in international conventions regarding the recognition and enforcement of arbitral awards, preference will be given to the provision allowing or making such recognition and enforcement easier, either because of more liberal substantive conditions or because of a simpler procedure. This rule is in conformity with the aim of bilateral or multilateral conventions in this matter, which is to facilitate, as much as possible, the recognition and enforcement of arbitral awards."[18]

18. While the provisions of the New York Convention rarely compete with other international instruments concerning recognition and enforcement, where courts have been faced with such conflicts, they have typically resolved them under the more-favourable-right provision under article VII(1).

a. European Convention of 1961

19. The European Convention on International Commercial Arbitration (done in Geneva, 21 April 1961) (the "European Convention") is one of the few regional instruments containing more liberal rules governing the arbitral process than the New York Convention. It is the first international instrument to treat international arbitration as a whole, and consequently to provide rules governing all of its various stages. As of the date of this Guide, 32 States are bound by the European Convention.[19]

20. Under the European Convention, the recognition and enforcement of arbitral awards is considered only very indirectly.[20] Accordingly, where an arbitration agreement or award falls within the field of application of both the European Convention and the New York Convention, courts have correctly considered that the provisions of the New York Convention concerning enforcement complement the provisions of the European Convention and that they need not apply the more-favourable-right provision at article VII(1). For instance, when considering an application for the enforcement of a foreign arbitral award, a Spanish court applied

---

[18] *Denysiana S.A. v. Jassica S.A.*, Federal Supreme Court, Switzerland, March 14, 1984, Arrêts du Tribunal Fédéral 110 Ib 191, 194. Courts in Spain have also endorsed that article VII(1) follows the principle of maximum effectiveness. See *Actival Internacional S.A. v. Conservas El Pilar S.A.*, Tribunal Supremo, Spain, 16 April 1996, 3868/1992; *Unión de Cooperativas Agrícolas Epis-Centre v. La Palentina S.A.*, Tribunal Supremo, Spain, 17 February 1998, 3587/1996, 2977/1996; *Delta Cereales España S.L. v. Barredo Hermanos S.A.*, Tribunal Supremo, Spain, 6 October 1998.

[19] For the current status of the European Convention, see the United Nations Treaty Collection, at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en.

[20] Pursuant to its article I, the European Convention applies to "arbitration agreements concluded for the purpose of settling disputes from international trade between physical legal persons having, when concluded the agreement, their habitual place of residence or their seat in different Contracting States" and to "arbitral procedures and awards based on" such agreements. Its application thus differs from that of the New York Convention in two respects: (i) the European Convention applies only to disputes arising from international trade; and (ii) the European Convention requires that the parties to the arbitration agreement come from different Contracting States. The scope of application of the New York Convention contains neither of these two requirements and is thus broader.

both instruments, noting that "the European Convention concerns the applicable law and the jurisdiction of judicial authorities and arbitrators, whereas the New York Convention concerns the recognition and enforcement of arbitral awards."[21] German courts have affirmed the complementary nature of these instruments by reference to Section 1061(1) of the German Code of Civil Procedure, which provides that the stipulations of other treaties concerning the recognition and enforcement of arbitral awards will remain unaffected by the application of the New York Convention.[22]

b. Panama Convention of 1975

21. The Inter-American Convention on International Commercial Arbitration (done in Panama, 30 January 1975) (the "Panama Convention") was modelled after the New York Convention and written to be fully compatible with it.[23] The Panama Convention contains provisions concerning the recognition and enforcement of awards which are similar, but not identical, to those found in the New York Convention.[24] At the date of this Guide, the Panama Convention is applicable in 19 countries, all of which are also Contracting Parties to the New York Convention.[25]

22. According to a 2008 survey of decisions from Latin America, most Latin American States that are party to both instruments have relied exclusively on the New York Convention when recognizing and enforcing foreign arbitral awards.[26]

23. The majority of reported cases expressly discussing the Panama Convention were rendered in the United States of America, whose Federal Arbitration Act contains provisions governing the relationship between the New York Convention

---

[21] *Nobulk Cargo Services Ltd. v. Compania Española de Laminacion S.A.*, Tribunal Supremo, Spain, 27 February 1991. See also the same view expressed by French courts in *Société Européenne d'Etudes et d'Entreprises (S.E.E.E.) v. République Socialiste Fédérale de Yougoslavie*, Court of Appeal, Rouen, France, 13 November 1984.

[22] For instance, Oberlandesgericht, München, Germany, 34 Sch 019/08, 27 February 2009. In contrast, where a party resisting enforcement has alleged that an interested party may not rely on both the European Convention and the New York Convention in support of its request for enforcement, an Italian court has referred to the compatibility in the first clause of article VII(1) to support its finding that both instruments would apply. See *Arenco-BMD Maschinenfabrik GmbH v. Societá Ceramica Italiana Pozzi-Richard Ginori S.p.A.*, Corte di Appello, Milan, Italy, 16 March 1984.

[23] Albert Jan van den Berg, *The New York Convention 1958 and the Panama Convention of 1975: Redundancy or Compatibility?*, 5 ARB. INTL. 214 (1989).

[24] For instance, unlike article II(3) of the New York Convention, the Panama Convention nowhere specifically requires the courts of a Contracting State to refer the parties to arbitration when seized of an action subject to an arbitration agreement falling under its field of application. While article 5 of the Panama Convention largely incorporates the grounds for refusal under article V of the New York Convention, the precise wording of these articles differs in several respects. Furthermore, unlike the New York Convention, the Panama Convention contains provisions governing other aspects of the arbitral process, such as the appointment of arbitrators (article 2), the conduct of the arbitral proceedings (article 3).

[25] The current status of the Panama Convention is available online at: www.oas.org/juridico/english/sigs/b-35.html.

[26] Cristián Conejero Roos, *The New York Convention in Latin America: Lessons From Recent Court Decisions*, in 2009 GLOBAL ARBITRATION REVIEW, THE ARBITRATION REVIEW OF THE AMERICAS 21.

and the Panama Convention. Section 305 of the Federal Arbitration Act provides that when both Conventions are applicable to an arbitral award or agreement, the Panama Convention shall apply if a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Panama Convention and are member States of the Organization of American States. At the same time, Section 302 of the Federal Arbitration Act mandates that certain provisions of the Federal Arbitration Act shall apply together with the provisions of the Panama Convention.[27]

24. In practice, courts in the United States of America have applied the New York Convention and the Panama Convention as if they were identical. For instance, in a case before the United States District Court, when a party seeking to enforce an award relied on both the New York Convention and the Panama Convention, the Court limited its consideration to the New York Convention on the grounds that "codification of the Panama Convention incorporates by reference the relevant provisions of the New York Convention (…) making discussion of the Panama Convention unnecessary."[28]

25. The effect of article VII(1) in cases where both the New York Convention and the Panama Convention apply has not been considered in the reported case law. In specific cases, however, the Panama Convention may offer enhanced enforcement options compared to those of the New York Convention. For instance, Article 4 of the Panama Convention may, in certain cases, imply more favourable options for enforceability for arbitral awards than the New York Convention by equating final arbitral awards with final judicial judgments.[29] Pursuant to the more-favourable-right provision of the New York Convention, a party seeking to enforce an award falling under both instruments could take advantage of such an option.

c. Bilateral treaties

26. In accordance with article VII(1), an interested party may base its request for enforcement on a bilateral agreement that specifically concerns the recognition and

---

[27] United States Code, Title 9 — Arbitration, § 302, which specifies: "Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter 'the Convention' shall mean the Inter-American Convention."

[28] *TermoRio S.A. E.S.P. v. Electrificadora del Atlantico S.A. E.S.P.*, District Court, District of Columbia, United States of America, 17 March 2006, 421 F. Supp. 2d 87, (D.D.C. 2006), at footnote No. 4, p.91. See also *Productos Mercantiles E Industriales, S.A. v. Faberge USA Inc.*, United States Court of Appeals, Second Circuit, United States of America, 18 April 1994, 23 F.3d. 41 (2d Cir. 1994), at 45, where the court noted, "The legislative history of the Inter-American Convention's implementing statute … clearly demonstrates that Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention."

[29] Article 4 of the Panama Convention provides as follows: "An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties." This provision however mitigates the equality of treatment between arbitral awards and judicial judgements by stating that the recognition or enforcement of an award "may be ordered", in contrast to the imperative "shall" of article III of the New York Convention.

enforcement of foreign arbitral awards and agreements, as well as bilateral agreements that contain, inter alia, provisions on these issues.[30] The conditions for recognition and enforcement under bilateral agreements may be more or less favourable than the New York Convention, depending on the circumstances surrounding the award.

27. As an illustration, German courts have applied more favourable provisions of bilateral treaties in accordance with article VII(1). In a case before the German Federal Court of Justice, an interested party was permitted to rely on the 1958 German-Belgian Treaty concerning the Reciprocal Recognition and Enforcement of Judicial Decisions, Arbitral Awards and Official Documents in Civil and Commercial Matters, which provides that an award rendered in Belgium must be recognized and enforced in Germany when it has been declared enforceable in Belgium and does not violate German public policy.[31]

28. Courts have also inquired whether an applicable bilateral treaty specifically excludes the application of the New York Convention, and in the event that it does not, have enforced awards pursuant to either the New York Convention, or more favourable domestic law provisions. For instance, in a 1997 decision — *Chromalloy* — the Paris Court of Appeal considered an argument advanced by Egypt that enforcement of an award should be denied, inter alia, because it violated Article 33 of the 1982 France-Egypt Convention on Judicial Cooperation (the "France-Egypt Convention").[32] According to the Court, since the France-Egypt Convention expressly stipulates that the recognition and enforcement of awards should be granted in accordance with the provisions of the New York Convention, the States had implicitly consented to the application of any more favourable domestic law pursuant to article VII(1). Enforcing the award, the Court relied on the more limited grounds for refusal of enforcement under the then applicable Article 1502 of the French Code of Civil Procedure.[33]

C. Interaction of the Convention with domestic law

29. Article VII(1) facilitates the recognition and enforcement of foreign arbitral awards by ensuring that Contracting States will not be in breach of the Convention

---

[30] Franz Matscher, *Experience with Bilateral Treaties*, in ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 452 (A.J. van den Berg ed., 1999).

[31] Bundesgerichtshof, Germany, III ZR 78/76, 9 March 1978. See also Bundesgerichtshof, Germany, III ZB 50/05, 23 February 2006, in which the Federal Supreme Court remanded a case back to the Oberlandesgericht Karlsruhe, which, it considered, had erroneously examined a request to refuse enforcement to an arbitral award rendered in Minsk in light of the provisions of the New York Convention, instead of the more restricted grounds for non-enforcement of the 1958 Bilateral Treaty on General Issues of Commerce and Navigation between Germany and the former USSR, which continue to apply in respect of Belarus.

[32] *République arabe d'Egypte v. Société Chromalloy Aero Services*, Court of Appeal, Paris, France, 14 January 1997.

[33] For similar reasoning by German courts, see Bundesgerichtshof, Germany, XI ZR 349/89, 26 February 1991; Oberlandesgericht, Frankfurt, Germany, 6 U (Kart) 115/88, 29 June 1989; and by an Italian court see *Viceré Livio v. Prodexport*, Corte di Cassazione, 11 July 1992.

by enforcing arbitral awards pursuant to more favourable provisions found in their domestic laws.

30. The domestic laws of Contracting States to the New York Convention take a variety of approaches to the recognition and enforcement of foreign arbitral awards. While the domestic arbitration law of some jurisdictions provides that recognition and enforcement is to take place pursuant to the New York Convention,[34] others contain specific provisions concerning recognition and enforcement.[35] Other laws provide that a foreign award can be enforced if the court in the country where the award was rendered has entered a judgment on the award.[36]

a. Domestic law more favourable than article II

31. Article VII(1) refers only to the enforcement of "arbitral awards" and not "arbitration agreements". As commentators have noted, the omission of arbitration agreements from the text of article VII(1) was unintentional[37] and can be explained by the inclusion of the provisions concerning arbitration agreements in the New York Convention at a very late stage of its negotiation.[38]

32. French courts have long considered that article VII(1) applies to the recognition and enforcement of arbitration agreements. Thus, in a series of decisions beginning in 1993, French courts have held that pursuant to article VII(1) of the Convention, arbitration agreements could be enforced under the more favourable provisions of French arbitration law, rather than the more stringent requirements of article II of the New York Convention.[39]

33. As confirmation that article VII(1) also applies to arbitration agreements, at its thirty-ninth session, in 2006, UNCITRAL adopted a Recommendation regarding the interpretation of articles II(1) and VII(1) of the New York Convention. The

---

[34] For instance, Switzerland, Private International Law Act, 1987, Article 194; Germany, Arbitration Act, 1998, Article 1061.

[35] For instance, France, New Code of Civil Procedure, Articles 1504-1527; Netherlands, Code of Civil Procedure, Article 1076.

[36] For instance, Italy, Code of Civil Procedure, Article 830; Colombia, Code of Civil Procedure, Decree Number 1400 and 2019 of 1970, Article 694(3).

[37] ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (P. Sanders ed., 2011), at 27; ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 86-88.

[38] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Sixteenth Meeting, E/CONF.26/SR.l6.

[39] See *Bomar Oil N.V. v. Etap — L'Entreprise Tunisienne d'Activités Pétrolières*, Court of Cassation, France, 87-15.094, 9 November 1993, 1994 REV. ARB. 108; *American Bureau of Shipping (ABS) v. Copropriété maritime Jules Verne*, Court of Cassation, 03-12.034, France, 7 June 2006, 2006 REV. ARB. 945; *S.A. Groupama transports v. Société MS Régine Hans und Klaus Heinrich K.G.*, Court of Cassation, France, 05-21.818, 21 November 2006. The former Article 1443 of the French Code of Civil Procedure, in force from 1981, stipulated that an arbitration agreement shall be contained in the main convention or in a document to which the convention refers, without setting further requirements for the validity of an arbitration agreement in international arbitration matters. The current Article 1507 of the French Code of Civil Procedure applicable to international commercial arbitration provides that "[a]n arbitration agreement shall not be subject to any requirements as to its form." At the date of this Guide, there were no reported cases where a French court relied on this provision in application of article VII(1) of the Convention.

Recommendation clarifies that article VII(1) "should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement."[40]

34. Since the UNCITRAL Recommendation, courts from a number of Contracting States have, in the application of article VII(1), enforced arbitration agreements pursuant to any less stringent formal requirements under their domestic laws. For instance, in a recent decision the German Federal Court of Justice enforced an arbitral award involving two commercial parties in light of the theory of *kaufmännisches Bestätigungsschreiben*, which recognizes that commercial contracts, including arbitration agreements, may be concluded by the tacit acceptance of a confirmation letter between merchants.[41] Dutch courts have similarly applied article VII(1) to enforce awards pursuant to a domestic law provision which stipulates that, upon request, a court shall deem effective an arbitration agreement which is not included in a contract signed by the parties or contained in an exchange of letters or telegrams, conditions which are otherwise required to be met by article II of the New York Convention.[42]

35. The domestic laws of certain other national legal systems also contain fewer formal requirements for an arbitration agreement than the New York Convention. For example, Switzerland's international arbitration law provides that an arbitration agreement shall be valid if it is made "in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by text."[43] In a still broader manner, the United Kingdom Arbitration Act explicitly stipulates that the writing need not be signed by one of the parties and may result from a recording by one of the parties, or by a third party if authorized by parties to the agreement.[44] A party seeking enforcement of an arbitral award could avail itself of these provisions pursuant to article VII(1) of the Convention.

b. Domestic law more favourable than article IV

36. Article IV of the New York Convention sets out the documents to be submitted by a petitioner to the enforcing court at the time of a request for recognition and/or enforcement, namely: a duly authenticated original award or duly certified copy

---

[40] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), annex II.

[41] Bundesgerichtshof, Germany, III ZB 69/09, 30 September 2010, SchiedsVZ 2010, 332. See also Kammergericht Berlin, Germany, 20 Sch 09/09, 20 January 2011; Oberlandesgericht Celle, Germany, 8 Sch 14/05, 14 December 2006. German courts enforced arbitration agreements pursuant to this notion even before the 2006 UNCITRAL Recommendation. See Oberlandesgericht Köln, Germany, 16 W 43/92, 16 December 1992. The concept, as it relates to arbitration agreements, was codified in 1998 at Section 1031(2) of the new German Code of Civil Procedure, which is contained in the rules concerning domestic awards. The Oberlandesgericht Frankfurt has considered that article VII(1) of the Convention, which refers to the laws that relate to the enforcement of foreign arbitral awards, would not necessarily lead to the application of Section 1031(2). See Oberlandesgericht Frankfurt, Germany, 26 Sch 28/05, 26 June 2006.

[42] *Claimant v. Ocean International Marketing B.V., et al*, Rechtbank, Rotterdam, Netherlands, 29 July 2009, 194816/HA ZA 03-925.

[43] Switzerland, Private International Law Act, 1987, Article 178(1).

[44] United Kingdom, Arbitration Act 1996, c. 23, Section 5.

thereof, the original agreement referred to in article II or a duly certified copy thereof and translations of these documents into the language of the country where the award is relied upon, where relevant.

37. Courts in Germany have consistently applied the more-favourable-right principle in article VII(1) to allow an interested party to rely on the less stringent requirements of German law, pursuant to which a party seeking enforcement of a foreign arbitral award in Germany need only supply the authenticated original arbitral award or a certified copy.[45]

38. Likewise, German courts have referred to the more favourable provisions of their domestic law to dispense with the requirement under article IV(2) of the Convention that an interested party produce translations of the award and the original arbitration agreement.[46] The same approach has been followed by courts in Switzerland, which apply the more favourable provision in Article 193(1) of the Swiss Private International Law Act.[47]

c. Domestic law more favourable than article V(1)(e)

39. Pursuant to article VII(1) of the New York Convention, an interested party may seek the application of a national law if that is more favourable than the provisions of the Convention, including the grounds for refusal listed in article V. Among these grounds, article V(1)(e) provides that recognition and enforcement may be refused if the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

40. The legislative history of the Convention does not discuss the relationship between articles V(1)(e) and VII(1). In particular, there is no record that the State delegates or their governments contemplated whether an award that has been set aside or suspended could be enforced through the application of article VII(1).

---

[45] Germany, Code of Civil Procedure, Sections 1064(1) and (3). See e.g. Oberlandesgericht München, Germany, 34 Sch 14/09, 1 September 2009; Bundesgerichtshof, Germany, III ZB 68/02, 25 September 2003. See also Oberlandesgericht München, 22 June 2009; Oberlandesgericht München, 34 Sch 19/08, 27 February 2009; Oberlandesgericht München, 34 Sch 18/08, 17 December 2008; Oberlandesgericht Frankfurt, 17 October 2007; Oberlandesgericht München, 23 February 2007; Oberlandesgericht Celle, 14 December 2006; Kammergericht, 10 August 2006; Oberlandesgericht München, 15 March 2006; Oberlandesgericht München, 28 November 2005; Oberlandesgericht Dresden, 7 November 2005; Oberlandesgericht Dresden, 2 November 2005; Oberlandesgericht Hamm, 27 September 2005; Bayerisches Oberstes Landesgericht, 11 August 2000. For a contrary opinion, see Oberlandesgericht Rostock, Germany, 1 Sch 03/00, 22 November 2001, in which the court considered that Article VII(1) could not allow a party to dispense with the formal requirements for enforcement under the New York Convention.

[46] For instance, Oberlandesgericht Celle, Germany, 8 Sch 14/05, 14 December 2006; Kammergericht Berlin, 20 Sch 07/04, 10 August 2006. See also Oberlandesgericht München, 28 November 2005; Oberlandesgericht Hamm, 27 September 2005; Oberlandesgericht Köln, 23 April 2004.

[47] Federal Supreme Court, Switzerland, 2 July 2012, Decision 5A_754/2011. Courts in the Netherlands have also enforced awards pursuant to Article 1076 of the Netherlands Civil Procedure Code, which is more favourable than article IV of the Convention: *Dubai Drydocks v. Bureau voor Scheeps- en Werktuigbouw [X] B.V.*, Rechtbank, Dordrecht, Netherlands, 30 June 2010, 79684/KG RK 09-85.

41. The final text of the New York Convention does not prohibit a court in a Contracting State from recognizing or enforcing such an award, if it can be recognized or enforced pursuant to that State's domestic law or another treaty to which it is party. In application of the more-favourable-right provision under article VII(1), courts in certain Contracting States have thus consistently enforced awards that have been set aside or suspended.

42. For instance, in a series of decisions beginning in 1984, French courts have established a rule that a party contesting enforcement is precluded from relying on grounds for non-enforcement under article V(1)(e) of the Convention in light of the more limited grounds under French law.[48] In the *Hilmarton* case of 1994, the Court of Cassation enforced an award rendered in Switzerland despite the fact that it had been set aside by the Swiss Federal Supreme Court and a new arbitral tribunal had been constituted to hear the dispute. The Court reasoned that "the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to public policy."[49]

43. French courts have followed this reasoning in a series of subsequent cases.[50] In the 2007 decision *Putrabali*, for instance, the Court of Cassation affirmed that "[a]n international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought. Under article VII [the interested party] (...) could invoke the French rules on international arbitration, which do not provide that the annulment of an award in the country of origin is a ground for refusing recognition and enforcement of an award rendered in a foreign country".[51]

44. The same year, the Paris Court of Appeal found that the rule according to which the setting aside of an arbitral award in a foreign country does not affect the right of the interested party to request the enforcement of the award in France

---

[48] The former Article 1502 of the French Code of Civil Procedure, in force until 2011, provided an exhaustive list of the five grounds upon which recognition and enforcement could be refused in France. See *Société Pabalk Ticaret Sirketi v. Société Anonyme Norsolor*, Court of Cassation, France, 83-11.355, 9 October 1984, 1985 REV. ARB. 431, with English translation in 24 ILM 360 (1985). Articles 1520 and 1525(4) of the French Code of Civil Procedure that is currently in force provide for the same grounds for refusal.

[49] *Société OTV v. Société Hilmarton*, Court of Cassation, France, 10 June 1997. XX Y.B. Com. Arb. 663, at 665, para. 5. The new tribunal ordered to be constituted by the Swiss Federal Supreme Court then rendered a conflicting second award ordering the respondent to pay a consulting fee under the contract at issue. The French Court of Cassation rejected a lower court ruling recognizing the second award and held that only the first award was recognized in France, ruling that the recognition in France of the first award, set aside outside France, necessarily prevented the recognition or enforcement in France of the second award.

[50] *Bargues Agro Industrie S.A. (France) v. Young Pecan Company (US)*, Court of Appeal, Paris, France, 10 June 2004, 2004 REV. ARB. 733; *PT Putrabali Adyamulia v. S.A. Rena Holding*, Court of Appeal, Paris, France, 31 March 2005, 2006 REV. ARB. 665, affirmed by *PT Putrabali Adyamulia v. S.A. Rena Holding*, Court of Cassation, France, 05-18053, 29 June 2007, 2007 REV. ARB. 507; *Direction Generate de l'Aviation Civile de I'Emiral de Dubai v. International Bechtel Co., LLP*, Court of Appeal, Paris, France, 29 September 2005, 2006 REV. ARB. 695.

[51] *PT Putrabali Adyamulia v. S.A. Rena Holding*, Court of Cassation, France, 05-18053, 29 June 2007, 2007 REV. ARB. 507, affirming *PT Putrabali Adyamulia v. S.A. Rena Holding*, Court of Appeal, Paris, France, 31 March 2005, 2006 REV. ARB. 665.

(since the arbitrator is not part of the national legal order of the country where the award was rendered) constitutes a "fundamental principle under French law."[52]

45. In the 1996 decision *Chromalloy*, the United States District Court of Columbia took a similar view and allowed an application to enforce an award rendered in Egypt and subsequently annulled by a Court of Appeal in Egypt.[53] The Court considered that in contrast to article V of the Convention, which sets out a "permissive standard" under which a court "may" refuse to enforce an award, article VII(1) "mandates that this Court must consider [the interested party's] claims under applicable U.S. law." The Court analysed whether the Egyptian Court's reasons for vacating the award were grounds that would have justified vacating a domestic award under Section 10 of the Federal Arbitration Act, Chapter 1. It held that, because the award would not have been vacated under Section 10, it should enforce the award in accordance with article VII(1) of the Convention.

46. Conversely, the New York Convention does not obligate courts in the Contracting States to recognize an award that has been set aside or suspended and they will not violate the Convention by refusing to do so.

47. Some courts have decided that the enforcement of an award should be refused if it has been set aside in the country where it was rendered. German courts, for instance, have adopted this position based on the previous version of the Code of Civil Procedure, which required the validity ("*Rechtswirksamkeit*") of a foreign arbitral award as a precondition for its enforcement,[54] as well as the new German Code of Civil Procedure, which provides that recognition and enforcement "shall be granted in accordance with [the New York Convention]", including the grounds for refusal under article V(1)(e).[55]

48. Similarly, courts in the United States of America have distinguished the 1996 *Chromalloy* decision and have declined to enforce awards that have been annulled or suspended.[56] For instance, in the 1999 decision *Baker Marine*, the Court

---

[52] Cour d'appel de Paris, 18 January 2007, *Société S.A. Lesbats et Fils v. Volker le Docteur Grub*.

[53] *Chromalloy Aeroservices Inc. v. Ministry of Defence of the Republic of Egypt*, 939 F. Supp. 907 (D.D.C.1996). See David W. Rivkin, *The Enforcement of Awards Nullified in the Country of Origin: The American Experience*, in ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 528 (A.J. van den Berg ed., 1998); See Emmanuel Gaillard, *The Relationship of the New York Convention with other Treaties and with Domestic Law*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE (E. Gaillard, D. Di Pietro eds., 2008), at 80-86; Georgios C. Petrochilos, *Enforcing Awards Annulled In Their State Of Origin Under The New York Convention*, 48 ICLQ 856 (1999).

[54] Oberlandesgericht, Rostock, Germany, 1 Sch 03/99, 28 October 1999. See Klaus Sachs, *The Enforcement of Awards Nullified in the Country of Origin: The German Experience*, in ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 552 (A.J. van den Berg ed., 1998).

[55] Bundesgerichtshof, Germany, III ZB 14/07, 21 May 2007.

[56] *Baker Marine Ltd. v. Chevron Ltd.*, United States Court of Appeal, Second Circuit, United States of America, 12 August 1999, 191 F.3d 194 (2nd Cir. 1999); *TermoRio S.A. E.S.P. v. Electrificadora del Atlantico S.A. E.S.P.*, District Court, District of Columbia, United States of America, 17 March 2006, 421 F. Supp. 2d 87 (D.D.C. 2006); *Martin Spier v. Calzaturificio*

of Appeals for the Second Circuit refused to enforce two awards rendered in Nigeria and set aside by the Nigerian courts, rejecting the argument of the interested party that the awards were set aside for reasons that would not be recognized under United States law as valid grounds for vacating an award. The Court reasoned that the "mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments."[57]

49. By contrast, a court's refusal to enforce an award that has been set aside or suspended could constitute a violation of the European Convention which, when applicable,[58] expressly limits the grounds for refusal that are set out at article V of the New York Convention. In this relation, Article IX(2) of the European Convention provides that where a State is party to both the European Convention and the New York Convention, a court's discretion to refuse enforcement on the basis of an award having been set aside shall be limited to those cases where the award has been set aside for one of the limited reasons enumerated in its Article IX(1).[59]

50. Pursuant to its obligation under the European Convention, the Austrian Supreme Court has enforced an award that had been set aside for violation of public policy in Slovenia, reasoning that "[p]ursuant to Article IX(1) of the European Convention, even the annulment of an award for public policy of the country of

---

Tecnica, S.p.A, District Court, Southern District of New York, United States of America, 22 October 1999, 86 Civ. 3447.

[57] *Baker Marine Ltd. v. Chevron Ltd.*, United States Court of Appeal, Second Circuit, United States of America, 12 August 1999, 191 F.3d 194 (2nd Cir. 1999). The Court distinguished *Chromalloy* on the basis of the nationality of the interested party, who was not a United States citizen, and of a provision in the arbitration clause stating that the decision of the arbitrator "could not be subject to any appeal or other recourse".

[58] For the application of the European Convention, see the United Nations Treaty Collection, at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en.

[59] Article IX(1) of the European Convention provides in full: "1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons: (a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or (b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside; (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention. 2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above."

origin (…) is not one of the grounds for refusal exhaustively listed (…) and is therefore not a ground for refusing enforcement in the enforcement state."[60]

d. Domestic law more favourable than article VI

51. Article VI of the New York Convention provides that a court before which the enforcement of the award is sought "may", if it considers it proper, adjourn its decision on enforcement if the award is subject to an action for setting aside in the country in which, or under the law of which, it is made. In application of article VII(1) of the Convention, courts have applied domestic laws more favourable to recognition and enforcement than article VI in order to dispense with any suspensive effect of an action for setting aside.

52. For instance, in a 1999 decision, the Luxembourg Court of Appeal considered the argument of the party resisting enforcement that an award rendered in Switzerland had no *res judicata* effect in light of proceedings to set the award aside at the Swiss Federal Supreme Court and that pursuant to article VI of the New York Convention, enforcement proceedings in Luxembourg should be suspended pending this decision. Rejecting this argument, the Court noted that "the principle of *favor arbitrandum* (…) permeates the Convention" and in particular article VII(1), which is "aimed at making the enforcement of foreign awards possible in the highest number of cases." The Court reasoned that "according to the Convention the Luxembourg court can only deny enforcement on one of the grounds provided for in its national law." Since Article 1028(3) of the Luxembourg Code of Civil Procedure does not include the challenge of the award abroad among its grounds for refusal, it refused to suspend its decision and enforced the award.[61]

53. French courts have also refused to suspend enforcement proceedings pending an action to set aside an award. In the 2004 *Bargues Agro* case, for instance, the Paris Court of Appeal refused to stay the enforcement of an award rendered in Belgium pending the conclusion of setting aside proceedings there, applying the more favourable provisions of French law.[62] The Court noted that because the award was rendered in the context of an international arbitration, it was not anchored in the national legal order of Belgium and its potential setting aside could not prevent its recognition and enforcement in another Contracting State. The Court thus held that article VI of the Convention "is of no use in the context of the recognition and enforcement of an award under [the then applicable] Article 1502 of the Code of Civil Procedure."

e. Other more favourable domestic law practice

54. German courts have relied on article VII(1) of the New York Convention to apply the domestic law principle of preclusion, which provides that a party that has participated in an arbitration proceeding without objecting to a known defect before the arbitral tribunal will not, in general, be able to rely on that defect as a ground for

---

[60] Supreme Court, Austria, 26 January 2005, 3Ob221/04b.

[61] *Sovereign Participations International S.A. v. Chadmore Developments Ltd*., Court of Appeal, Luxembourg, 28 January 1999.

[62] *Société Bargues Agro Industries S.A. v. Société Young Pecan Company*, Court of Appeal, Paris, France, 10 June 2004.

refusal to recognize or enforce the award.[63] German courts have interpreted Section 1044(2)(1) of the former Code of Civil Procedure as requiring the preclusion of objections against the award, for instance based on the invalidity of an arbitration agreement, if that ground could have been asserted in an action to set aside the award in the country where the award was made and a party had not availed itself of that possibility.

55. The German Code of Civil Procedure does not contain specific provisions setting out the grounds for refusal to recognize and enforce an award, but instead provides that "recognition and enforcement of foreign awards shall be granted in accordance with the New York Convention."[64] There is a divergence of opinion among German courts on the question of whether the preclusion principle may be applied on the basis of the New York Convention only. Some courts have held that while the grounds for non-enforcement under article V of the New York Convention do not preclude defences in this manner, a German court may nonetheless apply this principle despite the fact that it finds no explicit expression in the current Civil Code of Procedure.[65]

56. At the date of this Guide, the most recent decision of the German Federal Court of Justice on this issue has affirmed that the preclusion of defences should have limited applicability. According to the Court, it would not necessarily amount to bad faith for a party to raise a defect for the first time at the enforcement stage and such party would be precluded from doing so only where circumstances make the party's behaviour appear to be contrary to good faith and the principle of consistency with previous conduct ("*venire contra factum proprium*").[66]

ARTICLE VII(2)

57. The New York Convention was conceived as a replacement for the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (together, the "Geneva Treaties"), which were considered too cumbersome a legal framework for the enforcement of arbitral awards in the context of the growth of international trade after the Second World War.

58. It was only on 10 June 1958, during one of the last meetings of the New York Conference, that the provisions relating to the validity of the enforcement of the arbitration agreement were added to the New York Convention (what is now

---

[63] Oberlandesgericht, Düsseldorf, Germany, 8 November 1971; Bundesgerichtshof, Germany, III ZR 206/82, 10 May 1984. See also Albert Jan van den Berg, *The German Arbitration Act 1998 and the New York Convention 1958*, in LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY — LIBER AMICORUM KARL-HEINZ BOCKSTIEGEL 783 (R.G. Briner, Y.L. Fortier, P.K. Berger, J. Bredow eds., 2001).

[64] Germany, Code of Civil Procedure, Section 1061.

[65] For instance, Oberlandesgericht, Karlsruhe, Germany, 9 Sch 02/05, 27 March 2006; Oberlandesgericht, Karlsruhe, Germany, 9 Sch 02/09, 4 January 2012. Certain lower courts have deduced from the absence of such an explicit provision that no preclusion of defences may be applied under New York Convention. See e.g. Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 50/99, 16 March 2000; Oberlandesgericht, Celle, Germany, 8 Sch 11/02, 4 September 2003.

[66] Bundesgerichtshof, Germany, III ZB 100/09, 16 December 2010.

article II).[67] These matters being covered by the Geneva Protocol on Arbitration Clauses of 1923 (the "Geneva Protocol"), the Geneva Protocol was included in the new provisions which abrogated the Geneva Convention.[68]

59. According to the *travaux préparatoires*, it was suggested that article VII(2) should expressly provide that the Geneva Treaties shall become extinct ("cease to have effect") between Contracting States "on their becoming bound by [the New York Convention]". The addendum, "to the extent they become bound", was introduced in the text to accommodate the Contracting States that would not become bound by the New York Convention in all their territories simultaneously and not to ensure the continued application of the Geneva Treaties.[69] The *travaux préparatoires* further confirm that the replacement mandated by article VII(2) refers to the entirety of the Geneva Treaties: a proposal to limit their replacement to the degree that they were incompatible with the New York Convention was rejected during the drafting process.[70]

60. The rules for recognition and enforcement under the New York Convention introduced a number of improvements to the regime provided by the Geneva Treaties.

61. First, the Geneva Convention, which applied to awards based on agreements covered by the Geneva Protocol, provided for the execution of a foreign award only if the party seeking to rely on it could demonstrate that the award was "final" in its country of origin.[71] An interested party thus had to seek an exequatur (or leave for enforcement) in the country where the award was made before seeking enforcement in another country, thus giving rise to a requirement of "double exequatur". The more liberal regime under the New York Convention does not require an award to be final, but only requires it to be "binding".

62. Second, in order for the Geneva Protocol and Geneva Convention to be applicable, the parties to the arbitration both had to be subject to the jurisdiction of the States parties to the respective treaties. The New York Convention, by contrast, only requires that the award be made in the territory of another Contracting State or in the enforcing State if the award is considered as non-domestic in the State where recognition and enforcement is sought.

63. Third, the burden of proof under the New York Convention is less onerous on the party seeking enforcement. Pursuant to Article I of the Geneva Convention, an interested party was required to demonstrate the existence of a valid arbitration

---

[67] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-fourth Meeting, E/CONF.26/SR.24, p. 4.

[68] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-fourth Meeting, E/CONF.26/SR.24.

[69] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Text of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as provisionally approved by the drafting Committee on 6 June 1958, E/CONF.26/L.61, pp. 3-4; *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-fourth Meeting, E/CONF.26/SR.24, p. 4. See also comments in Oberlandesgericht, Düsseldorf, 8 November 1971.

[70] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Eighteenth Meeting, E/CONF.26/SR.18, p. 7.

[71] This notion was defined in Article 1(d) of the 1927 Geneva Convention as an award that was not (i) open to any form of recourse or (ii) the subject of pending proceedings contesting its validity.

agreement, concerning an arbitral subject matter, that the arbitral proceedings had been conducted in accordance with the parties' agreement and also that the award had become final in the place of arbitration and was not contrary to the public policy of the recognizing State. Under the New York Convention, a party seeking enforcement need only supply to a court the original award (or a duly certified copy thereof) along with the original arbitration agreement (or a duly certified copy thereof). Under the New York Convention, it is up to the party resisting enforcement to prove the existence of one of the grounds for refusal enumerated in article V of the New York Convention.

64. Reported case law on article VII(2) confirms the principle that the Geneva Treaties shall cease to apply to the recognition and enforcement of foreign arbitral awards in Contracting States that have become bound by the New York Convention.[72]

65. With very few exceptions, all States which had adhered to the Geneva Treaties have now become Parties to the New York Convention.[73] Article VII(2) is therefore of limited practical relevance today.

---

[72] For instance, *S.p.A. Nosegno e Morando v. Bohne Friedrich und Co-Import-Export*, Corte Di Cassazione, Italy, 20 January 1977; *Jassica S.A. v. Ditta Polojaz*, Corte di Appello, Trieste, Italy, 2 July 1982; Supreme Court, Austria, 21 February 1978; Oberlandesgericht, Düsseldorf, 8 November 1971; *Trefileries & Ateliers de Commercy (T.A.C.) v. Société Philipp Brothers France et Société Derby & Co. Limited*, Court of Appeal, Nancy, France, 5 December 1980; *Minister of Public Works of the Government of the State of Kuwait v. Sir Frederick Snow & Partners*, House of Lords, England, 1 March 1984, [1984] A.C. 426.

[73] The status of former colonies that were Contracting States to the Geneva Treaties is not clear, as some of them have not made formal announcements regarding their status. See Dirk Otto, *Article IV*, in RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 143 (H. Kronke, P. Nascimiento et al. eds, 2010).