Resisting Enforcement of a Foreign Arbitral Award under the New York Convention

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This article explores issues and considerations that may arise in connection with a challenge to the enforcement of an arbitral award under the New York Convention

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1. Introduction: the Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards

The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention" or "Convention"), which sets out the basic legal framework for the recognition and enforcement of foreign arbitral awards, has been described as the "[t]he mortar in the edifice of international commercial arbitration".[1] Indeed, the enforcement regime created by the Convention is "almost universal",[2] as all major jurisdictions are parties to the Convention, including the key Asian jurisdictions.[3] The Convention focuses on the recognition and enforcement of arbitral awards, whereas annulment proceedings fall outside its scope. It sets out a restrictive list of grounds on which the enforcement of foreign awards can be refused. Grounds for annulment of awards, on the other hand, are provided for in domestic law, and it is generally recognized that the annulment of an award cannot be sought in a jurisdiction other than the place of arbitration.[4]

The **grounds** on which enforcement of an award can be refused are provided for in article V of the Convention. The list is an exhaustive one,[5] as has been confirmed by the jurisprudence interpreting the Convention.[6] Article V(1) sets out five grounds which, in order to be successful, must be proven by the party contesting enforcement: (a) the invalidity of the arbitration agreement, (b) violation of due process, (c) the arbitrator exceeded his or her authority, (d) irregularity in the composition of the arbitral tribunal or the arbitral procedure, and (e) the award is not binding or has been set aside. The grounds in article V(2) can be examined *ex officio*, and therefore can be examined even if the request for enforcement is unopposed.[7] They are: (a) the non-arbitrability of the subject-matter of the award, and (b) the violation of public policy. An important feature of the Convention is that the grounds in article V do not permit any review of the merits of the arbitral award.[8]

The New York Convention is considered to have a "pro-enforcement" bias. Indeed, it sets out only a minimum standard for the recognition and enforcement of foreign awards,[9] allowing for the application of other international instruments and

municipal law where they are more favourable to recognition. *The Convention on the Settlement of Investment Disputes Between States and the Nationals of Other States* is an example of such an instrument, as it provides for automatic recognition and enforcement of awards from the International Center for the Settlement of Investment Disputes. This pro-enforcement bias has been reflected in the courts' application of the New York Convention. Indeed, cases in which enforcement has been refused have been quite rare, representing roughly ten percent of the cases reported in the *Yearbook Commercial Arbitration*, which compiles New York Convention decisions.[10]

While parties to arbitration agreements are generally expected to comply with any award rendered by the arbitral tribunal, there may be valid grounds to resist enforcement. Yet, the outlook appears to be bleak for any party seeking to resist enforcement of a prejudicial award. Enforcement can, however, successfully be challenged in certain cases, and parties must be cognizant of a number of issues in order to maximize their chances of success in this respect. This article identifies and elaborates on certain of these key issues. We will first briefly deal with the formal and procedural requirements for seeking enforcement, which can at times provide fertile ground for resisting an award. We will then explore the risk a party runs of losing or waiving the already limited grounds they can invoke for challenging enforcement, and what parties can do to prevent that risk from materializing. Lastly, we will provide some examples of grounds for challenging enforcement which have been successful in the relatively rare cases in which enforcement has been refused by a court.

It is generally accepted that the multinational instrument that is the New York Convention should be applied in a **uniform** manner. While no signatory state is bound by the case law of another signatory state, courts should not apply the Convention without taking note of what other courts have decided in similar circumstances.[11] Parties wishing to enforce or resist enforcement of an award are therefore well advised to search for New York Convention precedents in other jurisdictions that might support their case.

2. Limitations on the Scope of the New York Convention

It is useful to recall that the Convention is applicable only to arbitral awards, and therefore is not applicable to procedural orders and decisions on interim measures, or decisions rendered by bodies other than arbitral tribunals. The Convention does not define what constitutes an award. Essentially, what is relevant to such a determination is the content of the decision, not the terms that are used to designate it.[12] Two requirements must be met in order for a decision to qualify as an award: (1) the decision must have been rendered by an arbitral tribunal, *ie* a private body, offering sufficient guarantees of independence and impartiality, and (2) it must decide on a legal dispute between the parties in a final and binding manner.[13] The decision need not, however, be a final award on the *entire* dispute. Preliminary awards are also enforceable.[14]

Many States, including China, Indonesia, Malaysia, Korea and Japan, reserve the application of the Convention to awards made in other Contracting States. The **reciprocity** requirement is explicitly reserved in Article 1(3).

3. Formal and Procedural Requirements for Seeking Enforcement

While the burden of proving that one of the grounds in article V(1) is applicable in a given case falls on the party challenging the enforcement of an award, it is first incumbent on the party seeking enforcement to ensure that certain formal and procedural requirements are satisfied. First, the party *seeking* enforcement must produce to the court the duly authenticated original award and the original arbitration agreement, or a duly certified copy of those documents.[15] What law governs

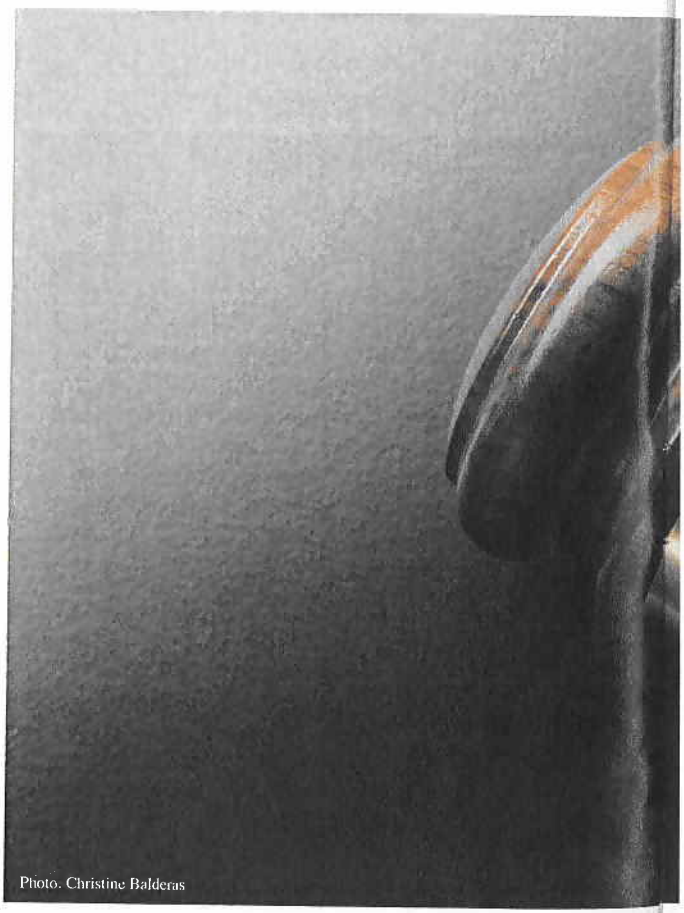
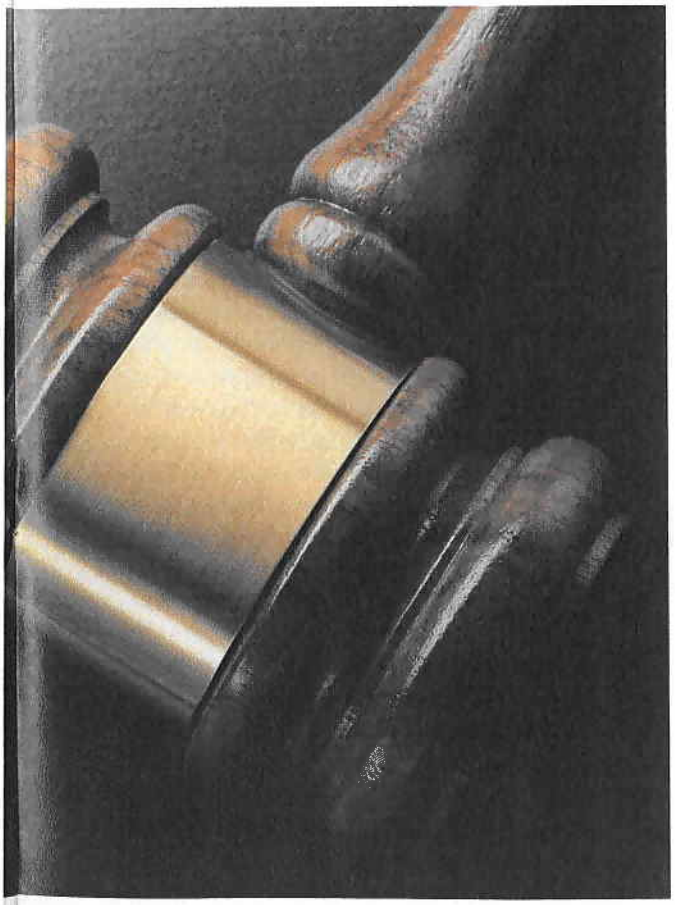


Photo. Christine Balderas

authentication or certification is not specified by the Convention, although it appears that if the authentication or certification is valid either pursuant to the law at the place of arbitration or the law at the place of enforcement, it will be considered as valid by the court.[16] Indeed, such an approach is consistent with "the purpose of Article IV to ease as much as possible the conditions to be fulfilled by the party seeking enforcement."[17] Where the language of either the award or the arbitration clause is not an official language of the country in which enforcement is sought, a certified translation or a translation by a sworn translator must also be produced.[18] These requirements are the only conditions which must be fulfilled pursuant to the New York Convention by the party seeking enforcement,[19] and thereafter the onus shifts to the opposing party.

A number of court decisions applying the New York Convention have relied on the requirements of article IV to refuse enforcement. These include a 2005 decision of the Spanish Supreme Court refusing to enforce an award that had been rendered in London on the basis that the party seeking enforcement had failed to supply a valid arbitration agreement as it was required to do under article IV(1)(b) of the New York Convention.[20] In a recent decision of the Swiss Federal Supreme Court, enforcement of an award was refused on the basis that the arbitration clause on which it was based did not bind the defendant.[21] In a third such case, a German court refused enforcement because the applicant had failed to show that the parties had concluded a valid arbitration agreement.[22] The court found that if the party applying for enforcement does not prove there is an arbitration agreement that satisfies the requirements of article II(2) of the Convention, "the further question whether there is one of the grounds for refusal of art. V(1) is not dealt with."[23] These cases could suggest an uneasy co-existence between articles IV and V(1)(a) of the Convention, and it has been argued that they "may lead to the mistaken belief that a petitioner must not only submit the original arbitration agreement or a certified copy thereof, but also prove that the agreement is valid."[24]



Ambiguities in the operative part of the award may also prove to be a source of problems for a winning party to secure enforcement. Indeed, in many jurisdictions, enforcement courts request that the operative part of an arbitral award set out clearly the specific acts that the award debtor is ordered to perform or refrain from for the award to be enforceable.[25] Declaratory relief granted in the award may thus pose problems.[26]

The party seeking enforcement must also be careful to respect **time limits** for enforcement of arbitral awards. As the New York Convention is silent on the question, these periods of limitation are governed by domestic law and vary greatly from country to country. For example, the time limit imposed under the US Federal Arbitration Act is three years from when the award is made.[27] In England, enforcement of an award becomes time-barred six years after the refusal of the debtor to honour it,[28] while in Switzerland, the period appears to be ten years.[29] In China, the time limit is much shorter. It used to be one year from the date of the award if at least one of the parties was a natural person, and only six months if neither party was a natural person. With the recent amendment of the Civil Procedural Law, the time limit was extended to two years for both individual persons and legal entities.[30] Depending on the jurisdiction, winning parties must therefore act rapidly once an award is issued in order to avoid the expiration of the statute of limitations, and losing parties should always be mindful of the potential argument that an action in enforcement is time-barred.

4. Can a Party Lose Grounds on which the Enforcement of an Award Can Be Challenged?

A party must be mindful that its conduct throughout the proceedings and after the issuance of the award in the place of arbitration may affect its ability to subsequently enforce or resist enforcement of the award. First, the manner in which it couches

its relief sought will be reflected in the arbitral award. The relief sought should therefore be drafted carefully. Ambiguities may entail difficulties in enforcing an award. Second, while the jurisprudence on the question is by no means unanimous, courts in a number of jurisdictions have ruled that parties contesting the enforcement of an award are precluded from invoking grounds set out in the New York Convention as a result of their prior conduct. Although the New York Convention does not deal expressly with the prohibition of contradictory conduct, such a prohibition is considered to be inherent in the Convention as a result of the principle of good faith, and because contradictory conduct "would violate the goal and purpose of the Convention, that is, the summary procedure to expedite the recognition and enforcement of the arbitration process."[31]

Depending on the jurisdiction, a party runs the risk of waiving or otherwise losing a ground for contesting enforcement, or may even be estopped from contesting enforcement altogether, in three different situations: (i) if it does not raise the ground during the arbitration itself, (ii) if the award is not challenged in the place of arbitration, or (iii) if the ground was raised but proved unsuccessful in annulment or enforcement proceedings elsewhere.

(i) Failure to raise the ground for challenging enforcement during the arbitration itself

The situations contemplated in a number of the grounds provided for in the *New York Convention* could already be objected to during the arbitration proceedings themselves. These include invalidity of the arbitration agreement, breach of due process (if, of course, the prejudiced party had the opportunity to take part in the proceedings notwithstanding the breach), improper composition of the arbitral tribunal, and failure of the arbitral procedure to conform to the parties' agreement. With this in mind, courts have precluded parties who failed to raise objections during the arbitration itself from raising them for the first time during enforcement proceedings, relying on the doctrine of estoppel or its equivalent.

A Hong Kong court, for example, applied the doctrine of estoppel against a party invoking the invalidity of the arbitration agreement because it failed to contest the jurisdiction of the tribunal during the arbitration even though it was aware that the constitution of the tribunal may have been improper.[32] The Higher Court of Appeal of Bavaria came to the same conclusion in the *K Trading Co v Bayerische Motoren Werke AG* case, in which BMW argued that the signatory of the arbitration agreement did not have the power to conclude an agreement on its behalf, even though it failed to raise an objection during the arbitration. The court set out a general principle that "[w]here, in violation of good faith, the formal invalidity of the arbitration agreement is raised [by a party which has] participated in the arbitration without raising any objection, this objection is not to be examined."[33] Although the doctrine of estoppel is not explicitly set out in the New York Convention, the court ruled that "[i]t appears from the interpretation of [article II] that the prohibition of contradictory behaviour is a legal principle implied in the Convention."[34] In another more recent German case, the party resisting enforcement on the basis of the invalidity of the arbitration agreement had itself initiated the arbitration proceedings, prompting the court to find that it was estopped from raising the ground.[35] The case law therefore shows that parties must be careful to raise any concerns they may have with respect to the validity of the arbitration clause in the arbitration proceedings themselves.

The warning also extends to the other grounds identified above. In an enforcement proceeding in Singapore, for example, a judge rejected the argument that the award was not in accordance with proper arbitral procedure when it was made by a party which had refused to participate in the arbitration and against which a default award had been issued as a result. Although the judge in the case also relied on other considerations to reject the argument, he noted:

> The defendants ... themselves were given every opportunity by the Commission to present their case in reply to the claim. They chose deliberately to reject that opportunity. It appeared to me that having chosen not to attend they had very little right to criticise the way in which the arbitration had been conducted.[36]

In the above-mentioned *K Trading Co v Bayerische Motoren Werke AG* case, the court also rejected the argument that the arbitral tribunal had exceeded the time limit for rendering its award on the basis that the procedural defect could have been, but was not, raised during the arbitration itself.[37]

Timely objections during the arbitration itself may therefore be considered a *sine qua non* condition for subsequently raising certain of the New York Convention grounds to resist enforcement. Courts in many jurisdictions will not accept a party waiting until enforcement of a prejudicial award is sought to raise arguments which could already be identified and addressed at an earlier stage.

(ii) Failure to challenge the award at the place of arbitration

As was set out above, annulment of an arbitral award cannot be sought in a jurisdiction other than the place of arbitration. The decision of whether to challenge the award at the place of arbitration may however affect a party's ability to successfully resist enforcement in secondary jurisdictions. In Germany, jurisprudence has gone so far as to hold that the grounds in the New York Convention for resisting enforcement may only be invoked if the award can still be challenged at the seat of arbitration and if there is "at least a likelihood of success on the merits".[38] In a case involving an award issued in Taiwan, a German court did however note that the jurisprudence to that effect was controversial. Ultimately, however, the court's ruling was equally unfavourable to parties seeking to resist enforcement. Indeed, the court held that the statutory rule, applying to domestic awards, that courts may not refuse to enforce an award if the party resisting enforcement has failed to seek to have the award set aside in a timely fashion, is also applicable to international awards governed by the New York Convention.[39] As the losing party had failed to petition a Taiwanese court to annul the award within the thirty day time limit imposed by Taiwanese law, its enforcement could not be challenged. In a recent case, however, the German Supreme Court ruled that the mere fact that a party resisting enforcement of an award did not challenge an award in the country where it was rendered is not tantamount to contradictory behaviour. The court acknowledged that there may be legitimate reasons not to seek the annulment of the award, and ruled that the setting aside of an award and the request for enforcement are two different causes.[40]

Even partial awards on jurisdiction may have to be challenged at the seat of arbitration in order to avoid being estopped from challenging the enforcement of the subsequent award on the merits. In a 2005 case in which a party had contested the jurisdiction of the tribunal in the arbitration proceedings but had not challenged the arbitral tribunal's unfavourable interim award on jurisdiction, the Hamm Court of Appeal ruled that the party was estopped from resisting enforcement on the basis of the invalidity of the arbitration agreement.[41]

If the jurisdiction where enforcement is likely to take place requires that awards be challenged in the country where they were rendered, a party that considers resisting the enforcement may therefore have to seek annulment in order not to forfeit its chances to oppose enforcement.

Ongoing annulment proceedings before the competent court are not a ground to refuse enforcement. Under the Convention, the enforcement courts may but are not obliged to suspend enforcement proceedings until a decision on annulment is issued.[42]

(iii) Grounds already raised unsuccessfully in annulment or enforcement proceedings elsewhere

The situations set out above highlight how the conduct of a party during and after the arbitration proceedings can have an impact on its ability to resist enforcement of an award; however, other considerations beyond its control may also prejudice that ability. Indeed, courts in a number of jurisdictions have ruled that a party is estopped from relying on grounds for resisting enforcement if those grounds have already been unsuccessfully relied on in annulment or enforcement proceedings elsewhere.

For example, a Singapore court ruled that a party resisting enforcement should not be given "two bites at the cherry" by being permitted to contest the enforcement of an award on the same grounds that were rejected by a court at the place of arbitration in annulment proceedings.[43] In that case, the losing party had sought unsuccessfully to have the award set aside before the Chinese courts, and then relied on the same grounds in the enforcement proceedings in Singapore.[44] An Indian court came to the same conclusion in the *International Investor KSCSC v Sanghi Polyesters* case, holding that grounds unsuccessfully raised in annulment proceedings in England were to be considered *res judicata*.[45]

Parties may also be estopped not only from invoking grounds which proved unsuccessful in annulment proceedings, but also from invoking grounds unsuccessfully raised in enforcement proceedings elsewhere. A 2003 Hong Kong judgment is a good illustration of this: in that case, the winning party had already had the award, which was issued in Switzerland, enforced by a US court before it sought enforcement in Hong Kong. With respect to the New York Convention grounds which had been argued unsuccessfully by the losing party in the US court, the Hong Kong court applied the doctrine of issue estoppel. After considering that the conditions for the application of issue estoppel were met in the circumstances,[46] it found that the losing party was estopped from raising them again and granted enforcement of the award.

While courts have found parties to be estopped from invoking previously unsuccessful grounds contained in article V(1) of the New York Convention, it is questionable whether parties would be similarly estopped with respect to grounds contained in article V(2). Indeed, the latter grounds, which include arbitrability under the law of the country in which enforcement is sought, as well as

public policy of that country, are distinct in that they rely on the law at the place of enforcement. A determination of a court in another jurisdiction would therefore have little or no relevance given that the issues to be considered may be completely different.[47] Another reason why parties would be unlikely to be estopped in raising those grounds is that a court in enforcement proceedings may invoke them *ex officio*.

Although the approach of different courts will vary on this issue, it is important for a party to an arbitration to maximize its chances of enforcement in all jurisdictions. Indeed, depending on the nature of the case, it may be difficult to predict where the winning party will enforce an award in its favour. A party must therefore think ahead, from the beginning of the proceedings, and be cognizant of the potential pit-falls described above so as to protect the already limited grounds it has at its disposal to challenge enforcement.

5. Examples of Grounds on which Enforcement was Successfully Resisted

As noted above, the pro-enforcement bias of the New York Convention entails that refusals on the part of courts to enforce awards are rare. However, the Convention is not a basis to simply rubberstamp foreign awards, and courts do occasionally refuse to enforce awards. This section sets out a few examples of such decisions, and in particular explores the public policy ground, which is often invoked by parties resisting enforcement.

A first example is a German case in which, pursuant to article V(1)(a) of the Convention, the court refused enforcement of an award on the grounds that the arbitration agreement was invalid under Chinese law, the law of the seat of arbitration, as had previously been determined by a Chinese court.[48] Applying the due process ground in article V(1)(b), the Hong Kong High Court in the *Paklito Investment Ltd v Klöckner East Asia Ltd* case refused to enforce a Chinese award rendered under the auspices of the China International Economic and Trade Arbitration Commission (CIETAC) on the grounds that a party had not been given an opportunity to comment on the reports of a tribunal-appointed expert.[49] Another example of a refusal based on article V(1)(b) is that of a German court in a case in which the respondent's participation in the proceedings was limited to nominating an arbitrator and submitting documents on the contract in dispute. The respondent was not informed of the arguments presented by the claimant, and the court concluded that merely being given the opportunity to give its view "without knowing the arguments of the opponent, is not sufficient for due process ... "[50]

It appears that the excess of jurisdiction ground in article V(1)(c) has only very rarely provided a basis for refusal of enforcement.[51] One of those rare cases to invoke it is a Hong Kong decision in which the Court of Appeal refused enforcement ruling that the "arbitrators made their purported awards in excess of jurisdiction and such awards should not be enforced here."[52] On the basis of article V(1)(d), which permits refusal of enforcement where there is an irregularity in the composition of the arbitral tribunal or in the arbitral procedure, an award that had been rendered by a truncated tribunal was refused enforcement in Germany. Contrary to the applicable procedural rules, only two of the three arbitrators had participated in the issuance of the award.[53] Interestingly, the award in that case had been set aside in the country where it had been rendered (Belarus). The German courts did not, however, consider that such annulment was a mandatory ground to refuse its enforcement abroad.[54] Nevertheless, article V(1)(e) provides that enforcement of an award which has been set aside at the place of arbitration can be refused. An example of a case refusing enforcement on that ground is the US Court of Appeals for the District of Columbia decision in *Termorio v Electranta*, a case dealing with an award that had been rendered and subsequently annulled in Colombia.[55] The court ruled that because "the arbitration award was lawfully nullified ... [and] there is nothing in the record here indicating that the proceedings before the [Colombian court] were tainted ..., appellants have no cause of action in the United States to seek enforcement of the award ... "[56]

The **public policy** ground contained in article V(2) of the New York Convention can in some circumstances provide a basis on which to resist enforcement of an arbitral award. The chances of success in invoking public policy will, however, depend very much on the jurisdiction in which it is raised. Indeed, France, for example, takes a very narrow view of public policy, which is well demonstrated by the *Cour d'appel de Paris*'s decision in the well known *SNF SAS v Cytec Industries BV* case.[57] In its decision granting enforcement of an award rendered in Belgium, the Court of Appeal ruled that enforcement would only be refused on public policy grounds if the violation was "flagrant, actual, and concrete."[58] A Hong Kong court took an equally restrictive stance:

> [to refuse enforcement of a Convention award] the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite it being a party to the Convention, it cannot reasonably be expected to overlook the objection.[59]

Public policy has nevertheless successfully been relied on to resist enforcement in a number of cases in many jurisdictions. For example, an Indian court refused to enforce an award on the grounds that it rejected an Indian party's plea of *force majeure* despite the fact that the party's performance was rendered illegal by an Indian Government directive.[60] In another example, a German court determined that German public policy was violated by the fact that a party in an arbitration had not been given the opportunity to examine a document submitted to the arbitrator by its opponent, and therefore refused enforcement.[61] In some cases, the way courts use the public policy ground to refuse enforcement of awards can appear questionable.[62] For example, in a recent decision, a court in the Philippines refused to enforce an award rendered in Singapore after it concluded that it violated Philippine public policy because, among other things, it awarded attorney fees and failed to apply Philippine law as was required by the contract. Such decisions are, however, "few and far between."[63]

By and large, though, public policy is quite a small loophole to escape enforcement as it should be construed restrictively by the courts and only prevent enforcement in extraordinary circumstances.[64] **Fraud**, for instance, could constitute such an extraordinary circumstance. A French court concluded that the dispositions of an award affected by one of the parties' fraudulent submission of an erroneous expense report to the tribunal were "contrary to French international public policy".[65] Although it was in an annulment and not an enforcement proceeding, the French courts would arguably have applied the same reasoning in an enforcement case. If, however, a party could have raised a fraud allegation in the arbitration but failed to do so, it may be prevented form resisting enforcement, or even from adducing evidence for the alleged fraud in the enforcement proceedings.[66]

A party that does not wish to pay an award but has a claim, or has acquired a claim in the meantime, against the winning party, may also try to **set off** its claim from the amounts awarded against it in the arbitral award. The admissibility and prerequisites for such a set off will vary depending on the jurisdiction.[67]

6. Conclusion

In conclusion, parties intending on resisting the enforcement of an award will generally face an uphill battle. Whether resisting enforcement will prove to be successful will depend on the grounds that are invoked, as well as on the jurisdiction in which it is sought. Parties must also be cognizant that their conduct throughout the proceedings and after the issuance of the award in the place of arbitration may affect their ability to subsequently resist enforcement of an award. Often, a more practical approach may be to try to reach a post-award settlement, which may be interesting to the winning party as it does not have to engage in costly and lengthy enforcement proceedings with an uncertain outcome.

Notes:

1 Richard J Graving, "Status of the New York Arbitration Convention: Some Gaps in Coverage but New Acceptances Confirm its Vitality", 10 ICSID Review (1995).

2 Hans Smit, "Annulment and Enforcement of International Arbitral Awards: A Practical Perspective" in Lawrence W Newman & Richard B Hill, eds, *The Leading Arbitrators' Guide to International Arbitration*, 2nd ed (New York: Juris, 2008), p 591 at p 591.

3 Among the countries that have not acceded to the Convention are Bhutan, North Korea, Myanmar, and Timor-Leste.

4 *See eg Gulf Petro Trading Co Inc v Nigerian National Petroleum Corp*, F3d, 2008 WL 62546 (US Court of Appeals for the 5th Circuit, 2008), Intl Arb LR (2008), n17, p 17.

5 Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (The Hague: Kluwer, 1981), at 265 [Van den Berg, NY Convention].

6 *Parson & Whittemore Overseas Co v Société général de l'industrie du papier (RAKTA)*, 508 F2d 969 (US Court of Appeals for the 2nd Circuit, 1974); see Domenico Di Pietro & Martin Platte, *Enforcement of International*

Arbitration Awards: the New York Convention of 1958 (London: Cameron May, 2001), p 135.

7 *Seven Seas Shipping Ltd v Tondo Limitada*, 1999 US Dist LEXIS 9574 (US District Court, Southern District of New York, 1999), YBCA,Vol XXV (2000), p 987.

8 Van den Berg, *NY Convention, supra* note 4 at pp 265, 269-273.

9 Article VII(1) of the *Convention* reads as follows : "[t]he 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."

10 Albert Jan van den Berg, "New York Convention of 1958: Refusals of Enforcement", ICC ICArb Bull Vol18 (2007) No2, p 15 at 49 [Van den Berg, "Refusals of Enforcement"].

11 Van den Berg, *NY Convention*, *supra* note 5 at p 1 f. *See* also Paolo Michele Patocchi in International Arbitration in Switzerland: An Introduction to and a Commentary on Articles 176-194 *of the Swiss Private International Law Statute* (The Hague: Kluwer Law International, 2000), Art 194, No 3: the courts should "actively adopt a uniform and comparative approach when called upon to interpret and construe the Convention, and in particular they should take judicial notice of the precedents made in other Contracting States."

12 *Publicis v True North*, 206 F3d 725, 2000 US App LEXIS 3765 (US Court of Appeals for the 7th Circuit, 2000), 18 ASA Bull 2/2000, p 427, YBCA, Vol XXV (2000), p 641 (in this case, a disclosure order is qualified as an award under the *New York Convention*). The solution adopted by the Court in Publicis is one that is identical in many jurisdictions: Phillippe Pinsolle, "Observations – Cour d'appel des Etats-Unis (7e circuit) 14 mars 2000", Rev arb 2000, p 657 at p 659. *See eg* Cour d'appel de Paris, 1 July 1999, *Brasoil*, Rev arb 1999, p 834, note Ch Jarrosson.

13 An arbitral award has been defined as "a final decision by the arbitrators on all or part of the dispute submitted to them, whether it concerns the merits of the dispute, jurisdiction, or a procedural issue leading them to end the proceedings." (Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman On International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), N 1353.) DiPietro & Platte state that "[i]n practice, the term award should be reserved for decisions which finally determine the substantive issues they deal with." (DiPietro & Platte, *supra* note 6, at p 30.) This view is reflected for example in a US case in which the District Court refers to an award as "finally and definitely dispos[ing]" of a claim submitted to arbitration. (*Zephyros Maritime Agencies, Inc v Mexicana de Cobre*, 662 F Supp 892 at p 895 (US District Court, Southern District of New York, 1987.) Because the *Convention* does not define what constitutes an award, the definition must be found in domestic law. While one author writes that it "appears to depend on the arbitration law governing the award" (Van den Berg, *supra* note 10, at p 39), another adds that a foreign decision must also be regarded as an award under the law of the place of enforcement to qualify as such, and that courts should take note how the concept of an "award" has been interpreted by foreign courts applying the *Convention* (Patocchi, *supra* note 11, Art 194, No 2.).

14 *See eg Austin John Montague v Commonwealth Development Corporation*, 27 June 2000, Appeal No. 8159 of 1999, SC No 29 of 1999, (Supreme Court of Queensland, Court of Appeal Division), YBCA, Vol XXVI (2001), p 744 at para 14, in which the court ruled that an interim award on jurisdiction could be enforced. In another case, an Indian court ruled that an interim award providing for interim measures "can be enforced as an arbitral award": *Marriott International Inc et al v Ansal Hotels Limited et al*, 5 July 2000, FAO (OS) No 335 of 1999 (Delhi High Court), YBCA, Vol XXVI (2001), p 788 at para 28.

15 Art IV(1) of the *New York Convention*. It should be noted however that not every jurisdiction requires a party seeking enforcement to produce a copy of the arbitration agreement (see eg for Germany Oberlandesgericht [Court of Appeal], Bayern, 23 September 2004, *K Trading Co v Bayerische Motoren Werke AG*, No 4Z Sch 005-04, YBCA, Vol XXX (2005), p 568.)

16 Patocchi, *supra* note 11, No 50; Van den Berg, *NY Convention*, *supra* note 5 at p 252.

17 Van den Berg, *NY Convention ibid* at 252.

18 Art IV(2) of the New York Convention.

19 Van den Berg, *NY Convention*, *supra* note 5 at p 248. While these are the only requirements imposed by the *New York Convention*, certain jurisdictions impose additional practical requirements on the party seeking enforcement. In China for example, a party seeking enforcement must submit "the name and quantity of the relevant assets [of the losing party], their location and evidence of the

economic situation of the defendant." (Clarisse von Wunschheim & Fan Kun, "Arbitrating in China", 26 ASA Bull 1/2008, p 35, at p 48.) The lack of assets of the losing party in China is "a frequent reason for failure of enforcement procedures". (*Ibid*)

20 Tribunal Supremo [Spanish Supreme Court], 14 January 2003, *Glencore Grain Ltd v Sociedad Ib rica de Molturacion*, 64 Cuaderno Civitas de Jurisprudencia Civil (January-April 2004), p 71, no 1715, YBCA, Vol XXX (2005), p 605.

21 Swiss Federal Supreme Court, DFT 4P102/2001-4P.104/2001, 21 ASA Bull 2/2003, p 364.

22 Oberlandsgericht [Court of Appeal], Celle, 4 September 2004, No 8 Sch 11-02, YBCA, Vol XXX (2005), p 528.

23 *Ibid*, para 8.

24 Van den Berg, "Refusals of Enforcement", *supra* note 10 at p 48.

25 *See*, *eg*, Austria: Hubertus Schumacher, "Zu Inhalt und Bestimmtheit von Schiedsspr chen und Vollstreckungsantr gen", 25 ASA Bull 3/2007, p 493.

26 For a matter where declaratory relief was enforced *see*, Oberlandesgericht [Court of Appeal], Köln, 22 April 2004, SchiedsVZ/ German Arbitration Journal (2004), no4, p VIII.

27 Art 207 *Federal Arbitration Act*, 9 USC Section 1 et seq. *See Flatow v Iran*, 1999 US Dist LEXIS 18957 (US District Court, District of Columbia, 1999), YBCA, Vol XXV (2000), p 1102.

28 Art 13 Arbitration Act 1996.

29 Art 137 Swiss Code of Obligations: the provision however refers to a judgment, not an arbitral award, and no rule applies specifically to arbitral awards. The courts have not yet addressed the question. *See* Christian Aschauer, "La prescription des sentences arbitrales", 23 ASA Bull 4/2005, p 599.

30 Art 219 Civil Procedure Law of China; Von Wunschheim & Fan Kun, *supra* note 19, p 35 at p 47.

31 *La société nationale des hydrocarbures v Shaheen National Ressources Inc*, 585 F Supp 57 (US District Court, Souther District of New York, 1983), YBCA, Vol X (1985), p 540 at para 16.

32 *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, [1995] HKLR 215 (Supreme Court of Hong Kong, 1994), YBCA, Vol XX (1995), p 671.

33 *K Trading Co v Bayerische Motoren Werke AG*, *supra* note 15, at para 5.

34 *Ibid*, para 5.

35 Oberlandesgericht [Court of Appeal], Koblenz, 28 July 2005, 2 Sch 04/05, YBCA, Vol XXXI (2006), p 673.

36 *Hainan Machinery Import and Export Corporation v Donald & McArthy Pte Ltd*, [1996] 1 Singapore Law Reports 34 (High Court, 1995), YBCA, Vol XXII (1997), p 771.

37 *K Trading Co v Bayerische Motoren Werke AG*, *supra* note 15.

38 Oberlandesgericht [Court of Appeal], Karlsruhe, 14 September 2007, *N v M*, headnote, online: www.kluwerarbitration.com, referring to German Supreme Court, BGH NJW-RR 2001, p 1059.

39 *Ibid*, headnote.

40 German Supreme Court, BGH, 17 April 2008, III ZB 97/06, SchiedsVZ/German Arbitration Journal (2008), no 4, p 196.

41 Oberlandesgericht [Court of Appeal], Hamm, 27 September 2005, 29 Sch 1/05, SchiedsVZ/ German Arbitration Journal (2006), no 3, p 106 at paras 5-6.

42 Article VI of the *New York Convention* reads: "If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security." For an example of a court decision refusing enforcement as a result of ongoing annulment proceedings, *see Creighton v Government of Qatar*, 22 March 1995, No 94-1035 RMU (US District Court, District of Columbia), YBCA, Vol XXI (1996), p 751, dealing with an award issued and challenged in France. For an example of a case in which a court granted enforcement despite pending annulment proceedings, *see* Cour d'appel [Court of Appeal, Luxembourg], 28 January 1999, YBCA, Vol XXIVa (1999), p 714.

43 *Newspeed International Ltd v Citus Trading Pte Ltd*, 4 June 2001, OS No 600044 (Singapore High Court), YBCA Vol XXVIII (2003), p 829 at para 6.

44 *Ibid* at para 6.

45 *International Investor KCSC v Sanghi Polyesters Ltd*, 9 September 2002, Civil Revision Petition Nos 331 and 1441 of 2002 (High Court, Andhra Pradesh (India)), YBCA, Vol XXX (2005), p 577.

46 *Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 27 March 2003, (High Court of the Hong Kong Special Administrative Region, Court of First

Instance), 21 ASA Bull 3/2003, p 667, at paras 50-51.

47 *See eg Hebei Import and Export Corporation v Polytek Engineering Co Ltd*, [1999] 2 HKC 205 (Court of Final Appeal of the Hong Kong Special Administrative Region), YBCA, Vol XXIVa (1999), p 652 at para. 44, which held that a party was not estopped from resisting enforcement on the ground of public policy even though it did not raise a public policy argument before the court of supervisory jurisdiction, reasoning that "[i]n the court of supervisory jurisdiction, the public policy to be applied would be a different public policy, namely that of the supervisory jurisdiction."

48 Kammergericht [Higher Regional Court], Berlin, 18 May 2006, SchiedsVZ/German Arbitration Journal (2007), No 1, p 100, YBCA, Vol XV (2007), p 347.

49 *Paklito Investment Ltd v Klöckner East Asia Ltd*, 15 January 1993 (High Court of Hong Kong), YBCA, Vol XIX (1994), p 664.

50 Landgericht [Court of First Instance], Bremen, 20 January 1983, YBCA Vol XII (1987), p 486, at p 487.

51 Professor Albert Jan van den Berg writes that only two cases reported in the ICCA Yearbooks have refused enforcement for excess of jurisdiction: Van den Berg, "Refusals of Enforcement", *supra* note 9 at p 24.

52 *Tiong Huat Rubber Factory v Wah-Chang International Company Ltd*, 28 November 1990 (Hong Kong Court of Appeal), YBCA, Vol XVII (1992), p 516, at para 19.

53 German Supreme Court, BGH, 21 May 2008, III ZB 14/07, SchiedsVZ/German Arbitration Journal (2008), No 4, p 195.

54 They examined therefore whether the awards could, in principle, be enforced in Germany. This was not the case as the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties (Article V(1)(d) of the *New York Covention*). The Supreme Court subsequently confirmed this finding. The court's approach to the enforcement of annulled awards has also been taken in other jurisdictions, in particular France, see Cour Cass, 29 June 2007, *PT Putrabali v Rena Holding*, 25 ASA Bull 4/2007, p 826. The French courts enforced an arbitral award rendered in a dispute between an Indonesian party, Putrabali, and French Rena Holding which had been annulled in England.

55 *Termorio v Electranta*, 487 F2d 928 (US Court of Appeals for the District of Columbia Circuit, 2007), note Goldstein, 25 ASA Bull. 3/2007, p 643.

56 *Ibid*, at p 930.

57 Cour d'appel de Paris [Paris Court of Appeal] (1re Ch C), 23 March 2006, Rev Arb 2007, p 100, note S Bollée.

58 *Ibid.*

59 *Hebei Import and Export Corporation v Polytek Engineering Co Ltd*, supra note 46 at para 87; Teresa Cheng, "Experience in Enforcing Arbitral Awards in Asia – A Hong Kong Perspective", (2000) 3 Intl Arb LR 185 at 187.

60 *COSID Inc v Steel Authority of India Ltd*, 12 July 1985 (High Court of New Delhi), YBCA, Vol XI (1986), p 502, at 506-07.

61 Oberlandesgericht [Court of Appeal], Hamburg, 3 April 1975, Recht der internationalen Wirtschaft 1975, p 432, YBCA, Vol II (1977), p 241.

62 Van den Berg, "Refusals of enforcement", *supra* note 10 at p 35.

63 *Ibid.*

64 International Law Association, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, New Delhi Conference 2002, available at http://www.ila-hq.org/en/committees/index.cfm/cid/19.

65 Cour d'appel de Paris [Paris Court of Appeal], 30 September 1993, *European Gas Turbines SA v Westman International Ltd*, YBCA, Vol XX (1995), p 198 at 206.

66 In the *Westacre Investments Inc v Jugoimport – SDPR Holding* case, in which the party resisting enforcement alleged that the opposing party had adduced perjured evidence in the arbitration, the English Court of Appeal ruled that in order to adduce evidence of fraud at the level of enforcement, that evidence must not have been available "at the time of the hearing before the arbitrators." (12 May 1999 (Court of Appeal, Civil Division), YBCA, Vol XXIVa (1999), p 753 at para 45.)

67 *See eg Mangistaumunaigaz Oil Producton Association v United World Trade Inc*, 17 June 1997, Civil Action No 96-WY-1290-WD (US District Court, District of Colorado) at paras. 1-2, YBCA, Vol XXIVa (1999), p 808, in which the US District Court rejected a party's attempt to set off its claims from the amount granted in the award, ruling that "[t]he Convention does not provide any basis for the assertion of counterclaims" in enforcement proceedings. See also Oberlandesgericht [Court of Appeal], Dresden, SchiedsVZ/German Arbitration Journal (2005), No 4, p 210, at p 213; Oberlandesgericht [Court of Appeal], Düsseldorf, SchiedsVZ/German Arbitration Journal (2005), no 4, p 214.

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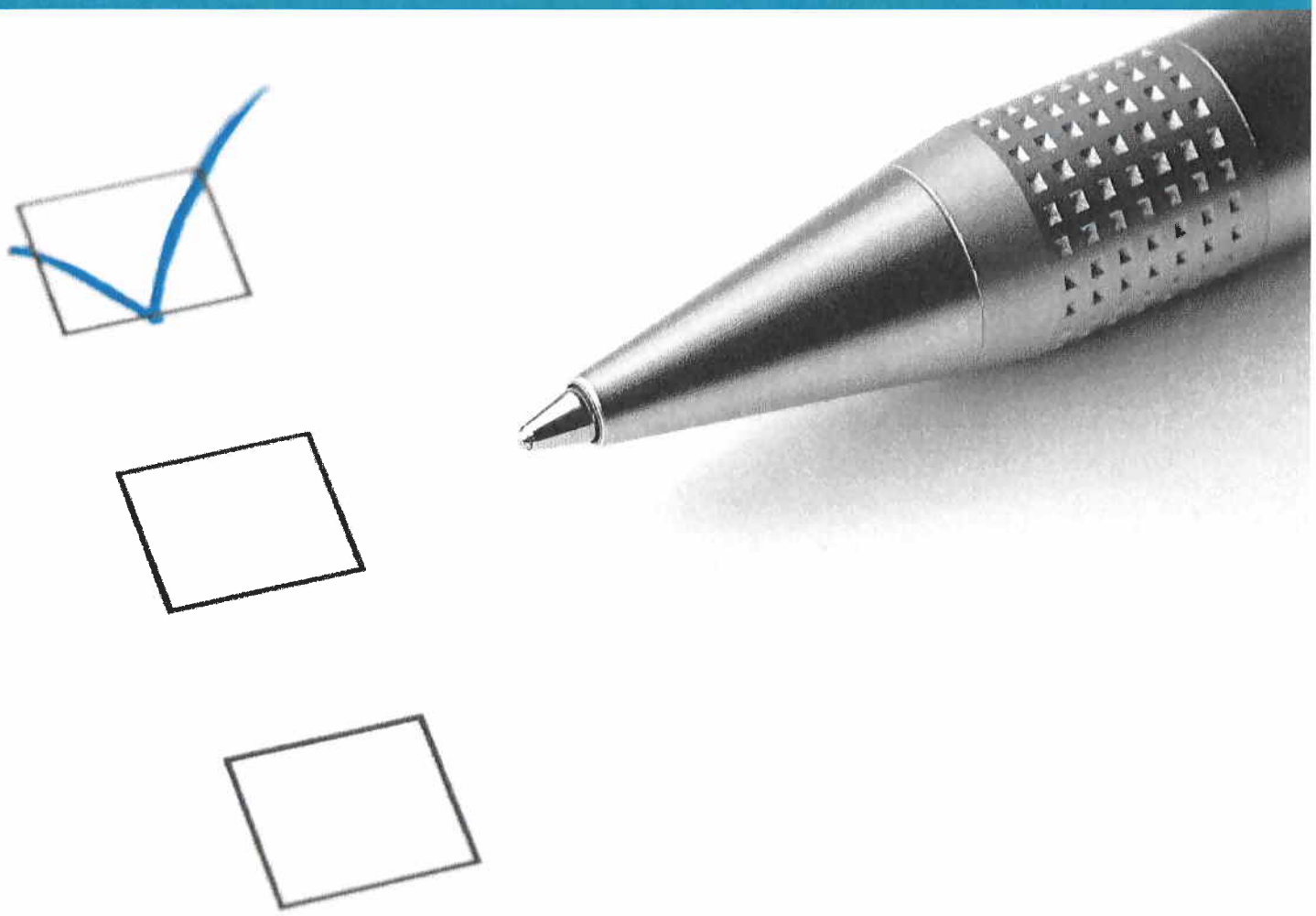

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