RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS

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Part One: Introduction

The New York Convention, among the most widely ratified treaties in force today, was intended and expected to prove fundamental to the workings of the international arbitral system. It would do so essentially by ensuring that arbitral awards are readily recognizable and enforceable in States other than the State in which they are
rendered. It is small wonder that the New York Convention figures prominently in all treatments of international arbitration – whether academic or professional – and remains central to all contemporary discussions of the subject.

Despite its wide adoption and its broad coverage, the New York Convention – like virtually all treaties – is dependent for its efficacy on the behavior of national actors. Depending on the view of international law prevailing in a given State, the Convention’s efficacy may require statutory implementation at the national level. The Convention’s efficacy also depends in all States – regardless of their general views of international law – on the adequacy of the Convention’s application on the ground. Although the literature on the Convention is extensive and rich, systematic attention to the workings of the Convention at the national level, across jurisdictions, has until recently been lacking. Fortunately, recent published works open up a highly useful window on national practice. Especially welcome is the comprehensive database recently assembled – and maintained on an ongoing basis – by the United Nations Commission on International Trade Law (UNCITRAL). This database is in turn critical to the production of the extremely valuable UNCITRAL Guide to the New York Convention that is currently underway.

Notwithstanding the availability of these sources, it seemed useful to the International Academy of Comparative Law to commission this General Report and the numerous national reports on which it is based. Ideally, this inquiry will foster an appreciation of the differences in understanding of the New York Convention that have emerged among national courts from a large number of jurisdictions. For manageability’s sake, national reporters were asked specifically to address only certain salient interpretation and application questions. Note that the Convention is in force in all the jurisdictions covered in this study, with the particular exception of Taiwan, which, as will become obvious, has taken significant inspiration from the Convention. Note also that Hong Kong and Macau are covered as jurisdictions, despite the fact that they have are not independent States.

Comparative law has particular value when deployed in the context of treaty interpretation and application. In addition to performing its usual functions, comparative law helps reveal the challenges and limitations of international unification through the treaty mechanism, thereby shedding light on international legal processes generally.
The thirty-eight jurisdictions\textsuperscript{1} canvassed in this study differ dramatically among themselves in the volume of decided cases interpreting and applying the New York Convention and therefore in the capacity of their national reports to respond to the range of issues raised by the questionnaire on which this General Report is based. Fortunately there are for every one of these issues a critical mass of responding jurisdictions and thus a basis for observing the range and distribution of responses.

The heart of the Convention is of course Article V which designates the grounds, and the only grounds, upon which a foreign award may be denied recognition or enforcement under the Convention, and that subject consumes much of the report that follows. However, a single article (Article II) deals, albeit in highly general terms, with enforcement, not of foreign arbitral awards, but of agreements to arbitrate. Enforcement of arbitration agreements is a matter that is both important in itself and in its relation to the recognition and enforcement of awards. Unless an agreement to arbitrate is enforceable, there may at the end be no award at all to be recognized or enforced. This study of the New York Convention thus encompasses Article II even though that provision of the Convention does not directly address the recognition or enforcement of awards.

This study is organized in five substantive parts.

Part Two looks at basic implementation issues. It asks in what form the New York Convention has been implemented into national law. It inquires into the declarations and/or reservations, if any, to which the Convention has been subjected in that process. It also seeks to understand how the basic terms “arbitral award” and “foreign arbitral award” are to be conceived. It considers the more particular question of whether measures of provisional relief ordered by an arbitral tribunal qualify as “awards” within the meaning of the Convention. Finally, it seeks to know whether the Convention is viewed as preemptive of other national law or whether, on the contrary, a party seeking

\textsuperscript{1} Argentina, Australia, Austria, Brazil, Canada, China, Croatia, the Czech Republic, France, Germany, Greece, Hong Kong, Hungary, India, Indonesia, Israel, Italy, Japan, Korea, Macau, Malaysia, the Netherlands, Norway, Paraguay, Peru, Portugal, Romania, Russia, Singapore, Sweden, Switzerland, Taiwan, Turkey, United Kingdom, United States, Uruguay, Venezuela, and Vietnam
recognition or enforcement of a foreign arbitral award may, at its option, also rely upon a locally available alternative means and why a party might want to do so.

Part Three treats the enforcement of agreements to arbitrate, as opposed to the enforcement of awards. This, as earlier observed, is a matter that, while addressed by the New York Convention, is far from addressed comprehensively. We limit the inquiries here to the two most basic. First, how do courts, in addressing agreements to arbitrate, interpret the Convention terms “null, void, inoperative or incapable of being performed” and do they consult any particular choice-of-law rules in determining what that phrase means? Second, what kinds of objections (within the rubric of “null, void, inoperative or incapable of being performed”) are national courts in principle willing to entertain prior to the arbitration, assuming a party resisting arbitration so requests, and by contrast what kinds of objections will the courts in principle decline to entertain at the outset, thus allowing arbitral tribunals to decide them at least in the first instance?

Part Four addresses what is widely regarded as the heart of the New York Convention, namely the grounds on which recognition or enforcement of a foreign arbitral award may properly be denied.

Some of the issues raised in Part Four are truly transversal, cutting across all the Convention grounds. It is important, for example, to know whether the Convention permits courts to recognize or enforce a foreign arbitral award, even though a ground has been established that would permit them to withhold such recognition and enforcement. If national courts may “overlook” the presence of grounds for refusing recognition and enforcement, when might they be inclined to do so? We also consider which grounds, if any, are subject to waiver by the parties and how, to that extent, waiver is established. Finally, we consider a particularly elusive question. To what extent does a court, when asked to determine whether a defense to recognition or enforcement of a foreign award is established, defer to judgments that one or more other courts and possibly the arbitral tribunal itself may have made at an earlier phase of the case on an issue – such as the scope of the agreement to arbitrate or the dispute’s arbitrability – on which the viability of a defense to recognition or enforcement depends.

But most of the issues surrounding the grounds for denying recognition or enforcement of awards under the New York Convention are ground-specific, since they
depend on our understanding of the meaning of the Convention’s several individual
grounds for such denial. Each of the Convention grounds raises a large number of
questions of interpretation, from which were selected, for each ground, those that would
 seem especially interesting or salient.

Article V(1)(a) establishes as a ground for denying recognition or enforcement of
an award under the Convention that “[t]he parties to the agreement referred to in Article
II were, under the law applicable to them, under some incapacity, or the said agreement is
not valid under the law to which the parties have subjected it or, failing any indication
thereon, under the law of the country where the award was made.” The national reporters
were asked, in particular, whether courts actually follow the precise sequence of choice
of law rules prescribed by Article V(1)(a) — i.e., the law to which the parties submitted
their agreement to arbitrate, followed by the law of the place of arbitration — for
determining whether an agreement to arbitrate is valid.

Article V(1)(b) provides for non-recognition and non-enforcement if “[t]he party
against whom the award is invoked was not given proper notice of the appointment of the
arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”
A question of both academic and practical significance is whether courts apply to foreign
arbitral awards essentially the same standards of proper notice and fair hearing as are
required by the domestic constitutional law of the jurisdictions in which those courts
operate.

Article V(1)(c) addresses the situation in which “[t]he award deals with a
difference not contemplated by or not falling within the terms of the submission to
arbitration, or … contains decisions on matters beyond the scope of the submission to
arbitration.” There has arisen in this context the very particular question whether a
tribunal is deemed to have decided matters beyond the scope of the agreement to arbitrate
if, while admittedly addressing a matter that was made subject to arbitration, it grants a
remedy, or form of relief, that the main contract by its terms specifically excluded.

Article V(1)(d) contemplates that the composition of the arbitral authority or the
arbitral procedure may not have been “in accordance with the agreement of the parties,
or, failing such agreement, … in accordance with the law of the country where the
arbitration took place.” Though the circumstance rarely arises, one cannot exclude the possibility that the parties may have expressly adopted a procedural feature that is not in accordance with the mandatory law of the jurisdiction in which the arbitration took place. The further question arises as to whether an award should be viewed as not in accordance with the agreement of the parties if the arbitral tribunal applies to the merits of a dispute a body of substantive law other than the one that the parties selected in their contract as the governing law.

According to Article V(1)(e), a court may deny recognition or enforcement if “[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.” Among the most intriguing issues surrounding this provision is whether, and if so when, courts are prepared to recognize or enforce a foreign arbitral award, even though that award has been set aside by a competent court of the place of arbitration. This scenario is of course a particular instance of the more general question raised earlier, namely whether courts are ever prepared to recognize or enforce a foreign arbitral award, even though a ground has been established that would permit them to refuse to do so.

Article V(2)(a) invites non-recognition and non-enforcement if “[t]he subject matter of the difference is not capable of settlement by arbitration under the law of [the] country where recognition or enforcement is sought.” There is reason to suppose that jurisdictions differ considerably over the kinds of claims that may be considered to be “non-arbitrable,” that is, legally incapable of being arbitrated, but there is also reason to suppose that there may be patterns that recur across jurisdictions.

Article V(2)(b) is the so-called “public policy” question, justifying non-recognition or non-enforcement of a foreign award if “recognition or enforcement of the award would be contrary to the public policy of [the] country where it is sought.” The questionnaire on which this study is based inquires as to the kinds of circumstances under which a foreign arbitral award may be deemed contrary to the public policy of the country in question. It also asks more specifically whether law at the national level draws
a distinction for these purposes between “international public policy” (*ordre public international*) and “domestic public policy” (*ordre public interne*).

As already noted, this study examines only a fraction of the interpretation questions that the New York Convention raises. But, again, the questions chosen are both especially important and interesting, and taken together allow us to take a suitably broad view of the Convention.

Although the jurisdictional and procedural aspects of judicial actions to enforce foreign arbitral awards tend to take a “back seat” in discussion of the Convention, they too can be quite interesting and even decisive of outcome. Among the more salient procedural issues are these: What is required in order for a court to exercise personal jurisdiction over the award debtor in an action to enforce a foreign arbitral award? Are actions to enforce a foreign arbitral award subject to a limitations, or prescription, period? On what broadly procedural grounds, other than absence of personal jurisdiction or prescription, may a national court decline even to entertain an action to enforce a foreign arbitral award? Part Five takes up these issues.

Part Six invites the national reporters to go beyond the issues specifically highlighted in the questionnaire and offer some overall assessments of Convention law and practice in their jurisdictions. Thus, they were asked to identify the respects, if any, in which the New York Convention is most commonly subject to criticism in their countries, underscoring the principal problems, difficulties or controversies that Convention practice has raised. Reporters were asked in conclusion to identify, on the basis of their own country’s experience, any specific reforms of the New York Convention that they consider particularly useful or appropriate.

**Part Two: Basic Implementation of the Convention**

We begin with certain basics about the Convention, notably whether it has been statutorily implemented in the States studied (and if so, how), whether and to what extent States have interposed reservations and declarations in signing or ratifying the Convention, and how various States go about defining what is an “arbitral award” and,
more particularly, a “foreign arbitral award.” A great number of other questions could be posed, but from a general perspective these seem most essential.

A. Implementing Legislation

It is important to determine whether, within any given jurisdiction, the New York Convention has received legislative implementation. In jurisdictions that regard international treaties as self-executing, no such implementation is necessary in order for the Convention to have application (though even a self-executing treaty may receive legislative implementation). But in jurisdictions that do not regard international treaties as self-executing (or for some reason do not consider the New York Convention in particular to be self-executing), implementing legislation is presumably necessary. Strictly speaking, in those circumstances it is that implementing legislation – not the text of the Convention – that will be given direct application by national courts.

Only in a minority – albeit a substantial minority – of the jurisdictions studied (close to one-third) is the New York Convention specifically deemed to be self-executing, and thus automatically applicable without need for implementing legislation. In other jurisdictions, the Convention, though not deemed self-executing, has been implemented by domestic legislation that either reproduces the text of the Convention as such or incorporates the text of the Convention by reference. In both of these

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2 A good example is France. The Convention itself was published in the Official Journal. [1959] J.O. 8726 (1959). See also the national reports for China, Japan, Portugal, and Sweden. In China, the National Supreme Court expressly declared the New York Convention to be applicable without need of any legislative implementation. (Portugal and Switzerland are among those jurisdictions that have enacted legislation implementing the Convention, even though, as a matter of constitutional law, they consider the Convention to be self-executing.)

3 See, for example, Austria (Federal Law Gazette 1961/200); Korea (Korean Arbitration Act, ch. VII); and Sweden (Swedish Arbitration Act, secs. 54-60.

4 Implementing legislation in Hong Kong (Hong Kong Arbitration Ordinance, sec. 87) says little more than “A Convention award is enforceable in Hong Kong.” Similarly, Article 74 of the Peruvian Arbitration Law 2008 simply states that the Convention shall apply to the recognition and enforcement of foreign arbitral awards.

In the United States, Congress implemented the Convention through incorporation by reference in Chapter Two of the Federal Arbitration Act (9 U.S.C. secs. 201ff). The majority of Canadian provinces have adopted a short implementing statute to which the text of the Convention is simply attached. See the
situations, the domestically applicable law is, for all practical purposes, the Convention’s own text. However, in other jurisdictions, the relevant implementing legislation in some measure diverges in content from the Convention. For example, a number of countries take the position that they have adequately implemented the New York Convention statutorily simply by enacting the UNCITRAL Model Law, which contains comparable recognition and enforcement standards. Implementation in this particular fashion is in principle unproblematic. But in other situations, the implementing legislation appears to deviate from the New York Convention in a substantive way. For instance, when Australia implemented the Convention, it paraphrased rather than reproduced the Convention. The paraphrase provided that “in any proceedings in which the enforcement of a foreign award … is sought the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves … that one of the grounds listed in paragraph (5) is available.” The Queensland Supreme Court ruled that the omission of the word “only” in the paraphrase meant that a court could refuse, on grounds other than those stated in the Convention, to enforce an award. This misreading of the Convention was remedied through the 2010 amendments to the IAA, reinserting the word “only.”

Canadian report, footnote 3 and accompanying text. In Quebec, the Code of Civil Procedure instructs courts to take the Convention into account in interpreting the provisions of the province’s Code of Civil Procedure on the subject. Code of Civil Procedure, art. 948(2). The obligation to do so was confirmed by the Canadian Supreme Court in GreCon Dimter Inc. v. J.R. Normand, Inc., 2005 SCC 46, [2005] 2 SCR 401. See also the national reports for Germany (Civil Procedure Code, sec. 1061); Greece (Code of Civil Procedure, arts. 903, 906); Israel (Arbitration Law, 28 LSI (5734-1973/74), sec. 29A, implemented by Regulation for the Execution of the New York Convention, 5738-1978 (1978)); Italy (Law of Jan. 19, 1968, n. 62, further implemented by Civil Procedure Code, arts. 839-40); the Netherlands (Arbitration Act 1986, codified in Code of Civil Procedure, art. 1075); and Slovenia (Arbitration Act, offc’l gazette no. 45/2008, art. 42/2).

5 See, for example, the 1996 Arbitration Act of the United Kingdom, secs. 100-04.

6 See, for example, the national reports for Ireland (Arbitration Act 2010); Malaysia (Arbitration Act 2005, secs. 38-39); Norway (Arbitration Act, no. 25 (2004)); and Singapore (International Arbitration Act, act no. 23 (1994). Interestingly, Ontario repealed its statute implementing the Convention when it adopted the UNCITRAL Model Law on International Commercial Arbitration through the International Commercial Arbitration Act (RSO 1990, c I-9), in the view that the implementing statute had thereby become superfluous. This led to at least one decision refusing to apply the Convention on the ground that it had not been shown to be in force the province. Kanto Yakin Kabushiki-Kaisha v. Can-Eng Mfg. Ltd, (1992) 4 BLR (2d) 108, 7 OR (3d) 770. Reportedly, a consensus has since emerged that enactment of the International Commercial Arbitration Act constitutes implementation of the Convention.


Obviously, national arbitration laws may well set out certain terms and conditions governing the Convention’s application (above and beyond those that the Convention itself requires) – terms and conditions that may need to be respected in order for a award creditor to successfully invoke the Convention at the national level. But judging by the national reports, only very rarely have signatory States declared the Convention to be non-self-executing, while at the same time failing to adopt adequate implementing legislation.\textsuperscript{9} Nor is there anything in the national reports to suggest that the Convention has been implemented through national legislation that purports to alter meaningfully the substantive import of the Convention.\textsuperscript{10}

\textbf{B. Reservations and Declarations}

One of the complexities associated with international treaties is the high incidence of reservations and declarations that signatory States attach to their treaty ratifications. Those complexities are naturally at their minimum when a State makes a reservation or declaration that the treaty in question specifically invites signatory States to make.

The New York Convention contemplates, and indeed invites, two specific reservations. One of them limits the Convention’s application to awards in disputes having a commercial character. The other reservation contemplated by the Convention pertains to reciprocity. Article I (3) provides:

\begin{itemize}
\item \textsuperscript{9} The Supreme Court of Indonesia ruled that the courts could not apply the New York Convention to enforce a foreign arbitral award because Indonesia had never statutorily implemented the Convention. PT Nizwar v. Navigation Maritime Bulgars Varna, case no. 2944 K/Pdt/1983 (1984). Subsequently, the Supreme Court issued Regulation 1 of 1990, requiring recognition and enforcement of foreign awards pursuant to bilateral or multilateral conventions. The legislature thereafter enacted Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Undang-Undang Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa (1999).
\item Macau is a special case. In 1999, just prior to ending its administration over Macau, Portugal extended application of the Convention to that territory by presidential decree 188/99, effective February 10, 2000. In 2005, the government of China formally declared the Convention applicable in Macau, which declaration was then published in the Macau Official Bulletin (no. 13).
\item The most straightforward scenario is one in which the Convention is literally attached to the implementing legislation. Most of the Canadian provinces have followed that practice.
\item Australia presents a slightly different situation. Australia enacted the New York Convention by way of the Arbitration (Foreign Awards and Agreements) Act of 1974, renamed the International Arbitration Act 1974 in 1989 when the UNCITRAL Model Law was given force of law through Part III of the Act. The provisions of the Convention are paraphrased in Part II of the International Arbitration Act.
\end{itemize}
When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Because the Convention specifically contemplates these reservations, they can scarcely be viewed as lessening the Convention’s efficacy from the drafters’ viewpoint, and States have in fact availed themselves broadly of them. A majority of States in this study have made both reservations, while most of the remaining States have made one of these reservations (almost always the reciprocity reservation), but not the other. In other words, more countries made both the reciprocity and the commercial reservation than made either of them alone. Even so, in what may be a surprising result, nearly one-third of the States reportedly have made neither of the two reservations contemplated by the Convention.

Obviously reservations and declarations become more problematic when States interpose them without the treaty text having invited them to do so. It appears from the present study that, with one notable exception, the States surveyed have not in fact subjected their signature or ratification of the New York Convention to what might be

11 See, for example, Argentina, China, Croatia, Georgia, Hong Kong, Hungary, India, Indonesia, Korea, Macau, Malaysia, Romania, Turkey, the United States, Venezuela, and Vietnam.
12 See, for example, the Czech Republic, France, Japan, the Netherlands, Portugal, Singapore, and the United Kingdom. The Canadian provinces (other than Quebec) have made the commercial declaration only.
13 The States that apparently have not made any reservations to the application of the New York Convention include Austria, Brazil, Germany, Ireland, Israel, Italy, Norway, Paraguay, Peru, Slovenia, Sweden, Switzerland and Uruguay. Norway presents the unusual situation in which the State made the reciprocity declaration, but is deemed to have abandoned that through its implementing legislation (Arbitration Act, act. no. 25 (2004), sec. 45).
14 In addition to interposing the reciprocity and commercial declarations, Vietnam made the following reservation: “All interpretations of the Convention before the courts or other competent authorities of Vietnam shall observe the rules laid down in the Constitution and law of Vietnam” (Decision no. 453/QD-CTN (1995), art. 1). According to the national reporter, Vietnam’s insistence on interpreting the Convention under its own law “surely impairs the objective of the New York Convention which is to unify internationally rules governing foreign arbitral awards.” However, in Decision no. 01/2013/QDST-KDTM (2013), a Vietnamese court reaffirmed this reservation.
termed “uninvited” reservations or declarations. From the viewpoint of the Convention’s efficacy, this is welcome news.

C. The Meaning of “Arbitral Award” and “Foreign Arbitral Award”

The scope of application of the New York Convention obviously turns on the meaning attributed to the terms “arbitral award” and “foreign arbitral award.” These terms identify the awards that are governed by the New York Convention and therefore benefit from the recognition and enforcement advantages that the Convention offers.

1. What is an “arbitral award”? 

The New York Convention does not purport to define meaningfully the term “arbitral award.” Article I(2) merely states that the term “shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.” A very considerable number of jurisdictions reportedly provide no meaningful definition, either in legislation or case law, of “arbitral award.” But nearly as many reportedly give the term an exceedingly broad

15 China, for example, has not legislated any definition of an “arbitral award.” Some national legislation simply reproduces the definition of “arbitral award” found in the New York Convention itself. This is the case, for example, in Australia (International Arbitration Act, sec. 3(1) and Singapore (International Arbitration Act, sec. 27(1)).

Some jurisdictions provide statutory definitions that are not particularly illuminating. The Arbitration Law of Israel, section 1, defines an arbitral award as “an award made by an arbitrator, including an interim award.”

Other jurisdictions do not purport to provide any statutory definition of the term. These include Austria, Brazil, Canada, France, India, Korea, Macau, the Netherlands, Norway, Paraguay, Peru, the United Kingdom, the United States, Uruguay, Venezuela and Vietnam.

In such jurisdictions, it is typically left to courts and scholars to define the term. The French Supreme Court has defined arbitral awards as “decisions by arbitrators that resolve definitively, in whole or in part, the dispute that has been submitted to them, whether on the merits, on jurisdiction or on a procedural motion that leads the arbitrators to bring the proceedings to a close.” Cass. Civ. 1re, Oct. 12, 2011, Rev. arb. 2012.86. Courts have given workable definitions of arbitral awards in other countries as well, including Canada and Greece. In still other countries, such as Austria, scholars play a very large role in defining what is meant by an arbitral award.

A number of jurisdictions specify that an arbitral award must be on “the merits.” See, for example, the national reports for Portugal and Venezuela. Other jurisdictions, such as Sweden and Taiwan, specify that to be an award a determination must be “final and binding.”
definition. Somewhat smaller groups either expressly build into the term a requirement that the disposition of the dispute be “final and binding” or restate the specific provisions of the UNCITRAL Model Law, article 31, on “Form and Contents of Award.”

Although national law appears largely content with vague definitions of “arbitral award,” or no definition at all, it is likely to address related questions of a narrower character, such as whether the notion of award encompasses “partial awards” (i.e., awards that dispose in final and binding terms of some but not all the legal claims and issues in a case). A good number of national laws specifically state that partial awards constitute awards within the meaning of the Convention. However, even where the legislation is silent on the matter, the distinct majority view is to that effect. It should be noted in passing that a significant number of national reports use the terms “partial award” and “interim award” interchangeably. The latter formulation is best avoided inasmuch as the term “interim” is also commonly associated with provisional measures issued by arbitrators. While it seems fairly settled that partial awards constitute awards, the same

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16 The problem is not solved by enacting the UNCITRAL Model Law on International Commercial Arbitration. That instrument defines the terms “arbitration” and “arbitral tribunal,” but not “arbitral award.” Indeed, even the Model Law’s definitions of “arbitration” and “arbitral tribunal” are not particularly instructive.

Section 27 of the Swedish Arbitration Act authorizes three types of determinations to take the form of arbitral awards: (1) decisions on issues referred to the arbitrators, (2) decisions to terminate arbitral proceedings without deciding the issues, and (3) confirmation of settlement agreements. Any other determination by an arbitral tribunal takes the form of a “decision,” which is not an award.

17 Article 31 reads:

1. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
2. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.
3. The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.
4. After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

One State, Greece, makes the definition of an award depend on the law governing the arbitral award, which most likely means the law of the arbitral situs.

18 Partial awards are expressly recognized as constituting awards under the Convention in Croatia (Law on Arbitration, art. 30); Ireland (Arbitration Act 2010, art. 2(1)); Malaysia (Arbitration Act 2005, sec., 2); Peru (Arbitration Law, art. 54); and Portugal (Law no. 63/2011, art. 42(2)).

19 See, for example, the national reports for Germany, Israel, Korea, Norway, Switzerland, and the United Kingdom. The issue evidently remains open in Slovenia.
may not be said for interim arbitral measures. As discussed below,\textsuperscript{20} the proper characterization of interim arbitral measures remains a contested matter.

As this discussion of partial awards and interim arbitral measures suggests, having a single abstract definition of an award is less critical to the functioning of the Convention system than being able to know whether certain recurring forms are or are not to be treated as awards, whether for recognition and enforcement purposes or otherwise. One such form is the “expert determination.” What exactly is meant by an expert determination is not certain, nor is it clear in most jurisdictions whether it is or is not assimilable to an arbitral award.\textsuperscript{21} It is a matter that warrants clarification – and ideally not merely at the national level, but at the level of the Convention as a whole. That aside, the reports do not describe the lack of a more meaningful definition of “arbitral award” as especially problematic.

2. What is a “foreign arbitral award”?\textsuperscript{22}

What characteristics does an award need to have under a country’s domestic law in order to be considered “foreign” and therefore subject to the Convention? Must an award be made abroad to qualify as “foreign,” or is it enough that an award have some feature that may be described as “foreign”? The Convention sheds light on this question by stating, in Article I (1), that “[t]his Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought …” and then adding that “[i]t shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.” The last sentence suggests that States may consider as “foreign” awards rendered on their own territory, rather than abroad, if they choose to consider those awards as “non-domestic.”\textsuperscript{22}

\textsuperscript{20} See Part Two, Section C 1 of this report, \textit{infra}.
\textsuperscript{21} See the national report for Canada. The prevailing view at least in Switzerland is that expert determinations are not awards.
\textsuperscript{22} It should be pointed out that the term “foreign arbitral award” has a highly distinctive meaning in the United Kingdom. According to the U.K. report, a “foreign arbitral award” is an award rendered in a State that is not a party to the New York Convention.
The great majority of States treat an award as “foreign,” within the meaning of the Convention, only if made on the territory of a foreign country, as the terms of the Convention themselves suggest. Indeed, the reports suggest that an award made abroad will be considered foreign in the enforcing State even if the parties agreed to conduct the arbitration in accordance with the arbitration law of the place where recognition or enforcement is sought. The situation may be slightly different in Turkey; there, under the so-called “procedural law principle,” whether an award is domestic or foreign is determined not so much by the place of arbitration as by the procedural framework governing the arbitration. Thus, presumably, an award rendered in Turkey on the basis of the arbitration framework of another State will be treated as “foreign.”

Only a distinct minority of States, among them the United States, are prepared to treat as “foreign” awards rendered on their own territory where the case simply presents one or more “foreign” elements. According to the U.S. Federal Arbitration Act, section 202:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

The German national report raises the possibility that a court might decline to treat an award rendered abroad as an award within the meaning of the Convention if, under the law of the rendering State, the award required local judicial confirmation (i.e. reduction to a local court judgment) in order to be enforceable and such confirmation had not in fact taken place (citing BayObl.G, 4Z Sch 13/02, SchiedsVZ 2003, 142, paras. 47-48 (2002)).

The matter is unsettled in certain jurisdictions, such as Venezuela.

According to the Turkish national report, despite the prevalence of the “principle of procedural law,” some courts continue to apply a strict territorial approach or a combination of both. Emphasis is placed in the report on decisions of the 15th Civil Chamber of the Supreme Court, which currently considers that an award rendered under “the authority of a foreign law” is a foreign award, even if rendered in Turkey.

These States apparently also include China (award made in Beijing is treated as foreign for Convention purposes apparently for the sole reason that it was rendered under aegis of the Court of Arbitration of the International Chamber of Commerce); Hungary (award rendered locally is foreign if institution under

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23 See, for example, the national reports for Australia (International Arbitration Act, sec. 3(1)); Brazil (Arbitration Act, art. 34); China (Arbitration Law, arts. 66, 72); Croatia (Law on Arbitration, art. 38); Germany (ZPO sec. 1025(I) and (IV)); Israel (Arbitration Law, sec. 1); Slovenia (Arbitration Act, art. 1/1); and Sweden (Swedish Arbitration Act, sec. 52) The same is true according to the national reports for France, Italy, Korea, Malaysia, Portugal, and Switzerland.

24 The same is true according to the national reports for Venezuela.

25 See, for example, the national report for Switzerland.

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28 These States apparently also include China (award made in Beijing is treated as foreign for Convention purposes apparently for the sole reason that it was rendered under aegis of the Court of Arbitration of the International Chamber of Commerce); Hungary (award rendered locally is foreign if institution under
Act, the Convention’s recognition and enforcement obligation applies even when an award stems from an arbitration seated in the United States, as long as the award “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign States.” A few national reports specifically raise the possibility that an award rendered locally may be treated as a Convention award under the Convention if expressly made pursuant to another jurisdiction’s law of arbitration.  

**D. Provisional or Interim Measures as Awards**

One of the more vexing questions of definition under the Convention is whether measures of interim or provisional relief issued by an arbitral tribunal may be considered as awards within the meaning of the Convention and thus presumptively entitled to recognition and enforcement. Obviously recognizing and enforcing arbitral provisional measures enhances the efficacy of such measures and, arguably, the efficacy of arbitration. The difficulty lies in considering such measures to be not only “binding” (which they almost certainly are), but also “final” (which is questionable).
This issue appears to be surrounded by considerable uncertainty among the reporting States. Courts in a number of States – including States where the question has arisen – are reported to have no settled rule on the matter.\textsuperscript{31} Interestingly, however, even in the absence of case law, national reporters for a good number of countries express a strong view on the matter, either favoring\textsuperscript{32} or disfavoring\textsuperscript{33} treatment of provisional measures as awards.

Even so, it appears that a clear majority of jurisdictions that have addressed the question – doing so less often by express statutory language than by judicial interpretation or academic consensus – decline to treat provisional measures as awards, thereby excluding them from coverage of the Convention’s guarantee of recognition and enforcement.\textsuperscript{34} The basic idea is that provisional measures are exactly that – provisional

\textsuperscript{31} In a significant number of jurisdictions, the issue has apparently not arisen. See, for example, Hong Kong, Hungary, India, Paraguay, Uruguay and Vietnam. In other national reports (for example, for Ireland, Israel, Macau and Venezuela), the issue is simply not addressed.

There is no settled law on the subject in Canada, apart from the two provinces – British Columbia and Ontario – that have statutorily determined that provisional measures may be treated as awards.

The situation is notably unclear in Indonesia. On the one hand, the New Arbitration Law, section 32(1), expressly provides that: “[a]t the request of one of the parties, the arbitral tribunal may render a provisional award or other interim awards …, including granting the attachment of assets, ordering the deposit of goods to a third party or the sale of perishable goods.” The statute thus employs the term “award” in this context. The national reporter nevertheless gives voice to some doubt as to enforceability of this species of award.

\textsuperscript{32} The authors of the reports for China, Ireland, Korea, and Malaysia state their belief that provisional arbitral measures are enforceable as awards, but cannot point to any case law so holding. The Korean national reporter bases his supposition on an unusual “understanding,” namely that “the Convention does not require finality of … arbitral awards.” Although the Chinese national reporter does not point to any case law to this effect, he strongly advocates treating provisional measures as awards. He notes that the New York Convention uses the term “binding” in Article V, but not the term “final,” and so argues that, even if provisional measures are not “final,” they are surely “binding,” and that should suffice. He also considers the enforceability of provisional measures to be critical to arbitration’s efficacy.

\textsuperscript{33} Though there is evidently no case law on the subject in their jurisdictions, several national reporters express confidence that provisional measures would not be considered to amount to arbitral awards. See, for example, the national reports for Brazil, Georgia, and Vietnam.

\textsuperscript{34} These jurisdictions appear to include Argentina, Austria, Canada, Croatia, the Czech Republic, Germany, Greece, Italy, Japan, the Netherlands, Norway, Paraguay, Peru, Russia, Singapore, Switzerland, Taiwan, and Turkey.

This position is expressly stated in the Rules of Arbitration of the Permanent Arbitration Court of the Croatian Chamber of Economy, art. 26(2). While the Norwegian legislation does not so state, the legislative history clarifies that measures of provisional relief do not constitute awards for recognition and enforcement purposes. Ot.pr. nr. 27 (2003-2004), sec. 13, sec. 23, comment on sec. 19.

In the case of the Netherlands, however, under a proposed amendment to national legislation, a measure of provisional relief issued by a tribunal sitting locally would constitute an award. 2014 Proposal for the New Act (Draft Arbitration Act), art. 1043b, para. 4: “Unless the arbitral tribunal decides otherwise, a decision of the arbitral tribunal ordering an interim measure shall be an arbitral award.” (The proposal
– and, since modifiable, incapable of resolving matters in a final fashion.\(^{35}\) Only in a minority of jurisdictions is it established that such measures are or may be subject to recognition and enforcement as Convention awards.\(^{36}\) In Singapore, the statute governing international arbitration was recently amended to provide expressly that a Convention award includes “an order or a direction made or given by an arbitral tribunal in the course of an arbitration…”\(^{37}\) As amended, the legislation enumerates the types of provisional or interim measures that tribunals may issue as awards. According to the national reporter, the amendment “underscores the firm commitment of the Singapore government in enhancing curial support for international arbitration.” There are a few other examples of national legislation expressly denoting provisional measures as awards and presumably requiring that they be treated as such.\(^{38}\) Note, however, that in virtually all

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specifically provides, however, that such a measure is not subject to annulment as an award.) The national reporter reasonably infers from this that under the proposed revision a measure of provisional relief issued by a foreign tribunal would be enforceable in the Netherlands as an award.

The possibility of treating provisional measures rendered by tribunals abroad is also evidently under active consideration in Sweden.

\(^{35}\) For a judgment to this effect, see the Australian case of Resort Condominiums v. Bolwell, (1993) 118 ALR 655.

\(^{36}\) These States include India, Macau, Peru, Romania, Singapore, the United Kingdom, and Venezuela. Legislation in the Canadian provinces of British Columbia (International Commercial Arbitration Act, RSBC 1996, c. 233, sec. 2(1)) and Ontario (International Commercial Arbitration Act, RSO 1990, c I-9, sec. 9) expressly designate provisional measures as awards. The British Columbia and Malaysian statutes specifically provide that arbitral decisions granting interest or costs constitute arbitral awards.

The French national report cites a single decision of the Paris Court of Appeal treating a provisional measure as an award and emphasizing that the tribunal had issued the measure \textit{sous astreinte}, i.e., providing for a fine in the event the order is not complied with. Otor, Rev. arb., 2005.737 (2004). The national reporter cites the case for the proposition that whether a provisional measure constitutes an award depends fundamentally on the intention of the tribunal, but observes that the recent French decree on arbitration (decree of Jan. 13, 2011) neither accepts nor rejects this position and that the Cour de Cassation has not yet had occasion to address the issue.

The case law in the United States, where the issue has repeatedly arisen, remains divided. The emerging trend is to place the emphasis, not on labels, but on the tribunal’s intention as to whether the provisional measure should be regarded as final. For an example of a provisional measure that qualified as an award, see Pacific Reinsur. Mgmt Corp. v. Ohio Reinsur. Corp., 935 F.2d 1019 (9th Cir. 1991), emphasizing that the measure was necessary to ensure that the final award would be meaningful. For an example of a provisional measure that did not qualify as an award, see Chinmax Med. Sys., Inc. v. Alere San Diego, Inc., 2011 WL 2135350 (S.D. Cal., May 27, 2011), relying heavily on the fact that the measure described itself as modifiable.

\(^{37}\) International Arbitration (Amendment) Act 2012, sec. 10, adding Section 12(1) to the International Arbitration Act

\(^{38}\) See, for example, Section 19(3) of the Malaysian Arbitration Act, so providing. However, the national reporter notes the absence of case law on the matter. Similarly, Article 48(4) of the Arbitration Law of Peru authorizes recognition and enforcement of provisional measures issued by a tribunal outside Peru in accordance with the same provisions applicable to recognition and enforcement of foreign arbitral awards.
jurisdictions, a consensus prevails that the notion of provisional measures does not include procedural or scheduling orders issued by a tribunal.39

The fact that provisional measures are not treated as awards as such in many jurisdictions does not of course mean that they are necessarily unenforceable in the courts of those jurisdictions, since such measures may be enforceable under local law without any necessity of their being treated as Convention awards as such. In other words, characterization of a provisional measure as an award is not necessarily the only avenue to enforcement. The UNCITRAL Model Law, for example, treats interim measures as judicially enforceable without designating them as awards, and so courts in jurisdictions adopting the Model Law presumably give effect to those measures under their lex arbitri though not under the Convention.40 Some States, even without adopting the UNCITRAL Model Law as such, reach the same result.41 In other words, without treating provisional measures issued by tribunals seated abroad as awards, they nevertheless specifically provide in their legislation for the recognition and enforcement of those measures.

E. The Availability of Recognition and Enforcement Alternatives

National reporters were asked whether parties could obtain recognition or enforcement of foreign arbitral awards in national courts through means other than the New York Convention. In an obvious sense, the availability of alternatives enhances recognition and enforcement by giving award creditors more than one option for achieving those results. On the other hand, their availability may generate confusion, precisely because the recognition and enforcement “ground rules” — both substantive and procedural — may vary according to the option that an award creditor chooses to invoke.

39 See, for example, the national reports for Canada and France
40 This point is particularly underscored in the national report for Australia, which adopted the UNCITRAL Model Law and its provisions on the enforceability of provisional measures issued by foreign arbitral tribunals. According to the national reporter, Croatia would be in this position had it adopted the UNCITRAL Model Law prior to its amendment in 2006, when the Model Law was amended to make provisional measures enforceable, albeit not as awards. He urges that national courts interpret the Model Law, as enacted in Croatia, in the spirit of the 2006 amendment. For a similar observation, see the national report for Greece.
41 See, for example, the national report for Slovenia (citing Arbitration Act, art. 43) and Paraguay (basing this finding on case law, namely the judgment in the case of Nucleo S.A. v. Olympia, AI no. 1216 (Court of First Instance, Nov. 12, 2012)).
The fact remains that the New York Convention by its terms (notably Article VII) squarely contemplates the use of domestic law alternatives to the Convention and indeed guarantees their availability to the extent they exist. The question then becomes one of identifying the alternatives that do exist and are therefore in principle available.

A substantial majority of States whose reports address the question make available domestic law alternatives to the Convention for the recognition and enforcement of awards. Some of these alternatives require reciprocity, while others

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42 According to the Convention’s Article VII, paragraph 1:
The provisions of the … 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.

43 See, for example, the national reports for Austria (ZPO, sec. 614, codifying the Austrian Enforcement Act, secs. 79 ff); the Czech Republic (including Act no. 91/2012 Coll. on International Private Law); Italy (Code of Civil Procedure); Korea (Korean Arbitration Act); Romania (Civil Procedure Code, arts. 1.123 through 1.132); Singapore (the common law); Switzerland (PILA, art 178); and Turkey (Act on Private International Law and Procedural Law”, No. 5718 of Nov. 27, 2007 (“APIL”), and Act on International Arbitration (“AIA”), no. 4686 of June 21, 2001. Legal doctrine in Turkey is divided as to whether the APIL is always available to the award creditor; at least some take the view that the APIL may only be used in the recognition and enforcement of awards rendered in States that are not a party to the New York Convention. As for the AIA, which is based on the UNCITRAL Model Law, it applies when (i) Turkey is the place of arbitration or the parties or tribunal chooses the AIA as applicable, and (ii) the dispute contains a “foreign element” as the AIA defines that term. It is not entirely clear from the report whether the APIL or AIA is more advantageous than the Convention from the award creditor’s point of view. The grounds for denying recognition and enforcement under the AIA are framed differently than under the Convention. A court refuses recognition or enforcement sua sponte if the award (i) stems from an arbitration agreement that does not exist, (ii) is contrary to public policy or good morals, or (iii) adjudicates a dispute that is non-arbitrable under Turkish law. Additional grounds come into play only if the award debtor invokes them and can shows (i) that it was not represented properly before the arbitral tribunal, (ii) that it was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present its case, (iii) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made, (iv) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the law of the country where the arbitration took place, (v) that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or (vi) that the award has not yet become binding or enforceable on parties under the law to which the parties subjected it or under the law of which the award was made. It is difficult to say, on the face of things, whether this set of defenses is more arbitration-friendly than those set out in the Convention.

Among the jurisdictions reporting no alternative legislative avenue for recognition and enforcement of foreign arbitral awards (that is, apart from other treaty avenues) are Ireland, Macau, Sweden, Switzerland, the United States and Venezuela. In the case of Macau, by way of exception, alternate avenues exist for the enforcements of awards rendered in China and Hong Kong.

The Supreme Court of Norway has held that the Convention (as implemented in Norway through Sections 45-46 of the Arbitration Act) is the sole legislative basis on which a foreign arbitral award may be recognized or enforced. The same rule obtains in Portugal and Slovenia. Absent a treaty, the only available avenue for recognition or enforcement of a foreign arbitral award in these jurisdictions is the New York Convention, as implemented by domestic law.
may not. States adopting the UNCITRAL Model Law commonly entertain enforcement actions under that instrument (art. 36), as enacted, rather than the New York Convention as such.\footnote{45 See, for example, Canada, where most of the provinces have adopted the Model Law. In Ontario, where the Convention has not been implemented through a separate statute, use of the Model Law as enacted is the sole available enforcement regime. See Activ Financial Systems, Inc. v. Orbixa Mgmt Servs, Inc., 2011 ONSC 7286, 211 ACWS (3d) 258 (Superior Court of Justice).} On the one hand, the grounds for refusing enforcement in the two instruments are congruent. On the other hand, however, Article 36 of the Model Law does not by its terms require a showing of reciprocity. It would seem that under Article VII of the Convention, if a jurisdiction adopts the Model Law as drafted (i.e. without a reciprocity requirement), the reciprocity requirement stated in the Convention is inapplicable. Specifically to avoid this, the Singapore legislature excluded Article 36 in adopting the Model Law, so that the reciprocity requirement of the Convention cannot be avoided.\footnote{46 See Astro Nusantara International BV & Ors v. PT Ayunda Prima Mitra & Ors, [2013] 1 SLR 636, paras. 101-02.} In France, the alternative regime under national law for the recognition and enforcement of foreign awards\footnote{47 Code of Civil Procedure. Among the advantages is the absence, as a basis for refusal to recognize or enforce a foreign award, of the fact of its annulment in the place of rendition.} is deemed so much more liberal than the Convention that award creditors invoke it regularly. Even if they do not, and they invoke the Convention instead,
the courts accord recognition and enforcement whenever the conditions of national law are met, even if the conditions of the Convention are not.\textsuperscript{48}

In a remarkable number of jurisdictions, alternate means of recognition and enforcement of foreign arbitral awards exist, but are reportedly not used – presumably because they present no particular advantages over the New York Convention route.\textsuperscript{49} This may be the case in Hong Kong, where award creditors have the option of enforcing foreign awards through an action in common law, based on an implied promise by each party to an arbitration agreement that it will comply with an award against it, but do not generally find it advantageous.

Finally, in a potentially disturbing development, according to several national reports, courts have applied to enforcement actions national alternatives to the New York Convention, without those alternatives necessarily presenting any advantages to the award creditor\textsuperscript{50}

Turning to international treaties, a substantial majority of States report that bilateral or multilateral treaties guaranteeing recognition and enforcement of awards do exist.\textsuperscript{51} Ordinarily, for any such treaty to apply, the award must have been rendered on  

\textsuperscript{48} Norsolor, Cass. Civ. 1re, Oct. 9, 1984, Rev. arb. 1985; decision of March 10, 1993, Cass. Civ. 1re, Rev. arb. 1993.255 (2d case). In Germany as well, a court will apply the most liberal regime available for the enforcement of foreign arbitral awards – indeed whether the award creditor invokes it or not. BGH, III ZB 68/02, SchiedVZ 2003, 281, para. 9 (Sept. 25, 2003); BGH, III ZB 18/05, SchiedsVZ 2005, para. 16 (Sept. 21, 2005); BGHZ 166, 278, SchiedsVZ 2006, 161, para. 19 (Feb. 23, 2006). The same may be said of Greece (Patras Court of Appeal 426/1982, Legal Tribune 1983.252). The Paraguayan Arbitration Law No. 1879/02 specifically provides that “except agreement otherwise, [the courts] shall apply the [international treaty that is] the most favorable to the party requesting the recognition and enforcement of an agreement and arbitral award.” To similar effect is Article 78 of the Arbitration Law of Peru.

\textsuperscript{49} See, for example, Australia (common law action alternative) and Greece (Code of Civil Procedure, arts. 903, 906).

\textsuperscript{50} See, for example, Argentina, where courts have applied domestic law (Code of Civil and Commercial Procedure, arts. 517, 519) rather than the New York (or Panama) Convention, without any indication that it was a more favorable avenue for enforcement. See also Brazil (applying internal Resolution no. 9/2005 of the Superior Tribunal of Justice (STJ), the Brazilian court having exclusive jurisdiction over actions for the recognition and enforcement of foreign arbitral awards). In Croatia, courts have applied the Law on Arbitration, in lieu of the Convention, even though it contains an additional ground for refusing recognition and enforcement (viz. lack of reasons or signature) and, to that extent, is not more favorable than the Convention. See Supreme Court decision VSRH Gž 8/11-2 (May 3, 2011) (entertaining the ground of lack of reasons). However, in other respects (e.g. the writing requirement), the Law on Arbitration is more liberal than the Convention. The alternative regime under Czech law (Act no. 91/2012 Coll. on International Private Law) appears to provide defenses to recognition and enforcement beyond those in the Convention, as does the alternative regime under Georgia law (Arbitration Law, as enforced by the Georgian Supreme Court).

\textsuperscript{51} See, for example, the national report for Uruguay. The Russian national report sets out a particularly
the territory of a signatory State. The most commonly cited alternative treaties are the ICSID Convention, the European Convention on International Commercial Arbitration, the Inter-American Convention on International Commercial Arbitration (“Panama Convention”) and Mercosur (the 1992 Las Leñas Protocol), as well as individual bilateral treaties. The relationship between the New York Convention and these international alternatives is not always clear, even in cases such as the Panama Convention which was entered into in full knowledge of, and largely patterned on, the New York Convention.

Part Three: Enforcement of Agreements to Arbitrate

Although the New York Convention’s primary interest lies in the recognition and enforcement of awards, Article II specifically requires enforcement of agreements to arbitrate. Article II (3) provides, *inter alia*:

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

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long list of alternative treaty mechanisms. The Chinese national reporter estimates that China has entered into more than 50 bilateral judicial assistance treaties mandating mutual recognition and enforcement of awards.

52 The European Convention contains several provisions that limit an award debtor’s defenses against the recognition or enforcement of a foreign award.

53 The Austrian national report cites bilateral treaties for the recognition and enforcement of foreign arbitral awards with Germany (1960), Belgium (1961), Switzerland (1962), Liechtenstein (1975) and the former Yugoslavia (now applicable to Macedonia, Croatia, Kosovo, Montenegro and Slovenia).

54 The Panama Convention was signed in 1975 and subscribed to by 17 nations in the Americas. Each State party must, or at least may, define the Panama Convention’s relationship to the New York Convention. According to a reservation by the U.S., unless the parties expressly agree otherwise, if a majority of the parties involved in an arbitration are citizens of Panama Convention States, the Panama Convention, if applicable, takes priority over the New York Convention. Otherwise, the New York Convention prevails. (The U.S. also interposed a reciprocity reservation.) To enhance uniformity of application between the two Conventions, the U.S., upon implementing the Panama Convention statutory through Federal Arbitration Act (FAA) Chapter 3, incorporated by reference many of the provisions found in FAA Chapter 2, implementing the New York Convention. Even so, there are some not insignificant differences between the two Conventions.
The Convention term “refer the parties to arbitration” is ambiguous.\textsuperscript{55} “Referring the parties to arbitration” may entail staying national court litigation that has been brought in putative violation of an agreement to arbitrate. It may also entail issuance of an order compelling arbitration which, if issued to the Claimant, will require that party to pursue proceedings, if at all, in an arbitral forum, and if issued to the opposing party, may require that party to appear in the arbitration once instituted.\textsuperscript{56}

In any case, the inclusion of Article II in the Convention was highly desirable. Unless courts are prepared to enforce agreements to arbitrate, there may be no arbitral awards available to be recognized or enforced under the Convention. On the other hand, Article II is highly elliptical. It neither defines “null, void, inoperative or incapable of being performed” nor identifies a choice of law rule designating the body of law to be consulted in determining precisely whether an agreement has such a defect. This General Report seeks to illuminate these two issues in particular. It does not dwell on the question whether a given dispute does or does not fall within the scope of an agreement to arbitrate. Important as that question is, the notion of “scope” in most jurisdictions is neither elaborated nor described as subject to particular choice of law rules.\textsuperscript{57}

\textbf{A. Agreement “Null and Void, Inoperative or Incapable of Being Performed”}

1. What does “Null and Void, Inoperative or Incapable of Being Performed Mean”?\textsuperscript{58}

It appears from the responses from national reporters that there prevails considerable imprecision over the meaning of the highly general phrase “null and void, inoperative or incapable of being performed,” within the meaning of Article II of the Convention.\textsuperscript{58} In light of the Convention’s ambition to bring clarity and certainty to the

\footnote{55} This ambiguity is underscored in particular in the national report for Japan.  
\footnote{56} The Dutch report underscores that when national courts “refer” parties to arbitration, they neither issue a declaration that the arbitration agreement is valid and binding nor “compel” arbitration.  
\footnote{57} The same may be said as to the question whether an arbitration agreement is mandatory or optional. The Malaysian national report discusses two cases raising this question.  
\footnote{58} The apparent assumption among national reporters is that arbitration agreements may be denied
law, this is regrettable. In the overwhelming majority of countries reporting, there is neither any statutory definition nor any well-settled case law,\textsuperscript{59} but at best isolated examples of Article II’s application.

Among the remaining jurisdictions, the dominant view appears to be that agreements to arbitrate are subject, in regard to their validity and enforceability, to standard principles of contract law drawn from one jurisdiction or another, depending on applicable choice of law rules,\textsuperscript{60} though tempered in the case of some, but not all, jurisdictions by a presumption (often a powerful presumption) favoring the enforceability of agreements to arbitrate.\textsuperscript{61} Thus, if the arbitration clause is illegal (because, for example, it purports to subject a non-arbitrable claim to arbitration,\textsuperscript{62} or offends a mandatory domestic law norm), it will be deemed “null and void,” considering that illegality is a standard contract defense. Similarly, depending on the applicable law, an arbitration agreement may be denied enforcement due to lack of consent, or consent marred by incapacity, misrepresentation, fraud, duress, undue influence, as well as non-arbitrability and violation of public policy.\textsuperscript{63} In principle, these refer to defects that exist enforcement under the Convention only if found to “null and void, inoperative or incapable of being performed,” and not on any other ground. The Israeli reporter thus takes issue with the Israeli Supreme Court’s suggestion that in exceptional cases a court may decline to enforce an arbitration agreement without finding the agreement “null and void, inoperative or incapable of being performed.” See hotels.com v. Zuz Tourism Ltd. and Hotels Online Ltd., Case no. 4716/04. Tak-Supreme 2005(3), 2989 (Sept. 7, 2005) (agreement may be denied enforcement for lack of good faith of party invoking it); Proneuron Biotechnologies Ltd. v. Teva Pharmaceutical Indus. Ltd., Case no. 1817/08, Nevo electronic database (Oct. 11, 2009) (agreement may be denied enforcement for violation of public policy). However, it could readily be argued that lack of good faith and violation of public policy are accepted defenses to the enforcement of contracts and therefore bases for finding an arbitration agreement “null and void, inoperative or incapable of being performed.”

\textsuperscript{59} According to the Japanese national report, courts and scholars have identified no “substantive criteria” for determining the validity of an arbitration agreement. The matter is unsettled elsewhere as well, as in Venezuela.

\textsuperscript{60} The Indian national report is explicit about the reliance of national courts, for purposes of Article II of the Convention, on Indian contract law and in particular on the Indian Contract Act 1872, citing several cases for this proposition. See, for example, Ramasamy Athappan v. Secretariat of the Court, International Chamber of Commerce, France, (2009) 3 ml 84 (Madras High Court). The national reports for Indonesia the Netherlands, and Turkey likewise make specific reference to the general law of contract. The same approach is implicit in the United Kingdom national report.

\textsuperscript{61} A leading U.S. decision to this effect is Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

\textsuperscript{62} See, for example, the national report for Australia.

\textsuperscript{63} See the national reports for Australia, Austria, Canada, the Czech Republic, Korea, and Macau. According to the Swedish national report, “[g]enerally, an agreement to arbitrate is treated as any other commercial agreement, and thus subject to general principles of contract law.” Swedish law, doubtless like
from the moment that an agreement comes into being rather than occurring subsequently.\textsuperscript{64}

The link between “inoperative or incapable of being performed” and standard contract principles is not as strong or obvious as the link between “null and void” and those principles. Nevertheless, contract law principles tend to be consulted in giving meaning to these terms as well. An agreement appears to be “inoperative” in most jurisdictions reporting on that issue if, for one reason or another, it cannot have effect or has ceased to have effect.\textsuperscript{65} It will be “incapable of being performed” under circumstances that would justify non-enforcement of a contract due to impossibility.\textsuperscript{66} Agreements may be inoperative from the very start (as in the case of an internally contradictory arbitration agreement) or subsequently (as in the case of designation of an arbitral institution that no longer exists). In principle, arbitration agreements become others, treats incapacity of parties as a contract defense differently, subjecting that issue to “the law applicable to them,” which in the case of corporate authority may be the law of the place of incorporation.

The volume of decided cases among the jurisdictions is highly variable. The national reports for Australia cite a large number of cases. The national reports for Croatia, Japan, and Korea cite many fewer. And the national reports for other jurisdictions (e.g., Argentina, Brazil, Ireland, Macau, Norway, Paraguay, Peru, Portugal, and Uruguay) report no cases at all. Perhaps surprisingly, Singapore is apparently within the latter category, although its courts have had occasion to rule on the existence of an arbitration agreement and on whether it binds a non-signatory. They have also firmly taken the view that, unless an agreement to arbitrate is found to be invalid, it must be enforced. See, e.g., Coop Int’l Pte Ltd. v. Ebel SA, [1998] SGHC 425, para. 12; Transocean Offshore Int’l Ventures Ltd. v. Burgundy Global Exploration Corp., [2010] SGHC 31, paras. 28-29. But see Tjong Very Sumitomo & Ors v. Antig Investments Pte Ltd., [2009] SGCA 41, para. 24.

\textsuperscript{64} On this point, see the national report for Georgia.

\textsuperscript{65} The agreement may cease to have effect due, for example, to a statutory intervention, a court order, a subsequent arbitration agreement, frustration of contract or fundamentally changed circumstances, bad faith, failure to meet form requirements for a valid contract, discharge or waiver, or a settlement of the dispute. For a catalogue of this sort, see the national report for India. One U.S. court has held that when parties to an arbitration agreement waive their right to arbitrate, the agreement is not merely “inoperative,” but actually “null and void.” Apple & Eve LLC v. Yantai N. Andre Juice Co., 610 F.Supp. 2d 226 (E.D. N.Y. 2009). Waiver would appear to entail inoperativeness rather than nullity, but in fact the choice of categories makes no difference.

\textsuperscript{66} Here too a number of different scenarios may be posited. The arbitrator or institution named may no longer exist or be available, or the clause may be internally contradictory (the so-called “pathological” clause). On this, see in particular the national reports for Croatia and India. For an extended discussion of pathological clauses, see the national report for Italy, which offers a particularly colorful example. A contract between an Italian and Syrian firm provided that “[a]ny dispute … shall be settled by a sole arbitrator [who] shall be expert in Swiss law and in the production of Arabic bread.” No one satisfying both conditions could be found, and the arbitration agreement was denied enforcement.

Unsurprisingly, it was held by an Australian court that the refusal of a party to pay the required advance on costs is not sufficient to render the arbitration agreement incapable of being performed. See El Nasharty v. J. Sainsbury PLC, [2007] EWHC 2618 (Comm). For similar results, see the reports for Canada (Burlington Northern RR Co. v. Canadian Nat’l Rwy Co., [1997] 1 SCR 5, 34 BLR (2d) 291))
incapable of being performed only for reasons arising after the agreement has been formed.\textsuperscript{67}

Importantly, an agreement to arbitrate will not ordinarily be denied enforcement because null and void, inoperative or incapable of being performed, if that charge is levelled at the entire contract rather than it arbitration clause in particular. Under a widely-observed variation on the principle of separability, if the claimed defect is equally applicable to the main contract as to the arbitration clause, the defense is in principle for the arbitral tribunal to adjudicate.\textsuperscript{68}

Mention was made above of the tendency of courts in many jurisdictions to act on a presumption favoring the enforceability of agreements to arbitrate. More concretely, this may entail hesitating to find that a party waived its right to arbitrate absent clear and convincing evidence to that effect,\textsuperscript{69} trying as hard as possible to salvage an otherwise pathological arbitration agreement,\textsuperscript{70} generally favoring the conclusion that an arbitration agreement is not null and void, inoperative or incapable of being performed,\textsuperscript{71} and possibly even enforcing an agreement despite its invalidity.\textsuperscript{72}

France is a special case. As noted,\textsuperscript{73} parties seeking to enforce an arbitration agreement in France typically utilize domestic French law rather than the New York Convention, since the former is deemed more favorable to enforcement. As interpreted, that law does not permit enforcement to be refused on the ground that the agreement is null and void, inoperative or incapable of being performed.\textsuperscript{74} Rather, a French court

\textsuperscript{67} On this point, see the national report for Georgia.
\textsuperscript{68} Various reports emphasize this point. See, for example, the national reports for Australia, Germany, and Japan. The Israeli national report is critical of the failure by courts in some instances to give effect to the separability principle, deciding the validity of an arbitration agreement when the challenge to it was in effect a challenge to the main contract.
\textsuperscript{69} See, for example, the case of Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd, (2006) 157 FCR 45, [2006] FCAFC 192 (Australia).
\textsuperscript{70} See, for example, the cases of OLG Hamm, 29 Sch 1/05, SchiedsVZ 2006, 106, paras. 23-26 (Sept. 27, 2005) (Germany); Case 89 Daka 20252, Supreme Court, April 10, 1990 (Korea).
\textsuperscript{71} See in particular the Malaysian national report, citing four judicial decisions as evidence for this proposition. See also the national reports for Portugal and Sweden.
\textsuperscript{72} This questionable prospect is alluded to in the Singapore national report.
\textsuperscript{73} See notes 47, 48, supra, and accompanying text.
\textsuperscript{74} The German national report raises a similar possibility of avoiding, through Article VII of the Convention, the requirement of the Convention that the arbitration agreement not be “null and void, inoperative or incapable of being performed.” Among the many examples cited, see BGH, XI ZR 349/08, SchiedsVZ 2011, 46, para. 29 (June 8, 2010).
must declare itself incompetent to adjudicate a case claimed to be subject to an arbitration agreement unless “the arbitral tribunal’s jurisdiction has not yet been invoked and the arbitration agreement is manifestly null or inapplicable.”

2. **What Law Governs the Enforceability of Agreements to Arbitrate?**

Interestingly, while only a minority of the States surveyed offer a working definition of “null and void, inoperative or incapable of being performed,” half of the jurisdictions surveyed apparently have reasonably well-settled choice of law rules for determining the matter. (The other half either have no clear choice of law rule in law or judicial practice, or simply refer to the Convention, as if the term “null and void, inoperative or incapable of being performed” had a uniform settled international meaning.) In a majority of jurisdictions addressing the matter, courts look at the law chosen by the parties to govern the agreement, failing which reference is made to the law governing the main contract (or the substance of the dispute if not a contract dispute).

Some jurisdictions go further and, upon recognizing or enforcing an award, more or less precisely follow the phraseology of Article V(1)(a) of the New York Convention on the choice of law applicable to the validity of the arbitration agreement. According to that provision, if no choice of law was made, the applicable law is the law of the arbitral seat.

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75 Code of Civil Procedure, art. 1448. The French position reflects the co-called “negative” dimension of *Kompetenz-Kompetenz*, meaning that not only may arbitral tribunals determine their own jurisdiction, but courts may not do so at the outset except in the narrow situation of a manifestly null or manifestly inapplicable arbitration agreement. According to the French report, manifest nullity in an international arbitration case has never been found by a court, while manifest inapplicability has been found on a number of occasions.

76 There is no settled choice of law rule in Macau and Vietnam. This is evidently also the case in Japan, where uncertainty and disagreement over the applicable law prevail. Curiously, according to the Japanese national report, no choice of law rule prevails for determining the validity of the arbitration agreement under Article II of the Convention, but a choice of law rule exists for determining the scope of the agreement. The report highlights a case involving a “cross-style” arbitration agreement providing for arbitration in New York if sought by the Japanese party and in Tokyo if sought by the American party. In the absence of a choice of law clause, the Supreme Court of Japan treated the scope of the agreement as subject to U.S. law because the arbitral situs in that case was New York. Case 51-8 Minshu 3657; Jap. Annual of Int’l L 1998, 41, 109 (1997).

77 See, for example, the national reports for Austria, Croatia, Greece, India, Peru, Portugal, and Romania. This is also the general practice in the United States, although the national report suggests that U.S. courts sometimes simply apply the law of the forum (citing the cases of Corcoran v. Ardra Ins. Co., Ltd., 77 N.Y.2d 225 (N.Y. 1990); Freuden sprung v. Offshore Tech. Servs, Inc. 379 F.3d 327 (5th Cir. 2004); and Appole & Eve LLC v. Yantai N. Andre Juice Co., 610 F. Supp. 2d 226 (E.D. N.Y. 2009)).
It is widely accepted that parties may choose a transnational body of rules, such as the Unidroit Principles of International Commercial Contracts, rather than a national law, to govern the agreement if they clearly manifest that intention. But other approaches that are followed include applying the ordinary choice of law rules of the forum or even applying the substantive law of the forum.

According to a clear minority of national reports, the terms “null and void, inoperative or incapable of being performed” are or should be interpreted not under the specific norms of a particular jurisdiction, but under general principles of international

78 This approach appears to be the approach taken in Australia and Canada.

German scholars evidently favor following the sequence laid down in Article V(1)(a) of the Convention, though the German courts appear to favor application of the conflict of laws rules of the forum.

Swiss law is particular in this respect. If the arbitration is seated abroad, the courts will follow the choice of law sequence laid down in Article V(1)(a) in deciding the arbitration agreement’s validity. However, if the arbitration is seated in Switzerland, that determination is made in accordance with the Swiss Private International Law Act (PILA), which presumably means Swiss conflict of laws rules.

The Convention in Article V(1)(a) provides, in the context of recognition and enforcement of awards, that the validity of the arbitration agreement is to be determined “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.” The question has arisen whether the term “under the law to which the parties have subjected it” refers only to choices of law contained in the arbitration clause itself and not to general contractual choice of law clauses. If that is the case, in the absence of a specific choice of law reference in the arbitration clause, the law applicable to the validity of the arbitration agreement would be “the law of the country where the award was made.” Effect would not be given to a general choice of law provision in the contract. However, the reported results suggest that the term “under the law to which the parties have subjected it” is to be read broadly to include both choice of law provisions contained in the arbitration clause itself and general contractual choice of law clauses. For additional treatment, see Part Four, Section B 1 of this report, infra.

79 One jurisdiction whose courts take this view is China. See Mitsubishi Corp. (Hong Kong) Ltd. v. Yangtze Three Gorges Investment Co, NSC. 1999 Jing Final no. 426. Others include the Czech Republic, Germany, Taiwan, and the United Kingdom. It is decidedly also the case in the Netherlands, though disagreement persists over the law to which Dutch conflict of law principles point. Perhaps as a result, a proposed reform of Dutch law would subject the arbitration agreement’s validity to “the law chosen by the parties or the law of the place of arbitration or, if the parties have made no choice for the applicable law, … the law governing the legal relationship with respect to which an arbitration agreement has been concluded.” The Japanese Supreme Court has largely adopted this view (see Case 51-8 Minshu 3657; Jap. Annual of Int’l L 1998, 41, 109 (1997), though according to the national report uncertainty continues to prevail.

Even in the U.S., there is authority to the effect that, though a contract contains a specific choice of law clause, courts apply the law of the forum to decide whether an agreement is null and void, inoperative or incapable of being performed. See Matter of Ferrara S.p.A, 441 F. Supp. 778 (S.D. N.Y. 1977).

80 Russian courts apply the lex fori – Russian law – to the question of the arbitration agreement’s validity. The Croatian courts, in a clear pro-arbitration move, reportedly apply either the chosen law or forum law, whichever will lead to the validity of the arbitration agreement.
law, so that choice of law rules as such do not come into play, and greater uniformity across jurisdictions in interpretation of the Convention.

Clearly there exists no consensus either over the meaning of “null and void, inoperative or incapable of being performed” or over the choice of law methodology, if any, to be followed in giving that phrase content.

**B. Allocation of Authority to Decide Threshold Issues**

The allocation of authority as between courts and arbitral tribunals to determine the enforceability of agreements to arbitrate prior to the arbitration having begun is among the most contentious issues in international commercial arbitration. The lack of agreement is all the more remarkable in light of the near universality of adherence, at least in principle, to the notion of “Competence-Competence.”

This particular subject is further complicated by some jurisdictions’ use in this context of the term “arbitrability.” In a few national reports, authors use the term “arbitrability” to refer to the general question whether a court will or will not enforce a putative agreement to arbitrate. According to this broad usage, if an arbitration agreement is for any reason unenforceable under the applicable law, the dispute is not “arbitrable.” But in its more exact usage, the term “arbitrability” signifies more specifically the legal capacity (under the applicable law of course) of a particular dispute to be arbitrated. The latter usage is more usual and, if only for reasons of clarity, is to be preferred.

It may be more useful, for purposes of delineating the allocation of authority between courts and arbitrators over threshold issues, to employ the terms “jurisdiction” and “admissibility,” despite the degree of uncertainty that surrounds their meaning as well. Although only a minority of jurisdictions apparently use this pair of terms, it is becoming increasingly accepted to use the term “jurisdiction” (“arbitral jurisdiction,” to be more exact) to denote those threshold issues that courts may address and decide prior to arbitration, if asked to do so, and the term “admissibility” to denote those threshold issues that courts decline to address or decide, but instead leave for primary

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81 See, for example, the national report for Brazil.
decisionmaking by the arbitrators. Borrowing those terms, we may say that the wider the universe of issues deemed to be “jurisdictional,” the greater the role of courts in determining whether an arbitration will go forward, while the wider the universe of issues deemed to be merely ones of admissibility, the more reduced the judicial role at the outset. The matter is not simply a technical one. Early judicial intervention is justified in some quarters in terms of ensuring the consent of the parties and shoring up arbitration’s legitimacy, but viewed in other quarters as impairing the efficacy of arbitration by injecting unnecessary cost, delay and judicial formality.

It is surprising, in light of the importance of achieving the right balance between these competing considerations (namely legitimacy and efficacy), how unsettled the law is both within and across jurisdictions. Evidently, in nearly a third of the countries surveyed, no clear answer can be given to the allocation of authority question, due either to the lack or indeterminacy of the case law.82 Reports from a large number of other countries simply state that courts intervene only to the extent necessary to determine whether the agreement is “null, void, inoperative or incapable of being performed,” thus simply restating the Convention formula and shedding no additional light on the matter. There does seem to be widespread agreement that courts may determine for themselves at the outset the question whether a dispute is “arbitrable” in the narrow sense of the term, i.e. legally capable of being arbitrated, which seems quite correct, given the purely legal nature of that determination.

There is considerable support in the national reports for the notion that a distinction should be drawn between challenges affecting the validity of the entire contract in which an arbitration clause is found, on the one hand, and objections that pertain exclusively to that clause, on the other. This is certainly the general rule in the United States, whose courts thereby lend an additional meaning to the notion of

82 Even in some jurisdictions (such as Australia and Austria) having an abundant international arbitration case law, there is no answer from the courts (though there is a good deal of academic commentary). See also the national reports for Hungary, Paraguay and Uruguay.

The Romanian national report is unclear and even contradictory on this point. On the one hand, the report states that a court need not refer the parties to arbitration “if the arbitration agreement is null or inoperative.” It goes on, however, to state that “[p]rior to the arbitration … the validity of the arbitration agreement is not capable to be examined by the national (Romanian State) court.” As for the Russian report, it is silent on the allocation of authority question.
“separability.”

Other jurisdictions apparently proceed in a similar fashion. Some national reports imply that the authority of a court to determine the validity and enforceability of an arbitration agreement prior to arbitration is plenary; in other words, challenges to the validity and enforceability of the agreement as such (as distinct from challenges to the main contract) may be brought to court prior to arbitration, regardless of the ground on which that challenge is based.

The notion that any challenge to the arbitration agreement, as distinct from the contract as a whole, is ripe for judicial determination at the outset could well result in excessive judicial intervention, given the wide range of objections that can be levelled specifically at the arbitration clause. It is in this context that courts in the United States have recognized the specific distinction between jurisdictional and admissibility questions referred to earlier. Both jurisdictional and admissibility questions implicate the arbitration clause only, but only the former will be subject to early judicial determination; the latter will be primarily for the arbitrators to decide. (Rather than contrast “jurisdiction” with “admissibility, the U.S. Supreme Court tends to speak in terms of a distinction between “substantive” and “procedural” arbitrability—the former subject to judicial determination at the outset, the latter not.)

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84 In Indonesia, for example, the courts are not allowed under any circumstance to entertain objections to arbitration provided it is established that a valid arbitration agreement exists.
85 By way of example, in China, according to the national report, “an objection to arbitration may be raised at the beginning of arbitration proceeding[s] to either the arbitration commission [i.e. the arbitral institution under whose aegis the arbitration is to take place] handling the application for arbitration or the court on the ground that there is no valid arbitration agreement” (emphasis added). See Arbitration Law, art. 20. The question of whether there is a valid arbitration agreement in China is viewed broadly to include also the question whether a given dispute falls within the scope of the arbitration agreement, assuming it exists. Interestingly, Article 20 specifies that if one party brings the validity question to the arbitration commission and the other brings it to a court, the court will decide the matter, and in the interim the arbitration itself will be stayed. Judicial proceedings on the validity question obviously take precedence.
86 The Israeli and Venezuelan reporters state that courts enjoy and exercise power to entertain a large number of objections to the jurisdiction of arbitral tribunals.
87 “Procedural arbitrability” issues in the U.S. include, notably, claims that a party waived its right to arbitrate, failed to initiate arbitration on a timely basis, or neglected to satisfy conditions precedent to arbitration.
88 German law similarly recognizes a distinction between jurisdiction and admissibility. A jurisdictional challenge – i.e., a challenge that calls into question the existence or validity of the arbitration agreement – is subject to threshold determination by a court, regardless of the particular validity challenge; an admissibility challenge presumably is not.
At the other extreme lie those jurisdictions that sharply limit intervention by national courts prior to arbitration, even on jurisdictional issues, justifying that result on a strict reading of Competence-Competence that both empowers arbitrators themselves to determine arbitral jurisdiction and largely excludes the power of national courts to do so, at least at the outset of arbitration (thus recognizing both a “positive” and “negative” dimension to Competence-Competence). Such is notably the case in France and, apparently, certain other jurisdictions as well.

Between these two extremes lie a multitude of different approaches. In some jurisdictions, the sole threshold challenge that courts will entertain is a challenge based on the arbitrability (in the strict sense) of the dispute. In others, a court may examine the validity of an arbitration agreement prior to arbitration, but only on a prima facie basis.

Other jurisdictions embrace more complex tests for drawing the line between threshold challenges that courts will and will not entertain at the outset. According to the Canadian report, the Supreme Court of that country addresses the problem as follows:

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89 A court will intervene at the outset under French law only if the arbitration agreement relied upon is “manifestly” invalid or inapplicable. French courts may intervene, on the other hand, to facilitate the arbitration, for example by naming arbitrators when necessary.

90 See the national reports for Argentina, Japan, Paraguay, and Peru.

91 See Case 1400/2008, Annals of Private Law 2009.335 (Greek Supreme Court). It is apparently unsettled in Ireland whether a court’s inquiry into the validity of an arbitration agreement prior to arbitration should be conducted on a prima facie or a de novo basis. In Barnmore Demolition & Civil Engineering Ltd. v. Alandale Logistics Ltd. & Ors, [2010] no. 5910P (Nov. 11, 2010), the court noted the distinction in the following terms, but did not decide the issue because it found the agreement, even under a prima facie standard, not to exist:

The entitlement of both the Court and the arbitral tribunal to rule on the existence of an arbitration agreement has given rise to extensive discourse. In light of the fact that both a court and the arbitral tribunal have jurisdiction to consider and rule on the existence of an arbitration agreement the issue arises as to the standard of judicial review which should be applied by the Court in exercising its jurisdiction under the Model Law [citing Gary B. Born, International Commercial Arbitration, for the proposition that some courts make a de novo determination and others only a prima facie determination].

In a similar vein, Portuguese law requires a court to refer parties to arbitration “unless it finds that the arbitration agreement is manifestly null and void, is or became inoperable or is incapable of being performed” (LVA, art. 5(1)). The Portuguese reporter describes this provision as confining courts, prior to arbitration, to only a prima facie review of the arbitration agreement’s validity, operativeness and capacity to be performed. In the absence of case law in Macau, the national reporter points to a decision of the Supreme Court of Portugal (a country whose law is commonly looked to in Macau to fill gaps), confirming that Portuguese courts should refer the parties to arbitration unless the invalidity of the arbitration agreement is, to quote the reporter, “clear and undisputed.” Case no. 2207/09.6TBSTB.E1.S1 (Jan. 20, 2011); Case no. 5961/09.1TVLSB.L1.S1 (Mar. 10, 2011).
(i) … where the objection to the referral to arbitration only raises questions of law, those questions ought to be resolved fully, and in a final manner, by the court;
(ii) … where the objection raises disputed questions of fact, the court should let the arbitral tribunal make the first ruling on that objection unless a prima facie review of the arbitration agreement clearly shows that it is either inapplicable or “null and void, inoperative or incapable of being performed;”
(iii) … [the same approach as in (ii) above] is also applicable where the objection raises mixed questions of law and fact, unless the questions of fact require only superficial consideration of the documents submitted by the parties.92

Then there are jurisdictions whose formulas for delineating arbitral and judicial authority to entertain threshold challenges are simply elusive93 or demonstrably not followed by the courts themselves.94

Part Four: Recognition and Enforcement under the Convention

As noted, the grounds for denying recognition and enforcement of foreign awards lie at the heart of the New York Convention. Indeed the main premise of the Convention is that foreign awards are entitled to recognition and enforcement unless one or more of the Convention’s own defenses to recognition and enforcement can be established.95 We

93 A good example is Croatia. According to the Croatian national report, courts will not entertain challenges to arbitral jurisdiction prior to the arbitration, but they will determine the validity or invalidity of an arbitration agreement prior to arbitration if their own jurisdiction depends on that. This formulation is problematic. It suggests that courts prior to arbitration both can and cannot determine the validity of an arbitration agreement.
94 The Indonesian national report is critical of the Indonesian courts in this connection. The national report, though without citing specific authority, asserts that “the courts are not allowed under any circumstances to entertain objections to arbitration while an arbitration exists.” But the practice of the Indonesian courts is evidently otherwise. See Perusahaan Dagang Tempo v. Roche Indonesia, Case no. 454/PDT.G/1999/PN.JAK.SEL (South Jakarta Dist. Ct, Jan. 25, 2000) (nature of case makes court a more suitable forum than arbitral tribunal); Perusahaan Listrik Negara (PLN) v. Paiton, Case no. 517/Pdt.G/1999/PN.JKT.PST (Central Jakarta Dist. Ct, Dec. 13, 1999) (disregarding the separability principle and deciding merits of dispute because main contract containing the arbitration clause was invalid). The national reporter regards such decisions as raising doubts about the Indonesian legal system in regard to arbitration.
95 Thus, in the well-known Chinese case of Duferco S.A. v. Ningbo Arts & Craft Import & Export Co., Ltd., 2008 Yong Zhong Jian Zi no. 4 (Apr, 22, 2009), the court, having found the award (though rendered in China) to be a Convention award, enforced it over the award debtor’s contention that the arbitration agreement was invalid under Chinese law. The court found no ground in the Convention that could justify
have an interest in gathering the meaning of the grounds taken individually, but also an interest in understanding how the grounds, taken as a whole, operate. We thus begin here (in Section A) with a series of transversal issues, i.e. issues that run across the grounds, before turning later (in Section B) to the specific grounds themselves.

A. General Issues in Recognition and Enforcement

1. Enforcement of Awards Despite Presence of a Ground for Denial

Though relatively late to arise, a question that has come to generate much academic and professional interest is whether and, if so, to what extent, courts may recognize and enforce a foreign award even though a Convention ground has been established that would permit them to refuse to do so. The permissive language of Articles V(1) and (2) of the New York Convention (“recognition and enforcement of [an] award may be refused … if”) suggests that courts retain a residual discretion to recognize and enforce an award notwithstanding the presence of a ground justifying a refusal to do so.

The issue is in principle a general one, applicable whenever a ground for denying recognition or enforcement of an award is present and the court where recognition or enforcement is sought is willing to consider the possibility of overlooking that ground and proceeding to recognize or enforce the award. However, the question arises most often in the particular situation in which an award, despite having been annulled by a competent court of the arbitral situs, is brought elsewhere for recognition or enforcement. This discussion implicates Article V(1)(e) of the Convention, which treats annulment of an award by a competent court as an adequate basis for denying recognition or enforcement of that award. For that reason, treatment of the recognition and enforcement of annulled awards is deferred until the section of this report specifically addressing Article V(1)(e) (see Part Four, Section B 5 of this report infra).
Notwithstanding its prominence as an issue of interest within the larger arbitration community, the question whether courts may recognize and enforce a foreign arbitral award, despite the presence of a Convention ground for refusing to do so, has thus far arisen only in a minority of jurisdictions surveyed; the courts of most countries have not yet had occasion to confront the question.96 Some jurisdictions that have confronted the question have done so only in connection with the enforcement of annulled awards, within the meaning of Article V(1)(e), 97 and not in connection with other Article V grounds. Although only a minority of jurisdictions have addressed the question, those that have done so more often than not affirm the authority of a court to essentially overlook a ground for denying recognition or enforcement of a foreign arbitral award, and to proceed to recognize or enforce it.98 In other words, the prevailing view is that courts do retain at least some residual discretion to recognize and enforce an award notwithstanding the presence of a ground for denying its recognition or enforcement. Only in a distinct minority of the reporting jurisdictions is denial of recognition or enforcement deemed strictly mandatory in the event that one or more Convention grounds for denying recognition or enforcement is present.99

96 See, for example, the national reports for Argentina, Australia, Croatia, Ireland, Israel, Italy, Japan, Korea, Macau, Malaysia, Paraguay, Portugal, Uruguay, and Venezuela. In some of these jurisdiction, the reporters, while unable to find any case deciding the issue, either predict or express strong support for the view that courts have the discretion to grant recognition and enforcement despite the presence of a ground for denying it. See, in particular, the national reports for Israel, Japan, Peru, Singapore, Slovenia, and Sweden.

97 See, for example, the national report for Austria.

98 See, for example, the Czech Republic and certain Canadian provinces. Courts in India have not thus far chosen to recognize or enforce an award despite the presence of a defense to recognition or enforcement, but the one court to address the issue has expressly, in effect by way of dictum, confirmed the courts’ authority to do so in a proper case. Glencore Grain Rotterdam B.V. v. Shivnuth Rai Havnarain, (2008) 4 Arb. L.R. 497 (Delhi High Court).

99 Evidently, the prevailing view in Greece, Romania, Switzerland, and Turkey is that the Convention grounds are mandatory and therefore, if established, cannot be disregarded. Under what the Greek national reporter terms a “territoriality approach,” the annulment of a foreign award leaves nothing to enforce. Thus, Greek courts feel obliged to deny recognition and enforcement of an award if there are grounds that would justify doing so.

The German courts likewise regard the Convention grounds as in principle mandatory. See, e.g.,
In most jurisdictions, the willingness of courts to overlook the presence of a ground for denying recognition or enforcement apparently does not depend on, or vary with, the particular ground that is established. However, in others, the grounds for denying recognition or enforcement whose presence may be overlooked are limited. Thus, Austrian courts will ordinarily not recognize or enforce a foreign award if a ground for non-recognition or non-enforcement is present, but recognize an important exception, allowing recognition or enforcement even though an award was set aside in the country of origin, within the meaning of Article V(1)(e). Under Norwegian law as well, the presence or absence of discretion to recognize or enforce an award against which a defense to recognition or enforcement is available depends on the ground in question. There, a court apparently enjoys discretion to disregard the defenses set forth in Article V(a)(1) through V(a)(5) of the Convention, but not the defenses set forth in Articles V(2)(a) (non-arbitrability) and V(2)(b) (offense to public policy). Thus, Norwegian courts may grant recognition or enforcement even though, for example, the arbitral procedure was not in compliance with the parties’ agreement or the arbitration law of the seat (Convention, art. V(1)(d)), but not if the underlying dispute is non-arbitrable under Norwegian law or if the award’s recognition or enforcement would be contrary to Norwegian public policy.

The national reports reflect a widespread view that violation of a procedural norm is especially likely to be overlooked, notwithstanding Article V(1)(b) of the Convention,

BGH, KZR 7/65, BGHZ 46. 365 (Oct. 25, 1966); OLG Düsseldorf, VI-Sch (Kart), 1/02, IPRspr 2004/195, 443, para. 25. However, they may overlook a defense to recognition and enforcement under alternative statutory or treaty enforcement regimes.

In China, a court may recognize and enforce a New York Convention award despite the presence of a ground in domestic law for refusing to do so, but may not recognize and enforce a New York Convention award despite the presence of a ground under the Convention for refusing to do so.

This is the case in Canadian provincial courts, for example. See e.g. Louis Dreyfus & Cir v Holding Tusculum, bv, 2008 QCCS 5903; Rhéaume v Société d’investissements l’Excellence Inc, 2010 QCCA 2269, [2011] RJQ 1. See e.g. Europcar Italia SpA v Alba Tours International Inc (1997), 23 OTC 376 (available on WL Can) (Ct J (Gen Div)); Javor v Francoeur, 2003 BCSC 350, 13 BCLR (4th) 195; Schreter v. Gasmac Inc., (1992), 7 OR (3d) 608 (Ct J (Gen Div)). A fortiori, a foreign award may be recognized or enforced even though under challenge in a court of the place of rendition. See Schreter v Gasmac Inc., supra.

Austrian Supreme Court of January 1, 2005 docket no. 3 Ob 221/04b; Austrian Supreme Court of August 24, 2011 docket no. 3 Ob 65/11x. See also Zeiler, Austrian Arbitration Act, § 614 mn 18.

The Taiwan national report contains a suggestion that courts may likewise consider non-arbitrability and offense to public policy as non-excusable defects, but not other grounds for denying recognition or enforcement.
if the violation is not an especially serious one\textsuperscript{103} or was not prejudicial to the party invoking it.\textsuperscript{104} (However, this scenario may best be viewed as one in which the defense to recognition or enforcement is simply not established rather than one in which the defense, though established, is overlooked.\textsuperscript{105}) Conversely, the Canadian report specifies that courts will not in any event recognize or enforce an award tainted by a serious procedural defect that implicates the integrity of the process as a whole.\textsuperscript{106}

2. Waiver of Grounds

We start this section with an important word of caution. The national reports tend, on the subject of waiver, not to distinguish expressly between (a) the act of refraining from raising a particular ground in support of a challenge to recognition or enforcement or of refraining from resisting recognition or enforcement altogether and (b) the perhaps more serious act of waiving, on a pre-dispute basis, a particular ground for challenging recognition or enforcement or of waiving the right to resist recognition or enforcement altogether.

On the first and much less controversial understanding of waiver – namely, whether an award debtor may refrain from raising a particular ground in support of a challenge to recognition or enforcement or refraining from resisting recognition or enforcement altogether – the language and structure of the Convention itself imply a mostly clear answer. Article V(1) of the Convention states that recognition and enforcement of an award may be refused “at the request of the party against whom it is invoked.” This formulation suggests that parties are free to refrain from raising the grounds set out in Article V(1)(a), which in turn suggests that courts may not, or at least should not, raise those grounds \textit{sua sponte}. However, Article V(2) of the Convention by

\textsuperscript{103} See, for example, the Czech Republic (where the violation is \textit{de minimis})

\textsuperscript{104} See, for example, Norway (where the non-conformity did not have an impact on the arbitral decision).

\textsuperscript{105} The Hong Kong report emphasizes how, rather than appear to enforce an award notwithstanding the presence of a ground for non-enforcement, courts tend to find that the ground simply has not been established. Courts may also find that no party’s rights were materially violated or no real prejudice was suffered (a kind of “harmless error” approach). In so doing, a court enforces the award, not in spite of the presence of a ground for refusing to do so, but rather because the ground has not been sufficiently established.

contrast provides that recognition and enforcement of an award may be refused “if the competent authority in the country where recognition and enforcement is sought finds” that the underlying dispute is non-arbitrable or that its recognition or enforcement would be contrary to public policy. This suggests that the court where recognition or enforcement is sought may raise either of these two grounds on its own initiative – not, however, that it is necessarily obligated to do so.

It is also widely agreed that certain of the grounds – particularly the grounds set out in Article V(1)(a), (b) and (d) of the Convention – will be deemed waived if a party, with full knowledge of the facts, fails to make a timely objection to the arbitral tribunal; waiver of grounds commonly takes this form, whether denominated waiver or estoppel. Thus, waiver for failure to object to the tribunal on a timely basis most frequently occurs in the context of objections based on the validity of the arbitration agreement, objections to procedural decisions taken by the tribunal, excess of jurisdiction by the tribunal, and composition of the tribunal (including partiality or lack of independence of an arbitrator). Arbitration laws and rules may even fix a time period

107 Waiver of this sort is mentioned in several national reports (see the reports for Israel, Italy, Malaysia, and Sweden), but is especially developed in the report for France. The new Article 1466 of the French Code of Civil Procedure codifies earlier case law inferring waiver from a party’s abstention (i.e., failure to object). In Peru, Article 75 of the Arbitration Law expressly precludes refusal of recognition or enforcement on grounds corresponding to Article V(a) of the Convention unless raised on a timely basis in the arbitral proceedings.

Swiss law takes very much the same position. Article 182(2) PILA requires that parties raise challenges to the validity of the arbitration agreement or to arbitral jurisdiction “prior to any defense on the merits.” Although this provision only applies to arbitration conducted in Switzerland, it evidently has a bearing on the recognition and enforcement of foreign awards. According to the national report, “[i]f a plea of lack of jurisdiction is not timely raised, the party is deemed to have tacitly submitted to arbitration; therefore, that party cannot challenge the jurisdiction of the tribunal anymore, not even at the stage of the recognition and enforcement of the award (emphasis added), citing DFT 4A_124/2010, reason 6.3.3.1 (Oct. 4, 2010), drawing upon DFT 135 III 136, 139; DFT 110 1b 191, 195; DFT 108 1b 85, 87. Waiver would equally result from failure to object to flaws in the composition of the tribunal or the arbitral procedure. DFT 4P 298/2005 (Jan. 19, 2006).

In the Netherlands, however, the possibility of waiver by failure to object is more limited. Curiously, failure to object to the tribunal does not preclude objections to enforcement based on improper constitution of the tribunal or excess of arbitral authority. (It also understandably does not preclude a defense of non-arbitrability.) The 2014 proposed reform would broadly codify the principle of waiver for failure to object to the tribunal.

108 On the possible difference between waiver (renonciation) and estoppel, see the French national report. Evidently, waiver denotes simply silence or a failure to object, while estoppel also presupposes reliance by the opposing party to its detriment. Some authors, though not the French national reporter, are reportedly of the view that, while public policy objections cannot be waived, they can be subject to estoppel. (The notion of estoppel, though originating in common law jurisdictions, has been accepted in French law. See Golshani, Cass. Ire civ., Rev. arb. 2005.993, D. 2005.3060, JCP 2005 I 179 (July 6, 2005)).
within which to make an objection of this sort, with failure to object within that period
constituting waiver.

It appears, from the tenor of the national reports, that the authors rightly focused
their attention on the second and more difficult understanding of waiver, namely the pre-
dispute waiver, either of specific grounds for challenging recognition or enforcement or
of the right to resist recognition or enforcement altogether. On this important species of
waiver, the jurisdictions surveyed are split, with a significant minority of jurisdictions
however reporting no law whatsoever on the subject.109

A healthy number of jurisdictions evidently allow the advance waiver of grounds.
While some of these jurisdictions permit waiver of the grounds without distinction among
them,110 most allow only some – but not all – grounds to be waived. The grounds that are
waivable tend, understandably, to be those set out in Article V(1) of the Convention, to
the exclusion of the grounds set out in Article V(2).111 But there are variations on that
theme.112

A lesser number of country reports describe the grounds for denying recognition
or enforcement of foreign arbitral awards under the Convention as not in any
circumstance subject to advance waiver by the parties.113 To that extent, the Convention
grounds would be in effect mandatory.114 Unfortunately, it appears from the national

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109 See, for example, the national reports for Argentina, Australia, China, Ireland, Macau, Malaysia,
Paraguay, Singapore, and Uruguay. The issue is not addressed in the national reports for Georgia, Hungary,
Indonesia, Japan, and Vietnam.

110 The Canadian report, for example, draws no distinction among the grounds in this respect; all appear to
be waivable. See Food Servs of America Inc. v. Pan Pacific Specialties Ltd, (1997), 32 BCLR (3d) 225
(SC).

111 See, for example, the national reports for Brazil, Italy, Sweden, Turkey, and Venezuela. The Swiss
national report expressly endorses this position.

112 For example, the Czech courts reportedly disallow waiver not only of the grounds in Article V(2), but
also of a claim that no valid arbitration agreement was ever entered into or a claim of fraud or the like.
Similarly, in Israel, waiver of the grounds set out in Article V(2) is disallowed, but so too is waiver of
objections based on fraud, bias, or nullity of the agreement to arbitrate.

113 See, e.g., Croatia, Greece, Hong Kong, Norway, Romania, Slovenia, and the United Kingdom. This
seems also to be the case in Korea.

114 Obviously the grounds are not mandatory in every sense of the term. In these jurisdictions, parties may
not waive in advance of a dispute the right to resist recognition or enforcement of an award or waive in
advance certain Convention grounds, but they may refrain, on a post-dispute basis, from raising all the
reporters that some authors may be conflating recognition and enforcement of awards with annulment of awards, as evidenced, for example, by the remark in the Greek report that the law forbids “renunciation of the right to file an action for the setting aside of an arbitral award before such award is rendered.”

The distinction, just alluded to, between waiver of the right to resist recognition or enforcement of an award and waiver of the right to seek annulment of an award is an important one. An interesting question, touched on by a few of the national reports, is whether rules on the waivability of objections in actions to annul a local award may be extrapolated to defenses to the recognition and enforcement of foreign awards. Switzerland, in the apparent interest of party autonomy, recognizes by statute the possibility of waiving in advance all or some of the grounds for setting aside an award rendered in Switzerland, provided the waiver is made expressly and provided none of the parties has its domicile, habitual residence, or place of business in Switzerland. But no Swiss statutory provision expressly addresses the waiver of defenses under the New York Convention at the recognition or enforcement stage. May the waiver rules in annulment be applied by analogy in recognition and enforcement? In the Swiss example, it would seem reasonably safe to do so, since it is difficult to see why Switzerland would be more restrictive of waiver in the recognition and enforcement of foreign awards than it is of waiver in the annulment of awards rendered on its own territory. The Swiss national report appears to take this view.

It is relatively easy to analogize from liberality in the annulment context to liberality in the recognition and enforcement context in a jurisdiction such as Switzerland which is broadly amenable to waiver in the context of annulment. Matters are more

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115 PILA, art. 192(1).

116 According to the Swiss national reporter, “the fact that the parties are allowed to waive all or some of the grounds for setting aside an award rendered in Switzerland can be interpreted as an indication that a similar waiver is also possible with respect to the grounds for denying the exequatur. As a matter of fact, the grounds for setting aside under Article 190(2) PILA are largely equivalent to the grounds for refusal under Article V [of the New York Convention]. If these grounds are not mandatory with respect to arbitration, why should they be mandatory when the arbitration has its seat abroad?"

117 Similarly, according to the Peruvian report, the Law on Voluntary Arbitration (LVA), art. 46(4),
difficult in a jurisdiction that is highly restrictive of waiver in annulment actions. It is far from apparent why States should scrutinize arbitral awards rendered elsewhere any more than they scrutinize awards rendered on their own territory.\textsuperscript{118} Annulment is a remedy that the law specifically grants to parties aggrieved by an arbitral award, and its availability may be viewed as a necessary corrective to a system like arbitration that does not normally provide for a right of appeal. Courts of the annulment forum have a special interest in the regularity and legitimacy of awards rendered on their territory. By contrast, resistance to enforcement is a purely defensive move and its renunciation falls easily within the sphere of party autonomy. Also the recognition and enforcement forum is not the one primarily responsible for the regularity and legitimacy of an award rendered elsewhere.

The German national report highlights the particular – and quite important – question whether waiver of a ground for defeating recognition or enforcement results from failure at an earlier point to seek an award’s annulment on that ground in a court of the arbitral seat. According to older case law construing the relevant provision of the German Civil Procedure Code, a party that failed to seek annulment of an award on the basis of the arbitration agreement’s invalidity could not thereafter invoke that ground to defeat recognition or enforcement.\textsuperscript{119} The German Supreme Court revisited the issue following reform of German arbitration law and largely reversed course.\textsuperscript{120} Now, as a generally precludes a party from asserting grounds for annulment that were not brought to the attention of the arbitral tribunal on a timely basis. The reporter reasonably suggests that the same rule may be applied by analogy to proceedings for recognition and enforcement of foreign awards.

\textsuperscript{118} Significantly, the Quebec Civil Procedure Code provides that no arbitration agreement may derogate from the provisions governing the annulment of awards, but contains no comparable provision as regards the grounds for defeating enforcement. RSQ c C-25, arts. 940, 947-947.7.

\textsuperscript{119} See e.g., BGH, VII ZR 32/67, BGHZ 52, 184 (June 26, 1969).

\textsuperscript{120} The Court found that the Civil Procedure Code, as amended, no longer permitted preclusion on the ground of failure to seek annulment. BGH, III ZB 100/09, BGHZ 188, 1, SchiedsVZ 2011, 105, paras. 8-10 (Dec. 16, 2010. However, the Court opened the door to preclusion based upon a lack of good faith in a case in which the award debtor led the award creditor to believe that he would not object on that ground to enforcement of the award. Id., para. 13-18. The fact remains that, as the German reporter puts it, “the mere fact that [a party] did not apply to have the award set aside in the country of origin was not enough to be precluded from later raising that objection” (emphasis in original). Preclusion is almost certainly ruled out if that party strongly objected during the arbitration. Case law recognizes an important exception, however. Enforcement cannot be objected to on grounds of arbitrator partiality (even if clothed as a public policy objection) if that objection could have been invoked before a court of the country of origin and was not, provided the foreign law on that matter reflected German law principles. BGH, III ZR 218/89 (July 12, 1990).
general matter, a failure to bring a set aside action in the arbitral seat does not operate as waiver, in a later recognition or enforcement proceeding, of defenses that would otherwise have been available in the annulment action. This outcome finds support elsewhere,\textsuperscript{121} and it seems sound. To make the bringing of an annulment action a prerequisite to one’s entitlement to raise a defense to recognition and enforcement later would over-incentivize the institution of annulment actions and compel litigation that might not otherwise be brought.

3. **Deference to Arbitrators or Other Courts on the Convention Grounds**

A number of the grounds that parties may invoke under the New York Convention to defeat recognition or enforcement of awards are grounds that may previously have been raised either before courts or arbitrators at an earlier phase in the proceedings. For example, when in an earlier phase a court is asked to refer the parties to arbitration, it may be called upon to decide whether the arbitration agreement is valid, whether the dispute is legally arbitrable, and whether it falls within the scope of the arbitration agreement. Thus, essentially the same questions that were raised in the context of a motion to compel arbitration may also be directed at the award in an annulment action in a court of the arbitral seat. During the arbitration itself, the tribunal may also have been asked to address these questions, among others. And naturally, in the course of its proceedings, the arbitral tribunal will also make a series of procedural determinations that may be challenged before the tribunal itself, but also in an annulment action directed at the award, as either contrary to the parties’ agreement or contrary to norms of fundamental procedural fairness, and possibly in the form of defenses to recognition or enforcement.

In other words, by the time recognition or enforcement of a foreign award is sought, one or more courts (of one or more jurisdictions) or an arbitral tribunal itself may have addressed some of the same questions upon which the presence or absence of a Convention defense to recognition or enforcement of the award depends. There

\textsuperscript{121}The Swiss report states that inferring waiver in those circumstances “would go too far.”
necessarily arises the question of whether and to what extent these prior judicial or arbitral determinations are deserving of deference by the court that is entertaining comparable defenses to recognition or enforcement under the Convention.

Despite its obvious importance, the question here posed is one to which a significant number of national reports are simply unable to provide a reliable answer, or indeed any answer at all, presumably because the issue has never been squarely raised within those systems or, if raised, never quite decided.

In their responses, few of the national reports specifically distinguish between deference to prior judicial determinations in the case, on the one hand, and deference to the views of the arbitral tribunal in the case, on the other. It nevertheless seems highly likely that – assuming a measure of deference is shown at all – prior judicial rulings in a case will receive greater deference than the rulings of the arbitral tribunal in that case. The entire purpose of the New York Convention is, within limits of course, to police foreign arbitral awards insofar as their overseas recognition and enforcement are concerned. At the same time, there is wide support among legal systems for the general notion that courts should show deference to judicial pronouncements at earlier stages of the same case.

For ease of analysis, we focus at this point on the question of deference to prior judicial rather than arbitral rulings. Among jurisdictions in which a view has been taken on the matter, there is no uniformity. In a significant minority of States, courts before which one or more grounds for defeating recognition or enforcement of a foreign arbitral award are raised are prepared to show at least some deference to prior judicial rulings on the same objection, although the degree of deference actually shown remains unclear.

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122 See, for example, the national reports for Argentina, Canada, China, Hungary, Japan, Korea, Macau, Peru, Portugal, Singapore, and Uruguay.

123 The Chinese national report highlights the greater deference that may be shown to earlier judicial as compared to arbitral determinations in the same case on issues pertinent to the presence or absence of a Convention defense to enforcement.

124 See, for example, Brazil, India, Malaysia, and Taiwan. On India, see Lal Mahal Ltd. v. Progetto Grano Spa, civil appeal no. 5085 (July 3, 2013). German courts, in entertaining actions to enforce foreign awards, reportedly tend to show at least some deference to judicial pronouncements made in the course of set aside actions by courts of the place of arbitration. Those pronouncements may possibly even be considered as conclusive.

125 According to the Israeli report, the extent of deference toward a prior judgment depends on the closeness of the connection between the parties or case, on the one hand, and the jurisdiction whose court issued that
National reporters commonly observe that even if prior rulings are not conclusive, or even entitled as a matter of principle to deference, they are nevertheless properly taken into consideration (and presumably given due weight) by the court where recognition or enforcement is sought.  

In a somewhat larger number of States, courts reportedly address the Convention defenses entirely independently, without deference of any kind to the findings that other courts might have reached on the same or similar issue earlier in the proceedings. Austria furnishes a clear example. Though a challenge to the arbitration agreement or award may have been previously decided by a foreign court, the Austrian courts, when asked to consider the same challenge as a defense to recognition or enforcement of the award, reportedly addresses the matter de novo.

In some jurisdictions enforcing courts appear to make the issue of deference to a prior judicial ruling depend on whether that ruling was issued by another court within the same legal system or by a foreign court. In the Netherlands, for example, it appears that a prior ruling by a Dutch court at an earlier stage in the same case would be given res judicata effect in a subsequent enforcement proceeding addressing the same issue, while such deference will not be shown to a prior court ruling on the issue by a foreign court. By way of example, a decision by a foreign court in the place of arbitration upholding arbitral jurisdiction in an annulment action could be freely re-examined by a Dutch court entertaining an action to enforce the foreign award.  

National reporters from a third group of countries suggest that whether any such deference will be shown to prior judicial determinations, and how much, depends on the particular Convention defense that is in issue. In Switzerland, for example, it has been held that, in ruling on the defense set out in Article V(1)(d) of the Convention (i.e., the assertion that the composition of the arbitral tribunal or the arbitral procedure was not in conformity with the parties’ agreement), a Swiss court will accord deference to a prior judgment, on the other.

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126 See the national reports for Australia, Croatia, Paraguay, and Switzerland
127 See, for example, Australia, Austria, China, Croatia, the Czech Republic, France, Greece, Italy, Norway, Romania, and Venezuela.
128 According to the Dutch national report, “the … court itself would examine whether there are grounds to refuse the enforcement if raised by the party opposing … enforcement.”
129 See, for example, Canada, Germany, and Switzerland.
previous ruling on that same issue by a court of a foreign country that entertained an action to annul the award, and may even regard that prior ruling as conclusive. Deference will also evidently be shown to the determination by a court of a foreign jurisdiction if the determination by the Swiss court is to be made on the basis of the law of that foreign jurisdiction. Thus, for example, a Swiss court is unlikely to deny recognition or enforcement to an award under Article V(1)(a) of the Convention (on incapacity of a party or invalidity of an arbitration agreement), if a court of the country whose law is applicable to that issue has already rejected a challenge to the agreement or award on that ground. Similarly, a Hong Kong court has held that, in deciding whether to deny recognition or enforcement of an award to the extent that a tribunal exceeded its jurisdiction by joining non-signatories to the arbitration, deference should be shown to the prior ruling on that issue rendered by a court of the arbitral seat in an earlier action to set aside the award, since the law of the seat was applicable to that question.130

It is worth mentioning that in no jurisdiction is deference likely to be shown to foreign court determinations on the defenses of non-arbitrability or violation of public policy. The reason is straightforward and sound. These are grounds as to which national courts, by the terms of the Convention itself, are required to apply their own law and not the law of any other jurisdiction. To be more precise, a court, in deciding whether recognition or enforcement of an award should be denied due to the non-arbitrability of the dispute under its own law or offense to its own public policy, has no reason to accord weight to a foreign court’s prior judgment in an annulment action that the award is or is not arbitrable under that foreign court’s own law or that the award does or does not offend the public policy of the jurisdiction to which that foreign court belongs.131

The question raised in this section is by no means a trivial one. There is a potential in every jurisdiction for a matter on which the availability of a defense to recognition or enforcement depends to have been adjudicated by another court (of the same or some other jurisdiction) at an earlier stage of the case or to have been the subject of a prior arbitral determination. There is therefore reason to suppose that many if not most

130 See Astor Nusantara International BV v. PT Ayunda Prima Mitra, HCCT 45/2010 (High Court of Hong Kong Special Administrative Division, Mar. 21, 2012).
131 The Greek national report is emphatic in this regard.
jurisdictions would have had a settled approach to the question. Such is evidently not the case. What is more, among jurisdictions professing a position on the question, there is a wide disparity of positions. It would perhaps be considered overreaching, though not unimaginable, to expect the New York Convention itself to prescribe uniform rules on this matter. However, even if the issue is to be addressed by each signatory State for itself, it is not too much to expect each of them to have in place a consistent and knowable approach of its own.

We turn now to selected questions pertaining to the Convention’s individual grounds for non-recognition or non-enforcement.

**B. The Grounds for Non-Recognition and Non-Enforcement**

In the sections that follow, each of the Convention’s individual defenses to recognition or enforcement is addressed, albeit only with respect to a selected number of issues pertaining to that defense.

1. **Article V(1)(a): Validity of the Arbitration Agreement**

   Article V(1)(a) establishes a specific sequence for identifying the law according to which the validity of an agreement to arbitrate is to be judged in a proceeding to recognize or enforce a foreign award. The agreement’s validity, according to that provision, is determined “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.” The question raised is whether courts in the jurisdiction concerned do in fact follow this precise sequence.

   The great majority of national reports did not or could not provide an answer to the question. But courts in a majority of jurisdictions for which reporters did provide an answer appear to follow the specific sequence of choice of law rules established by the

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132 See, for example, the national reports for Argentina, Croatia, the Czech Republic, Georgia, Indonesia, Ireland, Israel, Japan, Macau, Paraguay, Peru, Portugal, and Uruguay.
Convention. Hong Kong,\textsuperscript{133} Indian,\textsuperscript{134} Romanian,\textsuperscript{135} Singapore,\textsuperscript{136} and Vietnamese\textsuperscript{137} legislation expressly so provide, as does Brazilian,\textsuperscript{138} Chinese,\textsuperscript{139} Dutch,\textsuperscript{140} Korean\textsuperscript{141} and Swiss\textsuperscript{142} case law. This is the prevailing view in other jurisdictions as well.\textsuperscript{143} The Czech report makes the point that the Convention sequence should be followed in Convention cases, even though under domestic Czech arbitration law, a different choice of law sequence is indicated.\textsuperscript{144} As on so many other issues, Taiwan has incorporated the language of Article V(1)(a) into Taiwanese legislation, even though it is not a Convention signatory.\textsuperscript{145}

In a few jurisdictions, the narrower question has arisen as to whether “the law to which the parties have subjected [the arbitration agreement]” is to be understood as limited to those choice of law provisions that are specifically contained in the arbitration clause of a contract, rather than in a separate provision of that contract. If Article V(1)(a) is understood in the former fashion, absent the designation of a governing law in the arbitration clause itself, the validity of an agreement to arbitrate is determined by the law of the arbitral situs. If Article V(1)(a) is understood in the latter fashion, absent the designation of a governing law in the arbitration clause itself, a court determines the

\textsuperscript{133} Hong Kong Arbitration Ordinance, sec. 89(2)(b).
\textsuperscript{134} The Arbitration & Conciliation Act, 1996, art. 34 (2)(a)(1).
\textsuperscript{135} Civil Code, arts. 2.637-2.638.
\textsuperscript{136} International Arbitration Act, sec. 31(2)(b).
\textsuperscript{137} Code of Civil Procedure, art. 370(1)(b). For a recent application, see case no. 90/2013/QD.KDTM-PT (Court of Appeal, Ho Chi Minh City, April 18, 2013).
\textsuperscript{138} The Brazilian national report cites Case no. SEC 3709 (June 2012)
\textsuperscript{139} The Chinese national report cites Case no. 89 Daka 20252 (Supreme Court, Oct. 4, 1990).
\textsuperscript{140} Owerri Commercial Inc. v. Dielle Srl (Court of Appeal, the Hague, Feb. 22, 2000).
\textsuperscript{141} Decision 89 Daka 20252 (Supreme Court, Oct. 4, 1990).
\textsuperscript{142} DFT Bull. ASA, para. 261 (Mar. 21, 1995); ZH, Bull. ASA, p. 265 (May 26, 1994).
\textsuperscript{143} See, for example, the national reports for Australia, Canada, China, Greece, India, Slovenia, Sweden, Turkey, United Kingdom, and Venezuela.
\textsuperscript{144} In some jurisdictions, the courts have applied to the validity question the law chosen by the parties, but have not had to decide which law to apply in the absence of a choice. See, for example, Hungary and Italy. It cannot be said with assurance what law would be applied in those circumstances, though application of the law of the arbitral seat would seem sensible.
\textsuperscript{145} Arbitration Act, art. 50 (1), item 2.
arbitration agreement’s validity in accordance with the choice of law clause, if any, contained in the main contract, before having resort to the law of the arbitral situs. The Canadian courts evidently favor this latter view, preferring the law designated in a general choice of law clause over the law of the arbitral situs. As they reason, since “international arbitration agreements almost never explicitly ‘indicate’ their own governing law, the law governing the underlying agreement may be interpreted as [being] ‘the law to which the parties have subjected’ the arbitration agreement.” This is a widely held view, though not a universally held one. It does seem sound. Even a general contractual choice of law clause is probably a better indication of the parties’ expectations about the law applicable to the validity of the arbitration agreement than the selection of the arbitral seat.

Important as the sequence specified in Article V(1)(a) may be, it is nevertheless subject to Article VII of the Convention, which entitles award creditors to invoke provisions of national law that are more favorable to the enforcement of foreign awards than the provisions of the Convention. This is the case in several jurisdictions, including Germany – but nowhere as prominently as in France, most likely because there, as noted, parties seldom invoke the Convention for recognition or enforcement purposes, but instead have recourse to domestic French law which is deemed in principle to be more favorable to the enforcement of awards. According to the leading case, “the existence and enforceability of an arbitration clause is determined, absent any mandatory

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146 Achilles (USA) v Plastics Dura Plastics (1977) ltée/Ltd, 2006 QCCA 1523. Note that in this case, while the law of the underlying agreement (State of Washington) was found to apply to the arbitration agreement, this law was taken to be “similar” to Québec law because no proof of the relevant foreign law had been adduced.

147 In Germany, see, for example, OLG Dresden, 11 Sch 8/07, IPRax 2010, 241 (Dec. 7, 2007), subjecting the validity of an arbitration agreement between a Dutch and German party, providing for arbitration in New York, to the law of Liechtenstein, which was designated in the choice of law clause of the main contract. On this issue, see also the Slovenian national report.

148 In Norway, a general choice of law clause is not deemed to apply to the arbitration clause in a contract. If that clause does not state its own choice of law, reference is made to the law of the place where the award was rendered. Arbitration Act, sec. 46(1)(a). The case law is in accord.

149 See, e.g., BGH, III ZB 69/09, BGHZ 187, 126, SchiedsVZ 2010, 332, para. 12, stating that “[if] the arbitration agreement is valid pursuant to the national procedural law of the enforcing state – that is, ZPO sec. 1031 – it is not relevant anymore whether, within the framework of [Convention] Art. V(1)(a), this is also the case pursuant to the law of the country where the award was made.”

150 See notes 47-48, supra, and accompanying text
rule of national or international public policy, “by reference to the common intention of the parties without the necessity of referring to the law of any particular State.”

For reasons that are not fully explained in the national reports, courts in a small handful of jurisdictions apparently follow a sequence of choice of law rules other than that prescribed by the Convention. For example, according to the Austrian Supreme Court, the law governing the validity of an arbitration agreement in an international context is to be determined in accordance with the law of the state in which the arbitral award was rendered. The Russian report suggests that, while courts respect the parties’ choice of law to govern the arbitration agreement (whether that law is specified in the main contract or in the arbitration clause in particular), in the absence of a choice they are likely to apply Russian law, sometimes the Russian law of contract and sometimes Russian choice of law principles. In neither case, does the report offer a justification for the departure from the sequence set out in Article V(1)(a).

2. Article V(1)(b): The Right to a Fair Hearing

The question addressed in this section is how courts interpret and apply the defense to recognition and enforcement set out in Article V(1)(b) of the Convention, authorizing non-recognition and non-enforcement if “[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.” At issue is not whether a violation of the fundamental notions of due process and procedural fairness justifies refusing to recognize or enforce foreign arbitral awards; the Convention so provides. What is at issue is whether courts, in gauging the basic procedural fairness of the arbitral proceeding from which an award emerged, apply essentially the same procedural standards as those, if any, required of domestic constitutional law. The

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151 Dalico, Cass. Civ. 1re, Rev. arb. 1994.116, JDI, 1994.432 (Dec. 20, 1993). French courts also invoke the so-called principe de validité, according to which arbitration agreements enjoy a presumption of validity; only in exceptional cases (as where the underlying claim is by law non-arbitrable) is the presumption overcome. See e.g., Zanzi, Cass. 1re civ., Rev. arb. 1999.260 (Jan. 5, 1999).

152 See the Austrian Supreme Court decision of March 30, 2009, docket no. 7 Ob 266/08f. According to the Israeli report, unless the parties specifically plead the foreign law indicated by the Convention sequence of choice of law rules, courts are unlikely to follow that sequence.
question of course assumes that domestic constitutional law in any given jurisdiction does in fact impose procedural due process requirements, which is not necessarily so in all cases.153

It appears, unfortunately, that courts in only a distinct minority of jurisdictions have addressed the precise question posed here, namely the relationship between due process under the Convention and due process in domestic constitutional law. Perhaps the question is framed in terms too abstract. The national reports do articulate certain general propositions that do not, however, address the specific comparison that the question here posed invites. Some of those propositions are recounted below.

Thus, only a small number of national reporters were in a position to address expressly the relationship between Convention standards and domestic constitutional notions of due process. Some country reports – for example, those of Argentina, Croatia, Greece, Slovenia, Sweden, the United Kingdom,154 and Venezuela – suggest that there is no meaningful difference between the two; in other words, courts may be counted on to apply roughly the same procedural fairness standards as are required by domestic constitutional law.155 A larger number report that courts do not necessarily apply the same standards as required by domestic constitutional law, but apply instead a somewhat relaxed version of them.156 In other words, courts in these jurisdictions may be willing to

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153 Chinese courts reportedly do not apply the same due process standards as required by domestic constitutional law because there is in fact no procedural due process guarantee in the Chinese Constitution.

154 The U.K. Arbitration Act, sec. 68, spells out in some detail the requirements of fair procedure, but that section deals with the annulment of awards rather than their recognition and enforcement. The supposition must be that the standards on the two occasions are comparable.

155 The German report is emphatic. The right to be heard in arbitration mirrors the right to be heard as guaranteed by Article 103(1) of the German Constitution and does not differentiate between arbitral proceedings conducted on national territory and arbitral proceedings conducted abroad. The German report cites an abundant case law to this effect.

The Canadian reporters state that “within the arbitral context, the requirement for proper notice and a fair hearing is equivalent to the ordinary standards of natural justice and procedural fairness.” However, in Canada, this standard is not, strictly speaking, a “constitutional” standard but more in the nature of an “administrative law” standard.

156 Among the jurisdictions in this category are Brazil, the Czech Republic, Italy, Slovenia, and Taiwan. Austria appears to be in that category, since it is stated that not every infringement of the right to be heard justifies denying effect to an award.

The situation in the U.S. is somewhat ambiguous. Courts commonly apply something resembling constitutional due process standards in deciding whether the arbitral procedure was fundamentally fair. However, some courts emphasize that arbitral hearings need meet only “the minimal requirements of fairness,” notably “adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.” Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 301 (5th
enforce a foreign arbitral award resulting from a procedure that would not necessarily pass domestic constitutional muster.

In France, the procedural due process standards to which foreign arbitral awards are subjected are not measured against domestic law standards. They are, according to the French reporter, drawn from general principles of law that are in turn influenced by a variety of standards, most notably Article 6(1) of the European Human Rights Convention. In other words the standards are “de-nationalized” and reflect *l’ordre public international procedural.*  

The Swiss report echoes this same view. 158

What virtually all the national reports do underscore is the narrowness of the Article V(1)(b) exception and thus the rarity of refusals to recognize or enforce based on this ground. There recurs throughout the national reports the theme that a violation of due process justifies denying recognition or enforcement of awards only if the violation is a particularly serious one, 159 which is not to suggest that an occasion to deny recognition or enforcement on this ground never arises. 160 In a decision in 1990, the Supreme Court of Korea stated that Article (V)(1)(b) was not meant to cover every infringement of due process, but only those that are so serious as to be intolerable. A Canadian court went so far as to suggest that, in order to justify non-recognition or non-enforcement on procedural grounds, the violation must be tantamount to a violation of public policy under Article V(2)(b) of the Convention. 161 On the whole, the national reports do not specifically indicate whether the seriousness of a violation is to be determined chiefly by

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157 Code of Civil Procedure, arts. 1520-4, 1520-5. The international standard is based upon *le principe de la contradiction,* which is said “to demand that the parties were able to make their claims known in fact and in law and to address the claims of their adversary so that nothing that serves as a basis for the decision of the arbitrators will have escaped the adversarial process (une discussion contradictoire des parties).” See also Code of Civil Procedure, art. 1464.

158 The Swiss report, citing academic doctrine, remarks that “[a]lthough the enforcing court will probably be tempted to look into the law of its own country, for the purpose of consistent application of Article V(1)(b), the court seized should base its decision on general criteria applicable in all contracting states.”

According to the Austrian report, not every infringement of the right to be heard will suffice to justify a denial of recognition or enforcement. Fundamental principles must have been violated. See also, to this effect, the national reports for Canada, India, Ireland, the Netherlands, and Peru.

160 See the Hong Kong case of Paklito Investment Ltd v. Klockner East Asia Ltd, [1993] 2 HKLR 39, refusing enforcement where the party opposing enforcement had not been allowed to comment on or challenge the reports submitted by the tribunal’s appointed experts. A similar Hong Kong ruling is Apex Tech Investment Ltd v. Chuang’s Development (China) Ltd, [1996] 2 HKLR 155.

161 See Corporacion Transnacional de Inversiones, SA de CV v STET International, SPA (1999), 45 OR (3d) 183 (Sup Ct).
reference to the magnitude of the departure from the relevant standards of fairness or chiefly by reference to the prejudice suffered as a consequence of the violation, or both. A few national reporters point out an additional limitation, namely the necessity of demonstrating a causal link between the due process violation and the outcome. It also bears repetition that in most jurisdictions, procedural objections – even procedural objections of a due process nature – are subject to waiver if a party, with full knowledge of the circumstances, fails to object during the pendency of the proceedings.

Several of the reports seek, through contrasting examples, to show what does and does not constitute a serious violation of due process. According to the Dutch report, for example, the right to be heard under the Convention is violated if a tribunal takes testimony from a witness of whom the opposing party was entirely unaware prior to the hearing and whose testimony the opposing party had no meaningful opportunity to refute. On the other hand, no violation of due process occurs merely because a party’s request for a postponement of hearings was denied. What most jurisdictions virtually always insist on, however, is equal treatment of the parties.

3. **Article V(1)(c): Award Beyond Scope of the Submission to Arbitration**

(a) **Scope of the Submission Generally**

Parties to arbitration agreements ordinarily delimit in one way or another the universe of disputes that they have agreed to submit to arbitration. Article V(1)(c) of the Convention accordingly authorizes courts to withhold recognition or enforcement of a foreign award to the extent that the award “… deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions

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162 See the national reports for Germany, India, Japan, and Singapore. The matter is the subject of debate in Switzerland.

163 On this point in particular, see the Chinese, Peruvian, Singapore, and Swiss national reports.


165 See, for example, the national reports for France, Georgia, the Netherlands, and Sweden.
on matters beyond the scope of the submission to arbitration…” This is a corollary of the notion that a party’s submission to arbitration is based squarely on consent.

A remarkably large number of countries are reported to have no case law directly related to Article V(1)(c).166 This finding is surprising, all the more so since among the States figuring in this category are some that are especially prominent in the world of international commercial arbitration.167 Nevertheless, an even larger number of States report having case law on the subject, and all report that their courts do indeed, as they should, refuse to recognize or enforce awards that exceed arbitral jurisdiction, as Article V(1)(c) contemplates.168 Courts also tend to accept the Convention’s invitation to grant partial recognition or enforcement when some claims decided in an award fall within the scope of the arbitration agreement, while others do not.169 Given the clarity of the Convention language in both of these respects, the results are unsurprising.

A great many national reports hasten to add, however, that tribunals are entitled to a presumption – even a “powerful presumption”170 – that they acted within their powers. For example, the Irish national report underscores that, while awards in excess of jurisdiction may of course be denied recognition and enforcement, courts in determining the scope of the submission to arbitration are to construe arbitration agreements broadly. They also generally show deference to an arbitral tribunal’s reading of the arbitration agreement, presumably on the ground that determining the scope of the agreement to arbitrate is essentially an exercise in contract interpretation and thus one primarily vested

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166 See, for example, the national reports for the Czech Republic, Israel, and Portugal.
167 These countries include Australia and Switzerland. The cases in Germany are described as being few.
168 See, e.g., Argentina, Austria, China, Greece, Hungary, India, Italy, and the United Kingdom. In China, Article V(1)(c), on excess of arbitral authority, has been used to deny enforcement of an award as against a non-party to the arbitration agreement. The tribunal is deemed to have exceeded its authority when it renders an award against a party that cannot be considered to be a party to the arbitration agreement and therefore cannot be bound either by the agreement or the award. See Gerald Metals Inc. v. Wuhu Metal Plant and Wuhu Henxin Copper Group Co., Ltd. (Provincial Supreme Court of Anhui, 2003), available at: http://www.lawxp.com/statute/s540605.html.
169 See, for example, the national reports for China, Hong Kong, Italy, and Korea.
in the arbitrators. Although the other national reports seldom so state, courts elsewhere very likely follow the same practices reported in Ireland.

Courts in Singapore are also reported to prefer broad interpretations of the submission to arbitration, though through a quite different means. In determining scope, they have reportedly consulted not only the terms of the agreement to arbitrate, but also the parties’ pleadings in the arbitral proceeding, at least, presumably, if the opposing party did not object to the pleadings as in excess of jurisdiction. Consequently, they may very well recognize and enforce awards dealing with differences not precisely falling within the scope of the arbitration agreement itself.

(b) Grant of a Remedy as Excess of Jurisdiction

National reporters were specifically asked, in reference to Article V(1)(c), whether recognition or enforcement of an award is refused not only when the tribunal decided a claim not falling within the scope of the agreement to arbitrate, but also when, in deciding a claim that does fall within the scope of the agreement to arbitrate, the tribunal granted a form of relief that the main contract specifically excluded.

For all its interest, the question appears to have arisen in practice in only a handful of countries, and they are themselves split on the issue. Indications are that, in some jurisdictions, the award of an excluded remedy would indeed constitute an excess of authority within the meaning of Article V(1)(c). A Canadian court refused to enforce the portion of an award granting a party costs when the arbitration agreement expressly provided that each party was to bear its own costs. According to the national reports,

171 Some deference to the arbitral tribunal is to be expected when it comes to interpreting the breadth of the arbitration agreement, including the range of disputes it covers. In U.S. law, there is a powerful presumption that the arbitral tribunal has acted within its powers. Parsons & Whittemore Overseas v. Société Générale de l’industrie du Papier, 508 F.2d 969 (2d Cir. 1974).

172 According to the Croatian report, however, “courts would not be keen on overly broad interpretation of the scope of the arbitration agreement.” Rather, “[i]n interpreting what the parties contemplated, the intention of the parties might be judged primarily against the wording of the arbitration clause.”

173 According to the court in one case, “[t]he role of pleadings in arbitral proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrators’ adjudication.” The Swedish national report likewise views the parties’ submissions as a basis for determining the scope of the arbitration agreement.”

courts in the Netherlands, Turkey, and the United Kingdom would also most likely refuse to recognize and enforce an award to the extent it grants a remedy that the main contract expressly excludes. Nor is there anything in these reports to suggest that it makes any difference whether the exclusion of remedy is situated within the arbitration clause itself or in a separate contractual provision. By contrast, courts in other countries – Germany and Norway, for example – reportedly consider the award of a remedy specifically excluded by the main contract insufficient to constitute an excess of arbitral authority within the meaning of Article V(21)(c), though the rationales in the two countries are articulated slightly differently.\textsuperscript{175} The award of such a remedy is apparently regarded in Germany as in the nature of a mistake of law, which normally lies beyond the review of the enforcing court.\textsuperscript{176} For their part, Norwegian courts are reportedly willing to assume that a tribunal’s decision to award an excluded remedy was based on an interpretation – correct or incorrect – of the contract and is accordingly unreviewable by the enforcing court.\textsuperscript{177} Case law in the United States is broadly similar.\textsuperscript{178} Although the matter has not arisen in France, the courts there would likely be inclined to reject the argument on the ground that it too closely touches on the merits of the case.

4. **Article V(1)(d): Improper Composition of Tribunal or Arbitral Procedure**

According to Article V(1)(d) of the Convention, an award may be denied recognition or enforcement if the composition of the arbitral tribunal or the arbitral procedure followed by the tribunal was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the *lex arbitri*. The language in which this ground is couched suggests that the composition of the tribunal

\textsuperscript{175} The Romanian report cites a decision rejecting the argument that an award may be annulled where the tribunal awarded a party a greater sum of money in damages than it had requested.
\textsuperscript{176} The German reporter views this response as reflecting the general absence from German law (unlike the common law) of a sharp distinction between “rights” and “remedies.”
\textsuperscript{177} A broadly analogous question is whether a tribunal is deemed to have acted in excess of authority in applying to the merits of a dispute a body of law other than the one designated by the parties as the governing law. See the discussion of this issue at Part Four, Section C 4 of this report, *infra*, in connection with Article V(1)(d) of the Convention.
and the arbitral procedure to be followed are determined primarily by the parties’ agreement and only secondarily by the arbitration law of the arbitral seat.

(a) Party Agreement v. Mandatory Situs Law

The ground for non-recognition and non-enforcement set out in Article V(1)(d) is apparently widely enforced,\(^{179}\) as is the hierarchy between party agreement and situs law established by that provision. Thus, the courts will deny recognition and enforcement when the composition of the tribunal or the procedure followed was not in accordance with the agreement of the parties,\(^{180}\) but will not necessarily deny recognition and enforcement merely because enforcing the parties’ agreement in these respects necessarily entails disregarding provisions of the \textit{lex arbitri}. To that extent, courts apparently follow the sequence indicated by Article V(1)(d).

Theoretically, the parties’ agreement may prescribe a procedure or a panel composition that the \textit{lex arbitri} appears to bar, so that it is not possible to satisfy both sets of requirements, thus creating what may be regarded as a tribunal’s dilemma. The notion that, in keeping with Article V(1)(d)’s hierarchy, provisions of the \textit{lex arbitri} on these issues are subordinated to the agreement of the parties is in most circumstances not problematic because no serious conflict between the two sources is presented. Relatively few provisions of the \textit{lex arbitri} on matters of tribunal composition and arbitral procedure are, after all, truly mandatory in the sense that the parties are not free to deviate from them.\(^{181}\) Problems may arise only in the relatively rare case in which the rules on composition of the tribunal and arbitral procedure embodied in the agreement of the parties are contrary to rules of the \textit{lex arbitri} from which the parties cannot derogate.

\(^{179}\) See in particular the national reports for Austria, China, France, Israel, and Norway.
\(^{180}\) Chinese courts have applied Article V(1)(d) very strictly, denying recognition and enforcement where (a) the tribunal did not render its award within the time limit established by rules of the institution designated in the parties’ arbitration agreement, (b) the tribunal did not follow institutional rules governing the appointment of a substitute arbitrator, (c) the award creditor had failed to abide by a provision in the arbitration agreement requiring the parties to conduct negotiations of a certain duration before resorting to arbitration, and (d) the institution did not handle an arbitrator’s unexpected unavailability to participate in the hearings in accordance with the institution’s own rules.
\(^{181}\) The Vietnamese national report underscores the unlikelihood of a direct contradiction between the rules chosen by the parties and the mandatory rules of the arbitral situs.
Even in that case, the enforcing court may be able to justify enforcing the award despite the deviation from mandatory rules of the *lex arbitri.* (It will be recalled that, according to the dominant view, courts may but are not obliged to deny recognition or enforcement of a foreign award if a ground to that effect is established.\(^{182}\)) The court to which an abroad is brought for recognition or enforcement may consider that the better forum for championing the mandatory rules of the *lex arbitri* is a court of the place of arbitration – a court that undoubtedly has authority to annul an award on that basis and that has a greater interest than the enforcing court in vindicating those mandatory rules. In any case, judging by the national reports that address the issue, if courts in the States surveyed here were actually to be confronted with what appears to be a largely theoretical dilemma between party agreement and mandatory situs law, they would in most jurisdictions refrain from denying recognition or enforcement under Article V(1)(d), thus overlooking violation of the *lex arbitri.*\(^{183}\)

Even so, the prevailing view in a few jurisdictions is that, in the face of the dilemma here described, the mandatory law of the situs should supersede party agreement on the procedural issue, notwithstanding the Article V(1)(d) sequence.\(^{184}\) This position may simply reflect respect for mandatory situs law on such matters as composition of the arbitral tribunal or arbitral procedure. But it may also reveal a reluctance to enforce an award that could successfully be challenged in a set aside action in the jurisdiction in which it was made.\(^{185}\) This latter argument is not entirely persuasive. First, if at the time that enforcement of an award is sought, that award has already been set aside in the court of the arbitral situs, Article V(1)(e) (see Section Part Four, Section B 5 of this report, *infra*) would provide an independent ground for denying enforcement. In addition, if the set aside action has been instituted but not yet decided, the Convention authorizes the enforcing court to stay enforcement proceedings pending the outcome of that action. If at the time that enforcement of an award is sought, no set aside action had been brought in

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182 See Part Four, Section A 1 of this report, *supra.*
183 See in particular the national reports of France, Hungary, Romania, Sweden, Switzerland, and Taiwan.
184 According to the Norwegian national report, courts would be quite prepared to enforce the mandatory law of the situs even if, in violating that law, the tribunal was giving effect to the parties' agreement on that procedural matter. See also the national report for Venezuela.
185 For an expression of this view, see the Swedish national report.
the arbitral situs and the set aside period has lapsed, there is no longer any prospect of annulment of the award at the situs. One may also wonder why a party resisting enforcement abroad on Article V(1)(d) grounds would have failed to seek set aside in the place of arbitration. If this is all true, the only scenario to worry about is the one in which, at the time enforcement is sought, the losing party still had time to bring a set aside action in the arbitral situs. Given the extreme brevity of the annulment period in most jurisdictions, this is not a likely scenario.186

The fact that a tribunal’s deviation from the parties’ agreement in the composition of the tribunal or on arbitral procedure (or, conversely, that its deviation from the *lex arbitri*) might justify a denial of recognition or enforcement under Article V(1)(d) does not mean that courts readily deny recognition or enforcement on this ground. According to numerous national reports, including the Canadian, Dutch, Hong Kong, and Korean, deviation from these prescriptions will only result in a refusal to recognize or enforce an award if that deviation affects the integrity of the arbitral process as a whole or produces manifest prejudice.187 The prevailing judicial attitude in this regard echoes the prevailing attitude toward the due process defense set out in Article V(1)(b).188 Similarly, as under Article V(1)(b), the losing party will be ill-placed to resist recognition or enforcement of an award on the basis of a procedural irregularity if that party was aware of the circumstances during the arbitral proceedings and failed at that time to object.189

(b) Application of the Law not Chosen

A somewhat difficult scenario in the law of international arbitration is one in which the tribunal applies to the merits of a dispute a law other than the one designated as applicable by the parties through a contractual choice of law clause. Arguably, a

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186 The Swiss reporter precisely so observes: “[E]nforcement of the award will generally be sought only after the deadline for challenging … the award at the seat of arbitration has elapsed.”

187 According to the Swiss report, it has been suggested in the literature that “the procedural irregularity … must have been causal for the outcome of the proceedings.”

188 See Part Four, Section B 2 of this report, *supra*.

189 See, on this particular point, the Swiss national report.
tribunal’s failure to abide by the parties’ choice of law represents the kind of deviation from party agreement contemplated by Article V(1)(d).

In fact, relatively few national reporters appear to have a basis for knowing or even predicting what national courts would do in such circumstances. Even the few reports that address the question are evenly divided. According to the Canadian, Indian, Norwegian, Swedish, Turkish and United Kingdom reports, national courts would most likely refuse to recognize or enforce an award rendered pursuant to a substantive body of law other than the one selected by the parties. On the other hand, the courts of Brazil, Germany, Greece, Italy, Romania, and Venezuela are described as inclined to recognize and enforce an award even if rendered pursuant to a substantive body of law different from the one selected by the parties. Their rationale is that a determination of choice of law is better viewed as an aspect of the decision on the merits than as an issue of arbitral procedure,190 and thus as lying beyond judicial review in an action for recognition or enforcement. A notorious Indonesian case shows the risk of allowing courts to second-guess the arbitrators’ choice of law. The court there impermissibly sought to annul an award rendered in Geneva (and therefore an award over which it lacked annulment authority), partly on the ground that the tribunal had failed to apply Indonesian law to the dispute and thus exceeded its authority.191

5. Article V(1)(e): Award Set Aside in Arbitral Situs

Article V(1)(e) provides:

Recognition and enforcement of [an] award may be refused [if] … (e) [t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

190 In Brazil, for example, application of the “wrong” body of law would be regarded as a merits issue and beyond review upon recognition or enforcement. The problem is regarded in France as purely theoretical, since a tribunal is unlikely to apply a different law than the parties had adopted without giving some legal justification for doing so, and to review the persuasiveness of that justification would be to enter into the merits.

It is entirely understandable that, as Article V(1)(e) provides, an award may be denied recognition or enforcement if it “has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made,” and courts regularly give effect to this provision.\footnote{See in particular the national reports for China, Taiwan, Turkey, and the United States.} Importantly, Article VI of the Convention goes on to enable courts to suspend enforcement proceedings if the award in question is the subject of a set aside action in a competent court of the arbitral situs, and await the result of that action before entertaining the Article V(1)(e) defense.

The more interesting question is whether courts, though permitted to deny recognition and enforcement of an award that has been set aside in a court of the arbitral situs, may choose instead to recognize or enforce it. The question is of course a species of the more general question, treated earlier,\footnote{See Part 4, Section A 1 of this report, supra.} of whether courts may proceed to recognize or enforce a foreign award under the Convention even though one or more grounds that would justify a refusal to do so is established.

In the majority of jurisdictions surveyed, the specific question here posed is expressly addressed neither by statute nor case law.\footnote{See in particular the national reports of Brazil, Hong Kong, Hungary, India, Ireland, Israel, Japan, Macau, Malaysia, Paraguay, Peru, Portugal, Russia, and Singapore.} However, in a sizeable minority of jurisdictions it has been addressed, though in those cases typically by courts rather than legislatures. The prevailing view among those jurisdictions is that courts may decide in

\begin{footnotesize}
\footnote{A case raising this question is pending in the Brazilian courts. See EDF International S.A. v. Endessa Latinoamerica S.A., Case SEC 5782. According to one academic view in Brazil, for a court to enforce an award that has been annulled by a competent court of the arbitral situs would infringe the 1975 Panama Convention and the 1992 Les Leñas Protocol (Mercosur), which consider recognition or enforcement of an award under those circumstances to be impermissible.}

\footnote{In other jurisdictions, the matter, though unaddressed by the courts, has generated much academic debate. See, for example, the national reports for Italy and Slovenia. The national reporters from these jurisdictions take a range of views. Supporting authority to enforce annulled awards is the national report for Australia, citing L. Nottage & R. Garnett, “The Top 20 Things to Change on or Around Australia’s International Arbitration Act,” in Nottage & Garnett (eds.), International Arbitration in Australia 163 (2010). The Canadian reporters suggest that permitting courts to enforce annulled awards under the Convention is consistent with the Convention’s overall pro-arbitration philosophy. See also the national reports for the Czech Republic, Korea, and Venezuela.}

\footnote{National reporters from other jurisdictions either disfavor the recognition or enforcement of annulled awards or predict that national courts, when asked, will refuse to accord them recognition or enforcement. See the national reports for Romania, Sweden, Switzerland, Taiwan, and Uruguay.}
\end{footnotesize}
appropriate circumstances to recognize or enforce an annulled foreign award. Jurisdictions with considerable experience in this regard include Canada and the United States.

France is in this regard a quite special case. As in other countries, the annulment of an award in the arbitral seat does not necessitate non-recognition and non-enforcement of the award in France. But France goes further, for there the annulment of an award in the arbitral seat is simply not a sufficient basis for refusing recognition or enforcement of the award – as if Article V(1)(e) were simply not available as a basis for refusal. This should not, however, occasion surprise. The French system, as noted earlier, makes comprehensive use of Article VII of the Convention, entitling parties to rely upon domestic law means for enforcing foreign arbitral awards that are more favorable to enforcement than the Convention. Under the French conception, as described by the French Supreme Court, “international arbitral awards, which are not anchored in the legal order of any given State, are international judgment whose regularity is examined only in light of the norms applicable in the country where their recognition is sought.” Indeed, since annulment of an award in the place of arbitration is not a ground under French law for denying recognition or enforcement of that award, French courts have no basis for

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195 See, for example, the national reports for Austria, Canada, the United Kingdom, and the United States. But see the Chinese, Croatian, Greek, Korean, and Turkish reports, for example, which indicate that courts consider themselves barred from recognizing or enforcing an award that has been set aside in the seat of arbitration. However, the issue is reported to be a subject of strong debate in Chinese academic circles. Although Chinese courts will recognize and enforce a Convention award, even though a ground in domestic law for refusing its recognition and enforcement can be established, they have not recognized or enforced a Convention award when a ground for refusal under the Convention has been established. The sole Dutch decision in which a foreign annulled award was enforced in France is the noted Yukos decision of the Amsterdam Court of Appeal. Yukos Capital s.a.r.l. v. OAO Rosneft, Tijdschrift voor arbitrage 1011, p. 1534, Ybk Commc’l Arb., no. 31 (Apr. 28, 2009). However, there is dispute over whether enforcement in Yukos took place under the Convention or under some other means of award enforcement to which Article VII of the Convention permits access.


197 Awards annulled by a court of the arbitral seat were nevertheless enforced by U.S. courts in Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F.Supp. 907 (1996); Corporacion Mexicana de Mantenimiento Integral v. Pemex-Exploracion y Produccion, 962 F.Supp. 2d 642 (S.D. N.Y. 2013). These are exceptional cases, however.


suspension of enforcement procedures to await the outcome of an annulment action in the courts of the arbitral seat, as provided for by Article VI of the New York Convention.

Germany is also a good example of a State in which the Convention, as implemented, is generally deemed to foreclose enforcement of annulled awards, but in which parties may, by resort to Article VII of the Convention, have recourse to an alternative means that would permit enforcement of annulled awards and, to that extent, operate in a manner more favorable to enforcement. The alternative means most often invoked in Germany in this context is Article IX of the 1961 European Convention. Article IX provides that the setting aside of an award covered by the European Convention justifies denial of recognition or enforcement in another Contracting State only if it was predicated on certain grounds (basically invalidity of the arbitration agreement, fundamental procedural unfairness, resolution of disputes beyond those submitted to arbitration, and composition of tribunal or arbitral procedure in violation of parties’ agreement). This effectively forecloses German courts from denying recognition or enforcement of an award due to its annulment in the arbitral situs if the annulment was based on the non-arbitrability of the dispute under the law of the arbitral situs or violation of the arbitral situs’ public policy.

The German solution illustrates the possibility that judicial authority to enforce an award annulled in the arbitral situs may depend on the ground upon which the set aside was based. That is a position that legal writers in other jurisdictions support. Understandably, in States whose courts entertain the possibility of recognizing or enforcing annulled awards, the decision whether or not to do so in any given case is a highly discretionary one. National reporters thus emphasize that recognition or enforcement of annulled awards is anything but routine, and that it decidedly represents the exception and not the rule. The national reports do not shed much light on the criteria according to which courts decide in their discretion to recognize or enforce an annulled

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202 See, for example, the national report for Norway.

203 See in particular the United Kingdom report on the way in which such discretion is exercised.
award. Even in jurisdictions in which courts have on several occasions granted recognition or enforcement of annulled awards, the case law offers little guidance on the matter. 204

6. Article V(2)(a): Non-Arbitrability

As noted earlier, 205 in most jurisdictions, the term “arbitrability” is reserved for the question of whether a given dispute or category of disputes is legally capable of being arbitrated, and it is in that sense that the term is used here. Arbitrability raises many questions, among which we focus on two. First, what kinds of disputes are deemed non-arbitrable in the various jurisdictions surveyed. Second, do courts – as the terms of the Convention would suggest – withhold recognition or enforcement of a foreign award if the dispute would be non-arbitrable under that jurisdiction’s law (i.e. under the law of the place of recognition or enforcement), even if fully arbitrable under the law of the arbitral seat and under the law governing the claim? Conversely, do courts – again, as the terms of the Convention would suggest – grant recognition or enforcement of an award due to the fact that the underlying dispute is arbitrable under local law, even if the dispute is non-arbitrable under the law of the arbitral seat as well as under the law governing the claim?

(a) What Kind of Disputes are Non-Arbitrable?

Upon examining what is considered non-arbitrable in the countries surveyed, certain patterns emerge. Unsurprisingly, penal and tax disputes – essentially public law claims – are generally considered to be non-arbitrable. 206 But certain categories of private law disputes are also deemed non-arbitrable across a good many jurisdictions. Depending on the jurisdiction, these may include consumer protection claims, 207

204 See, for example, the national report for Canada.
205 See Part Three, Section B of this report, supra.
206 See, for example, the national report for Austria.
207 See, for example, the national reports for Australia, Brazil, Canada, India, and Sweden. Arbitration of consumer disputes is specifically authorized by the Czech Republic Act on Arbitration.
bankruptcy claims, labor and social law disputes, claims arising out of property rights in real estate, and inheritance matters. In a number of reporting jurisdictions, family law matters are also not subject to arbitration, as are corporate governance disputes, housing claims, and intellectual property claims. While no jurisdiction comes close to considering all categories of disputes between private parties to be arbitrable, the clear trend among jurisdictions addressing the matter is to reduce and not to expand the domain of non-arbitrable claims.

Caution is urged however in reading these results. Appearances may be deceiving. Take Australia, for example, where (a) insurance contract disputes are normally non-arbitrable, but arbitration is permitted if the parties agreed to arbitrate through a post-dispute arbitration agreement; (b) disputes over the carriage of goods under section 11 of COGSA are arbitrable only if arbitration is stipulated to take place in Australia; otherwise they are non-arbitrable; (c) disputes that by their nature might ordinarily be deemed arbitrable are not arbitrable if adjudicatory authority has been vested in a specialist court rather than a court of general jurisdiction; and (d) some consumer disputes are deemed arbitrable and some are not.

What features do non-arbitrable claims tend to have in common? In a large number of jurisdictions, it is said that only disputes involving freely transferable patrimonial rights may be settled by arbitration. A common variation on this among

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208 See the national reports for Australia, Austria, Croatia, the Czech Republic, France, India, Italy, the Netherlands, Singapore, Sweden, and Switzerland.
209 See the national reports for Austria, Brazil, China, Greece, Hungary, Israel, Italy, and Sweden.
210 See the national reports for Croatia, Israel, Sweden, Turkey, and Venezuela.
211 See the national reports for China, the Czech Republic, India, Israel, Italy, and Romania.
212 See the national reports for Austria, Canada, China, France, Hungary, India, Israel, Italy, Paraguay, and Singapore
213 See the national reports for Austria, Croatia, Israel, and the Netherlands.
214 See the national reports for Austria, Croatia, Germany, and the Netherlands.
215 See the national reports for Israel, the Netherlands, Norway, and Singapore.
216 For example, see the national report for Italy, according to which the following categories of claims once considered non-arbitrable are now considered arbitrable: antitrust, intellectual property, corporate governance, and labor law.
217 This is expressly so provided in the Insurance Contracts Act 1984.
218 See Metrocall Inc. v. Electronic Tracking Systems Pty Ltd (jurisdiction of specialized Industrial Relations Commission to adjudicate cannot be derogated from by agreement to arbitrate). This may be regarded as an instance of “implied” non-arbitrability.
220 See, for Brazil, Arbitration Act, art. 1.
States is to treat claims as arbitrable, provided the right in question is one of which an individual may freely dispose. 221

Another group of countries, exemplified by Germany, adopt a perhaps even broader notion of what is arbitrable. Thus, the German Civil Procedure Code (sec. 1030) defines as arbitrable:

Any claim involving an economic interest can be the subject of an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute. 222

Even so, different jurisdictions understand the notion of “economic interest” in this setting differently. Article 177 of the Swiss PILA, addressing international arbitration in particular, affirms that “all disputes involving an economic interest may be subject to arbitration,” 223 but, according to the Swiss national report, the notion of “economic interest” must in this context be construed broadly, since the provision is understood as intended to widen substantially access to arbitration for the settlement of international

221 Among the numerous examples, see (a) Article 3 of the Croatian Law on Arbitration providing that parties may agree to arbitrate disputes regarding rights that they may freely dispose of; (b) Articles 1 and 3, section 1, of the Korean Arbitration Act, providing that any disputes in private law may be settled in arbitration; (c) Article 1020(3) of the Netherlands Arbitration Act, stating that “the arbitration agreement shall not serve to determine legal consequences of which the parties cannot freely dispose;” (d) Article 2 of the Arbitration Law of Peru stating “[a]ll disputes relating to matters that may be freely disposed of according to the law, as well as to matters permitted by the law, international treaties or agreements, can be referred to arbitration;” and (e) Article 1/IV of the Turkish Act on International Arbitration.

In several jurisdictions, a dispute is deemed arbitrable as long as it may be the object of a compromise or settlement. See Uruguay (Civil Procedure Code, secs. 472, 476) and Venezuela (Commercial Arbitration Law, art. 3, Statute on Private International Law, art. 47, Code of Civil Procedure (art. 608)).

222 To the same effect, see the Portuguese Law on Voluntary Arbitration, arts. 1(1) and (2):

(1) Any dispute involving economic interests may be referred by the parties to arbitration, by means of an arbitration agreement, provided that it is not exclusively submitted by a special law to the State courts or to mandatory arbitration.

(2) An arbitration agreement concerning disputes that do not involve economic interests is also valid provided that the parties are entitled to conclude a settlement on the right in dispute.

The Slovenian Arbitration Act, consciously following legislation in Germany, Switzerland and Austria, likewise makes the involvement of an economic interest in a dispute the hallmark of arbitrability.

223 Technically, Article 177 of PILA governs international arbitral proceedings whose seat is in Switzerland, but the Swiss national reporter is confident that the same standards would be applied by analogy to the recognition and enforcement of foreign awards in Switzerland. Application of the broad standard set out in PILA Article 177 to recognition and enforcement of foreign awards may, according to the Swiss national report, explain why there are no reported Swiss cases in which recognition of enforcement of a foreign award has been denied on Article V(2)(a) grounds.
disputes. And it has indeed been construed exceptionally broadly. All that is required for an international dispute to present an “economic interest” is for it to have a financial value for at least one of the parties. Under this broad definition, arbitrable claims include claims arising out of competition law, intellectual property law, consumer contract law, labor law, inheritance law, and even some aspects of family or bankruptcy law – that is, claims that are viewed as non-arbitrable in other jurisdictions. Swiss law is particularly interesting, in that the broad definition of arbitrable disputes described above obtains only in international arbitration; in domestic arbitration, Swiss law is far more restrictive. In domestic arbitration, a dispute is arbitrable only as to subject matters that are “at the parties’ disposal,” thus, for example, excluding disputes that, while involving economic interests, are regulated by mandatory rules of law.

An alternative is to put the focus on the notion of public interest. As put by an Australian court, “[t]he common element [is] a sufficient element of public interest making the private resolution of disputes concerning such matters outside the national court system inappropriate.” The French national report suggests there is no single general criterion. Rather, the inclusion of any single category of dispute within the overall category of non-arbitrable claims under French law may be explained in terms of one or more of the following criteria: (a) the right in question is one over which the individual cannot by law freely dispose, (b) public policy, or (c) the exclusive attribution of adjudicatory authority to a particular national court or other governmental body.

(b) Choice of Law Governing Non-Arbitrability

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224 Code of Civil Procedure, art. 354.

The Singapore High Court has ruled that an award based on a finding of jurisdiction by alter ego is not subject to the non-arbitrability exception to enforcement because it did not implicate a “public interest,” which is the hallmark of issues considered non-arbitrable under Singapore law. Aloe Vera of America, Inc. v. Asianic Food Pte Ltd, [2006] SGHC 78, paras. 71-72.
226 However, the notion of ordre public (public policy) is narrowly construed in this context. The fact that a matter is governed by public law rather than private law does not in itself bring the ordre public exception into play. A good example is competition law, a field in which claims are freely arbitrable.
On the second question – the choice of law governing arbitrability – the prevailing view among those national reporters responding is that enforcing courts do precisely as the New York Convention appears to contemplate, namely, refuse recognition and enforcement of an award only if the dispute is not arbitrable under their own law, and irrespective of whether the dispute happens to be fully arbitrable under the law of the arbitral situs and/or the law governing the underlying claim. Only in one national report is the possibility raised of enforcing an award on a claim that is non-arbitrable under the law of the place of recognition or enforcement, in consideration of the fact that the claim is fully arbitrable under the substantive law of the dispute and the lex arbitri. Conversely, courts do not deny recognition or enforcement of an award merely because the underlying dispute is non-arbitrable in the seat or under the law governing the claim, provided it is arbitrable under forum law. An exception is Peru whose arbitration law instructs courts in determining the matter of arbitrability of a claim to refer to the law chosen by the parties to govern their dispute, the law otherwise applicable to the merits of the dispute, or Peruvian law, whichever one will uphold the dispute’s arbitrability.

That being said, some national reporters comment that they or members of the country’s academic community have doubts about the appropriateness of applying the arbitrability rules of the enforcement forum to awards having no connection with that jurisdiction.

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227 Jurisdictions reportedly taking this position include Australia, Canada, Greece, India, Korea, Romania, Singapore, Switzerland, Turkey, and Venezuela.
228 According to the United Kingdom report, “[g]enerally speaking, when the subject matter of the dispute is capable of being settled by arbitration under the substantive law of the dispute and the law of the arbitration, English courts tend to consider whether to exercise their discretion to deny enforcement simply on the grounds that the matter is not arbitrable under English law.” The U.K. report does not, however, cite any decisions to this effect.
229 The Swedish national report cites a case for this very proposition. OAO Arkhangelskoe Geologodobychnoe Predpriyatie v. Archangle Diamond Corp., Case T 2277-04 (Nov. 15, 2005). The national reporter describes the case as holding that “the fact that an issue is non-arbitrable under a foreign legal system does not constitute grounds for refusal …, even where the foreign legal system applies to the arbitration agreement, as well as the issue, which the award concerns.” Swiss law is apparently to the same effect.
230 Arbitration Law, art. 16.4 (the “maximum efficacy” principle) essentially takes the position that the arbitrability of a dispute should be determined by reference to the law that is most favorable to arbitration.
231 See the national reports for Norway and Japan. According to the Norwegian national reporter, “the rule of arbitrability should not be applied in abstract, but consideration should be given to the result of enforcing
7. Article V(2)(b): Violation of Public Policy

The New York Convention contemplates refusal of recognition and enforcement where granting either would violate the public policy of the country where recognition or enforcement is sought. As in the case of non-arbitrability, reference in the Convention thus is made exclusively to the law of the country where recognition or enforcement is sought, and to the law of no other country, apparently regardless of the seriousness of the award’s impact on the public policy of that other country even though it may be substantially more closely connected with the dispute.232

(a) Offense to Public Policy Generally

It is somewhat surprising to find that, notwithstanding the prominence of the public policy defense in discussions of the Convention, in many jurisdictions the defense has been the subject of little if any national court litigation.233 To that extent, discussions of offense to public policy as a basis for denying recognition or enforcement of foreign arbitral awards are often mainly doctrinal and academic. But courts in a significant number of countries surveyed have had occasion to consider withholding recognition or enforcement of awards on public policy grounds,234 resulting in sufficient national case law to justify our making at least some meaningful generalizations about the public policy defense. A prominent feature of the public policy defense in many jurisdictions is the distinction between “substantive” and “procedural” public policy.235 While most jurisdictions recognize both species of public policy, the latter category (i.e., procedural

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233 The national reporter for Norway, for example, reports no case law whatsoever on the subject.
234 Countries whose reports emphasize the public policy defense include Canada, China, France, Germany, India, Japan, Malaysia, Russia, Switzerland, and the United Kingdom.
235 See, for example, the national reports for the Netherlands, Slovenia, and Sweden.
public policy) is sometimes described as superfluous, since the New York Convention contains a separate ground for non-recognition and non-enforcement – fundamental procedural unfairness under Article V(1)(b) – that covers much the same ground.

National reports across the board assert that the notion of a violation of public policy for these purposes is to be interpreted extremely narrowly.236 Even violations of mandatory law do not necessarily constitute violations of public policy.237 Rather, the norms violated must be ones that reflect and embody the most fundamental notions of morality and justice.238 Thus, while the public policy defense may commonly be invoked in national legal systems, it is seldom invoked successfully.239 At the same time, however, a good number of national reports suggest, often quite critically,240 that the

236 See, for example, the Hong Kong report.
238 See the national reports for Canada, Greece, Hong Kong, Japan, Norway, Peru, Singapore, Slovenia, and Switzerland. Justice Foster of Australia, citing case law not only of that country, but also of Hong Kong and the U.S., stated:

The scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defence of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state.

Traxys Europe SA v. Balaji Coke Industry Ltd. (no. 2), 2012, 201 FCR 535.

The Korean courts have been asked on several occasions to deny recognition or enforcement of foreign awards on public policy grounds, but have thus far refused to do so, maintaining the view that the ground is to be construed narrowly. A good example is the decision of April 12, 1984, 83 Kahap 7051 (Seoul Civil Local Court, 7th dep’t), enforcing an award mandating performance under a contract even though under Korean law performance would have been excused as due to a natural disaster. Similarly, a court in Macau enforced a contract for the provision of legal services on a contingent fee basis even though such contracts are prohibited under the law of Macau. Case 163/2008 (Court of Second Instance, Nov. 12, 2009).

239 This is the experience in the United States, where courts emphasize that enforcement of an award will not be deemed contrary to public policy unless it would offend “the most basic notions of morality and justice” (see Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 516 (2d Cir. 1975) or “[be] repugnant to fundamental notions of what is decent and just” (see Republic of Argentina v. BG Group PLC, 764 F. Supp. 2d 21, 39 (D.C. Cir. 2011), quoting Ackerman v. Levine, 788 F.2d 830, 841 (2d Cir. 1986))).
240 For example, in the case of Resort Condominiums v. Bolwell, 1993, 118 ALR 655, the Queensland
defense is not in practice applied as sparingly as these general pronouncements would suggest.241

The more searching questions are these: first, when in any given jurisdiction does a violation rise to the level of a violation of public policy? And second, is any distinction to be drawn between public policy at the “national” and “international” levels? On the first point, unfortunately, the national reports do not expand on the meaning or application of the phrase “most basic notions of morality and justice.” The national reports typically cite isolated examples of judicial refusals to recognize or enforce awards on grounds of public policy, without advancing meaningful general propositions. Thus, an Argentine court refused to enforce an award that had imposed on the prevailing party costs that greatly exceeded the value of the award itself that had been rendered in favor of

Supreme Court found that enforcement of an award would violate public policy for three distinct reasons: (a) the orders issued by the arbitrators were too vague and far-reaching to permit enforcement, (b) the orders were not of the sort that a court in that jurisdiction would make, and (c) the orders were duplicative of those already issued by a U.S. court in respect of the same subject matter. The national reporter suggests that these public policy rationales, particularly the second, should “raise eyebrows.” In another Australian case, the court ruled that the illegality of a contract containing an arbitration clause could be the basis of a public policy objection to recognition or enforcement, even though the question of illegality had been raised before and decided by the arbitrator. Corvetina Technology Ltd. v. Clough Engineering Ltd., 2004, NSWSC 700.

The Brazilian national reporter cites with disapproval a case in which the public policy exception was applied on the ground that the foreign award did not comply with certain provisions of the Brazilian Arbitration Act applicable to arbitrations conducted in Brazil. Those provisions require an arbitration agreement to be in writing and duly signed by the parties. The reporter termed such a judgment as “simplistic.”

The loose construction of “violation of public policy” by Indian courts has especially come in for criticism. While in the leading case of Renusagar Power Ltd. v. General Electric, 1994 Supp. (1) SCC 644 (Supreme Court), the Supreme Court ruled that enforcement of an award would be contrary to public policy if contrary to either fundamental policy of Indian law, the interests of India or justice and morality, it subsequently broadened the notion. In the case of ONGC v. SAW Pipes Ltd., 2003, 5 SCC 705, 709, the Court added a fourth ground, namely “patent illegality.” Subsequent case law understands that term to denote an error of law apparent on the face of the record. Sayanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale, 1960, 1 SCR 890.

Although Malaysian courts claim to construe the public policy exception narrowly, they have rendered decisions that call that claim into question. In Sami Mousawi v. Kerajaan Negeri Sarawak, a court refused to enforce an award that in turn enforced a contract for consultancy services where the consultant failed to meet the Malaysian standards for certification of architects, engineers and surveyors. In Harris Adacom Corp. v. Perkom Sdn Bhd, [1994] 3 MLJ 504, the court ruled that it would be contrary to public policy to enforce an award in favor of an Israeli company, due to Malaysia’s embargo on trade with Israel.

241 Russia offers a good example. According to the national reporters, Russian courts tend to give the public policy defense very wide application. Especially problematic of course is the use of violation of public policy as a basis, not for denying recognition or enforcement of a foreign award, but for purporting to annul a foreign award (which of course is a prerogative reserved to courts of the arbitral seat). See the notorious Indonesian court judgment in Pertamina v. Karaha Bodas Co., decision no. 86/PDT.G/2002/PN.JKT.PST (Aug. 19, 2002).
the prevailing party. Enforcement under these circumstances was found to violate public policy because it vitiated access to justice.\textsuperscript{242} Similarly, Canadian courts have rejected a foreign award on public policy grounds because the award afforded a party double recovery\textsuperscript{243} and because the arbitrator failed to provide reasons for his award.\textsuperscript{244} A Georgian court denied enforcement of an award that granted the prevailing party an excessively high penalty for breach of contract.\textsuperscript{245} An Israeli court refused to enforce a foreign award that in turn enforced an agreement to bribe public officials, even though the conduct had all taken place in a jurisdiction that tolerates the bribery of public officials.\textsuperscript{246} Curiously, Turkish courts have on more than one occasion denied enforcement of a foreign arbitral award simply because it was rendered after the expiry of the time limit for its issuance.\textsuperscript{247}

On rare occasion, national courts or legislatures attempt to give at least some general content to the public policy exception. By way of illustration, the Swiss Federal Tribunal has identified by way of \textit{obiter dictum} a long assortment of public policy violations, including violation of the principle of \textit{pacta sunt servanda}, abuse of right, failure of good faith, expropriation without just compensation, corrupt practices, racial, gender or ethnic discrimination, forced labor, and violations of human dignity.\textsuperscript{248} In

\begin{itemize}
\item \textsuperscript{243} Subway Franchise Systems of Canada Ltd. v. Laitch, 2011 SKQB 249, 206 ACWS (3d) 655. See also the Italian judgment in Filippello v. El Sheraton Golf Hotel, Cass (Mar. 10, 1999), denying enforcement as against public policy of a foreign award contrary to a court decision, involving the same parties and object, that had already become \textit{res judicata}.
\item \textsuperscript{244} Smart Systems Technologies Inc. v. Domotique Secant Inc., QCCA 444, 168 ACWS (3d) 696.
\item \textsuperscript{245} Tbilisi Court of Appeal, Decision no. 2B/3048-10 (Nov. 3, 2010).
\item \textsuperscript{246} Nisan Albert Gad v. David Simon Tov, case 2103/03 (Jerusalem District Court).
\end{itemize}

Whether enforcement of a foreign award granting punitive damages would violate public policy is a question that continues to arise and that has not lent itself to hard-and-fast rules. See, for example, the national reports for Italy and Japan. Another commonly raised question is whether awards may be denied recognition or enforcement due to their application of a rate of interest substantially in excess of the rate of interest prevailing under forum law. Invocation of public policy in this context is usually unsuccessful. See, for example, the decision of the Lisbon Court of Appeal of December 17, 1998, published in Coletânea de Jurisprudência, tome V, pp. 125 et seq. (1998).

\begin{itemize}
\item \textsuperscript{247} Decision E 2064; K 1513 (15\textsuperscript{th} Civil Chamber of the Court of Cassation, March 10, 1994; decision E 1994/2876; K 1995/164) 15\textsuperscript{th} Civil Chamber of the Court of Cassation, Jan. 19, 1995.
\item \textsuperscript{248} In a controversial decision of 2006, however, the Swiss Federal Tribunal held that competition law rules do not form part of international public policy, basically for lack of universality.
\end{itemize}
Austria, the Civil Procedure Code itself enumerates a long list of specific circumstances in which enforcement of an award would violate Austrian public policy.249

(b) National versus International Public Policy

The national reports are more revealing on the distinction between national public policy (ordre public interne) and international public policy (ordre public international). According to this distinction, public policy at the national level reflects the most fundamental notions of morality and justice recognized in that legal system, and is appropriately applied to transactions or relationships confined to that jurisdiction. But transactions and relationships having an international character are said to be subject to a public policy standard that is less exacting or, if you will, more cosmopolitan. The more universal (as opposed to strictly national) a legal norm, the more likely for it to constitute international public policy.250

Although the distinction, and the notion of ordre public international itself, figure prominently in academic discussions of international commercial arbitration, judging by the national reports, they do not figure very prominently in the practice of the courts. Among the country reports responding to this question, a substantial number expressly state that the courts do not employ the distinction, at least not in the context of the recognition or enforcement of foreign arbitral awards.251 Courts in a somewhat smaller number of jurisdictions acknowledge the distinction,252 but unfortunately without clearly

249 See Section 611 (2) (5) and (2) (7) of the Austrian Civil Procedure Code. The Austrian statute distinguishes between breaches of procedural and substantive public policy. Examples of the former would be lack of impartiality or independence of the tribunal, participation of a party not capable of being a party to legal proceedings, and res judicata. Examples of the latter would be violations of fundamental civil rights under Austrian law and substantial violations of European law, notably EU competition law.

Section 8(7A) of Australia’s International Arbitration Act provides that “[i]f any doubt …, enforcement of a foreign award would be contrary to public policy if: (a) the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award.”

250 The distinction is nicely articulated in the Dutch national report.

251 These countries include Austria, Brazil, China, the Czech Republic, Hungary, Italy, Russia, Slovenia, Taiwan, the United Kingdom, and the United States.

252 These countries include Australia, Canada (at least in Quebec), Croatia, France, Germany, Italy, Portugal, Slovenia, Turkey, Uruguay, and Venezuela. In Portugal, arbitration legislation expressly provides that the recognition and enforcement of foreign awards is subject to international rather than domestic public policy. According to the enactment (Law on Voluntary Arbitration, art. 56(1)(b)(ii)), a foreign
indicating whether the courts actually practice it or whether it is chiefly an academic construct. In some jurisdictions – notably France\textsuperscript{253} and Switzerland\textsuperscript{254} – we know for a fact that the courts do consciously make use of the distinction;\textsuperscript{255} in most others we cannot be sure.\textsuperscript{256} In many jurisdictions, the matter remains in doubt.\textsuperscript{257} As the Norwegian and Swedish national reports explain, if domestic public policy is consistently enough construed restrictively, the distinction between \textit{ordre public interne} and \textit{ordre public international} loses much of its practical significance.\textsuperscript{258}

\textbf{Part Five: Procedural Issues in Recognizing and Enforcing Foreign Awards}

Article IV of the New York Convention requires a party seeking enforcement of a foreign arbitral award to comply with certain formal requirements, notably to produce a proper copy of the arbitration agreement and award,\textsuperscript{259} and a failure to do so will

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\textsuperscript{253} The effect of postulating an international as distinct from a domestic public policy is to render it more, rather than less, difficult to defeat recognition or enforcement on public policy grounds. In France, it is further emphasized that a violation of an international public policy norm arises only when the violation, under the circumstances, may be described as “effective et concrète,” “flagrante,” or “manifeste.” For French rulings to this effect, see Société SNF v. Société Cytect, Cass civ. 1re, Rev. arb. 2008.473 (June 4, 2008); Thales, RTD com.2005.263 (Court of Appeal Paris, Nov. 18, 2004).

\textsuperscript{254} As the Swiss national report points out, “[i]n a constant line of decisions, the Swiss Federal Tribunal exclusively refers to an ‘international’ or ‘transnational’ public policy.” As the report explains, “[t]his means that not all fundamental principles of the Swiss legal system belong to international public policy, but only ‘universal’ principles, i.e., such principles, which – under Swiss understanding of law and sense of justice – should be considered as fundamental by all countries in the world.” The report cites as examples of Swiss decisions to this effect DFT 132 III 389, reason 2; DFT 128 III 191, reason 4a; DFT 120 II 155, reason 6a.

\textsuperscript{255} According to the national report for the Netherlands, the same may be said for the Dutch courts.

\textsuperscript{256} A good example is Romania, where the distinction – consciously based on the French model – has recently come to be widely adopted within arbitration circles.

National reports for member states of the EU emphasize the national courts’ inclusion within the notion of public policy (whether national or international) of “European Union public policy.” See, in particular, the national reports for Croatia, Slovenia, and Sweden.

\textsuperscript{257} See, for example, the national reports for India and Vietnam.

\textsuperscript{258} In Singapore, the Court of Appeal initially adopted the distinction, stating that “public policy in the conflict of laws operates with less vigour than public policy in the domestic law.” Liao Eng Kiat v. Burswood Nominees Ltd., [2004] SGCA 45, 40. However, the court later ruled that the distinction has no application in cases governed by the International Arbitration Act (IAI), based on the UNCITRAL Model Law, because all awards subject to the IAI, as opposed to the Arbitration Act (AA) which applies exclusively to domestic arbitrations and awards, possess an “international focus” anyway. Soh Beng Tee & Co. Pte Ltd v. Fairmount Development Pte Ltd., [2007] SGCA 28, para. 61.

\textsuperscript{259} Article IV provides:
presumably bar enforcement. Apart from that, however, the Convention imposes no procedural barriers to the bringing of such actions.

By contrast, Article III of the New York Convention subjects enforcement actions to procedural requirements of the signatory States. It provides that each Contracting State “shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon...” In other words, each signatory State in principle applies its own procedural rules in taking the actions required by the Convention, that is, in actually recognizing or enforcing (or refusing to recognize or enforce) foreign arbitral awards. The next sections deal with certain salient procedural issues on which Article III would seem to point in the direction of national law.

A. Personal Jurisdiction in Actions to Recognize or Enforce Foreign Awards

One such basically procedural issue is personal jurisdiction, in particular jurisdiction over the award debtor in enforcement actions. Jurisdiction of course is not the prototypical procedural issue, and for two distinct reasons. First, States tend to regard the designation of limits, if any, on the exercise of national judicial jurisdiction as a matter appropriately left for the individual legal system to determine, not one to be dictated by international agreements on particular subjects. Second, procedural issues ordinarily relate to the question how an enforcement action is to be conducted, and not (as in the case of judicial jurisdiction) to the question whether such an action is to be conducted.

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

   (a) The duly authenticated original award or a duly certified copy thereof;

   (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.
The prevailing view among the States surveyed is that, in order for personal jurisdiction to be established, the award debtor must either be resident or domiciled in the State or have assets situated therein. In some jurisdictions, unless the award debtor is resident or domiciled in the State, personal jurisdiction lies not in the place where assets are located, but rather in a single designated court for the entire country.261

However, in some jurisdictions, the mere presence of assets belonging to the award debtor is not sufficient in the absence of another connection of some sort with the place where enforcement is sought. In Korea, for example, even in the presence of assets belonging to the award debtor, personal jurisdiction requires that the parties or the claims at issue be substantively related to Korea. Until 2011, a party seeking enforcement of a foreign award in Switzerland was likewise required, even in the presence of assets belonging to the award debtor, to demonstrate that the claim presented a sufficient link to

260 Among these countries are Austria, Argentina, Brazil, China, the Czech Republic, France, Germany, Hungary, Italy, Japan, Norway, Paraguay, Peru, Portugal, Switzerland, Turkey, and Venezuela.

However, the Taiwanese national report states that enforcement may be had in the place of the award debtor’s domicile, residence, principal office or principal place of business, without mention of the presence of assets as an adequate jurisdictional predicate. If this is the case, it would unduly restrict the enforcement of foreign arbitral awards in Taiwan. Admittedly, Taiwan is not a New York Convention State. But, arguably, a State that refuses to enforce a foreign award under the Convention unless the award debtor has its domicile, residence, principal office or principal place of business on the territory of that State would fail to honor its obligations under the Convention.

261 Thus, the competent court in Italy is the court of appeal in the place where the award debtor has its seat or domicile. Absent seat or domicile in Italy, jurisdiction vests in the Court of Appeal of Rome. In Greece, neither residence, nor domicile nor location of assets is necessary to establish jurisdiction. But in the absence of them all, jurisdiction is vested in the Court of First Instance of Athens. Code of Civil Procedure, art. 905.

The Indonesian national report identifies no particular requirements that must be met to establish personal jurisdiction to entertain an award enforcement action. But competence over such actions is in any event reserved to the Central Jakarta District Court. New Arbitration Law, art. 65.

262 The national report cites a decision of the Seoul Central District Court finding the necessary substantial connection with Korea. Decision 2009 Kahap 136849 (Sept. 7, 2010). But the case was an easy one since, according to the national report, not only was the petitioner a Korean company and the respondent a foreign company that was the petitioner’s majority shareholder, but “[g]iven that it was not difficult for the respondent to respond in the proceedings in Korea, that the execution of the arbitral award needed to be done in Korea, and that the governing law was Korean law,” the court was able to conclude “that enforcement of the foreign award in Korea conformed to both parties’ expectations, contributed to the fairness and the convenience of the enforcement, and thus established Korea’s substantive relation to the parties as well as the subject in dispute.”
Switzerland. A January 2011 reform eliminated the requirement of any such link, so that today the mere presence of assets in Switzerland is in itself sufficient.

The United States is an especially dramatic case in regard to personal jurisdiction. In keeping with general U.S. law principles, the award debtor must, in order to be subject to the personal jurisdiction of the court where enforcement is sought, not only meet the statutory requirements for the exercise of personal jurisdiction in the U.S. state in which the court sits, but also, as a matter of due process under the U.S. Constitution, have sufficient “minimum contacts” with that state. This is as true of personal jurisdiction in award enforcement actions, even though the proceedings tend to be summary. Unsurprisingly, however, courts in the U.S. disagree as to what constitutes sufficient “minimum contacts” in the award enforcement context. Some courts regard the local presence of assets – even assets wholly unrelated to the underlying claim – as sufficient in itself. Others require more.

To complete the picture, though, it should be added that in a minority of jurisdictions reporting on this issue, the law apparently imposes no particular personal jurisdiction requirements – not even a requirement of the presence of assets.

B. The Statute of Limitations

Another matter presumptively subject to national procedural law under Article III is the question of limitation periods, a matter on which the Convention itself is silent. Only a minority of States prescribe a specific period of limitation for actions to enforce foreign arbitral awards. These States include, among others, Canada, Hong Kong, Indonesia, Italy, Malaysia, the Netherlands, Norway, Romania, Russia, Turkey, the U.K.

263 DCBA, art. 271(1)(6).
264 The national report for Macau contains a suggestion that personal jurisdiction over an award debtor may be exercised only if the underlying obligation is to be performed in Macau. This seems improbable. The New York Convention offers no basis for confining a State’s obligation to enforce foreign arbitral awards to awards based on obligations to be performed on the territory where enforcement is sought.
265 See First Investment Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding Ltd. 703 F.3d 742, 746 (5th Cir. 2013).
266 See, e.g., Telecordia Tech Inc. v. Telkom SA Ltd., 458 F.3d 172, 179 (3d Cir. 2006).
267 Among these countries are Australia, Canada, Croatia, India, Indonesia, Israel, Peru, Slovenia, and Uruguay. This also appears to be the case in the Netherlands. However, Israel requires that the defendant be served with the claim in Israel or, subject to observance of certain formalities, outside of Israel.
and the U.S. In Italy, for example, the statutory limitation period for bringing an application to enforce a foreign arbitral award is ten years from the date the award becomes binding under the *lex arbitri*.\(^{268}\) In the U.S., the Federal Arbitration Act specifically requires that enforcement of a foreign award be brought within three years after the award was made. The date from which the limitations period starts to run may not, however, always be obvious. In the U.K., the six-year limitations period specifically runs from “the date on which the cause of action accrued.”\(^{269}\)

Much more commonly, arbitration law does not specify any particular limitations period for seeking recognition or enforcement of foreign awards. Under these circumstances, two main possibilities arise. Under one approach, there simply is no limitations period applicable to such proceedings.\(^{270}\) While in such jurisdictions an inordinate delay in presenting an application for enforcement of an arbitral award might possibly preclude enforcement,\(^{271}\) there is no limitations period as such. Under a second, and arguably preferable, approach, the applicable limitations period in these circumstances is the one designated by general provisions on limitations in the jurisdiction in question, frequently found in a civil code or code of civil procedure.\(^{272}\) For example, in Argentina, where no specific limitations period is laid down for actions pursuant to the Convention, the applicable limitations period is the general ten-year period designated in Article 4023 of the Civil Code.\(^{273}\)

\(^{268}\) Civil Code, art. 2946. Italy is unusual in making the date on which the limitations period begins to run depend on the date the award becomes binding under the *lex arbitri*. Jurisdictions more commonly date the running of their statute of limitations from the date of the award.

\(^{269}\) U.K. Limitation Act, sec. 7. In Agromet Motorimport Ltd. (Poland) v. Maulden Engineering Co., [1985] 1 W.L.R. 762, 763, the court applied the term “the date on which the cause of action accrued” as follows: “[A]n action to enforce an arbitrator’s award was an independent cause of action arising from the breach of an implied term in the arbitration agreement that the award would be honoured and not from the breach of the contract which had been the subject of the arbitration. [T]he six-year limitation period imposed by section 7 of the Limitation Act 1980 … therefore began to run from the date of the failure to honour the award.” What is not clear, however, is how the date of failure to honour the award is determined, unless it is assumed that the “failure” begins as of the date the award is issued.

\(^{270}\) This is apparently the case for Brazil, Croatia, Germany, Greece, Israel, Korea, Paraguay, Singapore, Switzerland, and Vietnam.

\(^{271}\) See, for example, Greece.

\(^{272}\) See, for example, Argentina, Australia, Austria, China, France, Hungary, India, Macau, and Malaysia. In India, reference is made to a general Schedule of Limitation Act (art. 137), providing a limitations period of three years from the date on which the right accrues, i.e. the date of the final award. See Noy Vallesina Engineering SpA Corp. v. Jindal Drugs Co., 2006 (3) Arb. L.R. 510 (Bom).

\(^{273}\) Portugal has no specific limitations period for award enforcement actions, so that the general limitations
Especially noteworthy is the fact that a remarkable number of jurisdictions adhere firmly to the view that, because limitations periods are a fully substantive rather than procedural matter, the applicable limitations period is determined solely by reference to the law governing the substantive claim or claims underlying the award, and not forum law.\(^{274}\) This appears to be the approach taken in the Czech Republic, Slovenia, Taiwan, and Uruguay. For instance, in Slovenia, rather than apply limitations periods of the \textit{lex fori}, courts apply the limitations period, if any, that pertains to the underlying cause of action. Portugal presents the unusual scenario of making the limitations period vary according to whether the award was based on Portuguese substantive law or the substantive law of another jurisdiction. If the award was based on Portuguese substantive law, enforcement is subject to the general 20-year prescription period set out on Article 309 of the Civil Code; otherwise it is subject to the law applicable to the underlying cause of action.

\textbf{C. Other Grounds for Declining to Entertain an Enforcement Action}

Rules governing judicial jurisdiction and limitations periods are, as we have seen, common across countries and their existence occasions little surprise. But Article III raises the further question of the extent to which States may impose additional procedural barriers of their own, and still remain faithful to their enforcement obligations under the Convention. In other words, the question naturally arises whether, in imposing certain “rules of procedure,” as Article III permits, States might unduly impede the operation of the Convention, an instrument whose purpose, after all, is to require States to grant recognition and enforcement of awards, subject of course to the Convention’s own defenses.

The reports in fact demonstrate that, unsurprisingly, States do impose a range of procedural requirements in enforcement proceedings. Most of them present no particular difficulty in terms of the Convention’s efficacy. For example, States may subject

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\(^{274}\) The Venezuelan report cites this as a plausible approach.
enforcement actions to certain prescribed formalities. A requirement that the enforcement action be brought through a legal representative who is a member of the local bar fits comfortably within the scope of Article III. States may also designate a single court within the country as competent to entertain enforcement actions, and can curtail rights of appeal from the grant or denial of recognition or enforcement. Courts may also presumably give effect to the principle of res judicata if that doctrine’s requirements are met, or require locus standi.

But other requirements under State procedural law are more questionable. Some States reportedly apply the principle of lis pendens to restrain an enforcement action if a similar action is already pending elsewhere. Though application of lis pendens may seem unobjectionable, it is not in fact obvious why an award creditor should not be able to pursue multiple actions for the enforcement of the same award; one can well imagine circumstances in which it would be entirely reasonable and prudent to do so.

Theoretically, a court could avoid entertaining an enforcement action against a foreign State or instrumentality by invoking the principles of sovereign immunity under forum law. Although this appears to be a real possibility in Hong Kong, under the sovereign immunity law of many jurisdictions, a State’s entering into an agreement to arbitrate will be deemed to constitute consent to judicial jurisdiction over actions relating to enforcement of the agreement or of the resulting award.

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275 By way of example, in the U.K., Rule 62.18 of the Civil Procedure Rules requires the award creditor to apply for permission under Section 100 of the 1996 Arbitration Act to enforce the award. The application may be made without notice, but must be supported with certain documentation (mirroring what Article IV of the Convention itself requires) and must state either (i) that the award has not been complied with or (ii) the extent to which it has not been complied with. The U.K. is not alone in requiring the award creditor to make a formal statement to the effect that an award has not been complied with, or complied with in full. See, in Singapore, Rules of Court, O. 69A r. 6 (1A).

276 See, for example, the national report for Vietnam.

277 In Slovenia, jurisdiction is exclusively vested in the District Court of Ljubljana.

278 The Slovenian Arbitration Act provides for the possibility of one appeal only, which goes to the Supreme Court.

279 See, for example the national reports for the Czech Republic and France.

280 See, for example the national reports for France and Italy. Obviously national rules may not, consistent with the Convention, apply its rules of locus standi to bar the award creditor itself from pursuing an action to enforce the award.

281 See, for example the national report for the Czech Republic.

282 According to the Hong Kong report, “[i]f an award is made against a State and it is brought for enforcement in Hong Kong then following the principle of absolute Sovereign immunity which is now in practice in Hong Kong after 1997, the court of Hong Kong shall refuse recognition and enforcement of a Convention award.”
In Taiwan, a court evidently may decline to entertain an action to enforce a foreign award in the unusual circumstance in which the specific remedy granted in the foreign arbitral award cannot be effectively enforced in Taiwan. The national report does not elaborate on what precisely would prevent a foreign award from being effectively enforced in Taiwan. Presumably, the mere fact that an award orders a form of relief unavailable in a Taiwanese court would not be enough for these purposes, at least under the Convention. To take that position would be in effect to add a ground for denial of recognition and enforcement to those limitatively prescribed by Article V.

Most contested is the application, in the courts of the United States, and to a lesser extent courts of other jurisdictions, of the doctrine of forum non conveniens, according to which a court possessing jurisdiction over a case may in its discretion decline to exercise that jurisdiction, due to the fact that there exists an alternative forum that is a manifestly more convenient place for the case to be heard and that can afford the plaintiff an adequate alternative remedy. Generally speaking, U.S. courts have been willing to entertain forum non conveniens stay or dismissal motions in response to actions to enforce foreign arbitral awards, and have on a few occasions granted such a motion. In most instances, however, courts find that the inconvenience of enforcing a foreign arbitral award, typically in a summary proceeding, is not so great as to warrant the use of forum non conveniens.

The courts’ use of forum non conveniens in this context has proven controversial, however, because the effect of a court’s stay or dismissal of such an action on forum non conveniens grounds is to deny the award creditor the benefit of access to that court for enforcement of the award – access that the Convention is meant to guarantee. Notwithstanding the availability of forum non conveniens stays or dismissals in U.S. courts,

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283 The courts of Canada have not yet taken a position on the availability of forum non conveniens in award enforcement actions. For a controversial Israeli decision, denying enforcement on forum non conveniens grounds, see Zvi Vidavski c. Chaya Simon, Application Permission to Appeal 2017/94 (June 16, 1994). A forum non conveniens motion in another enforcement case was denied due to the significance of the case’s links with Israel. Avraham Greenbaum v. Yehoshua Greenbaum, Family Case (Jerusalem) 540/01 (Oct. 17, 2001).


285 Leading U.S. decisions granting a forum non conveniens motion in an award enforcement action include Monagesque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine, 311 F.3d 488 (2d Cir. 2002), and Figueriedo v. Republic of Peru, 665 F.3d 384 (2d Cir. 2011).

courts, such stays or dismissals have rarely been granted because only rarely have the specific conditions required for such stays or dismissals been met.

**Part Six: An Assessment**

National reporters were finally invited to offer an assessment of the New York Convention’s operation in their jurisdiction’s courts, setting out with some particularity the difficulties, if any, encountered in its application and, where relevant, identifying reforms that in their view should be considered.

The reporters for the great majority of countries surveyed report general satisfaction with the Convention and its operation within their respective jurisdictions. This is equally true for States whose courts have had extensive experience with the Convention and States in which such experience has been limited. Overall, the Convention is credited with contributing importantly to the development and success of international commercial arbitration.

Notwithstanding this largely positive assessment of the Convention, over half of the national reports cite difficulties in the Convention’s application and propose avenues of Convention reform.

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287 See notably the national reports for Austria, Canada, China, Croatia, Germany, Greece, Hong Kong, Hungary, India, Ireland, Israel, Italy, Korea, the Netherlands, Norway, Peru, Slovenia, Sweden, Switzerland, the United Kingdom, and Uruguay. The Australian report states flatly that the Convention “is not subject to criticism in Australia,” while the Turkish report calls the New York Convention “the most successful convention (a Magna Carta) in private international law” and describes its influence on international commercial arbitration as “phenomenal.”

288 See, for example, Croatia and Paraguay. Reporters for a few countries – Macau and Venezuela, for example – expressly refrain from advancing proposals for reform, due to the relative scarcity of Convention cases in their courts and the resulting lack of experience with the Convention. In fact there is no reported judicial decision in Macau involving the New York Convention, and only the rare judicial decision in Venezuela.

For different reasons, the efficacy of the Convention is not as salient a matter in France and the United Kingdom as one might suppose, considering that both are major players in international commercial arbitration. In France, as noted (see notes 47, 48 *supra*, and accompanying text), award creditors rarely invoke the New York Convention, due to the greater appeal of France’s own even more arbitration-friendly regime for the enforcement of foreign awards. As a result, there is relatively little critical discussion of the Convention in France. The U.K. report observes that the volume of Convention case law in the U.K. is less than one might have expected. Due to the great popularity of London as an arbitral seat, more attention is given to the efficacy of the legal regime for the conduct of arbitration in the U.K. than to the recognition and enforcement of foreign arbitral awards in the U.K.

289 See, for example, the national reports for Canada, Germany, and Turkey.

290 These countries include Austria, Canada, China, Croatia, Germany, and Hungary.
To be sure, some of the criticism is levelled not at the Convention itself, but rather at the manner in which it has been statutorily implemented or applied within the jurisdiction. Reporters for a number of jurisdictions state that the drafting of national implementing legislation is simply flawed in various ways. The Brazilian report observes that the bar and bench are simply insufficiently knowledgeable about the Convention and inexperienced in its workings, with the result that the Convention is misapplied and even sometimes not applied. This report suggests the need, at least in some jurisdictions, for training on the part of legal professionals: judges and lawyers alike. Brazil is not alone in this respect. Reporters in other jurisdiction likewise assert that the courts have neglected to apply the Convention or have applied it unevenly and even incorrectly. The Russian report voices particular concern over the unpredictability that surrounds national judicial interpretation and application of the Convention, and the Indian report deplores certain Supreme Court rulings that it deems detrimental to the Convention’s purposes. These observations animate a frequent suggestion that authority to recognize and enforce foreign awards be vested in a single court that can specialize in that category of case and can be counted on to resolve them properly and consistently.

The Convention itself does not, however, escape criticism entirely. Indeed what can fairly be described as substantial shortcomings are leveled at the Convention itself. Much of the concern that is voiced is traceable to the perceived vagueness and ambiguity of Convention language. To be sure, not all instances of vagueness or

291 See, for example, the national report for Australia.
292 The Israeli report echoes this sentiment. In Turkey, regular seminars, conferences and colloquia (organized mainly by the Istanbul Chamber of Commerce and the ICC Turkish National Committee) have reportedly succeeded somewhat in educating the judiciary and the legal profession more generally on international arbitration, though more needs to be done.
293 See, in particular, the national reports for Brazil, Croatia, Georgia (applying Georgian Private International Law rather than the Convention, even though the latter strictly speaking applies only to foreign court judgments), Israel and Turkey. According to the Croatian national report, for example, courts have repeatedly applied national law on the enforcement of foreign arbitral awards rather than the Convention, even though the latter is applicable. Fortunately, doing so has not been outcome-determinative.
294 See, for example, the national reports for Argentina, Australia, Brazil, the Czech Republic, India, Paraguay, Russia, and Venezuela. The Paraguayan report laments the delays in the disposition of enforcement actions in national court, but the problem of delay is a systemic one and by no means peculiar to enforcement actions.
295 Among the countries whose national reports raise criticisms are China, Greece, Korea, and the Netherlands.
ambiguity are necessarily detrimental to the Convention’s functioning. For example, while the term “arbitration agreement” is undefined in the Convention, that fact does not appear to have generated any serious difficulties. The only specific suggestion made in this connection is that, as mentioned earlier, the distinction if any between arbitration and expert determination be clarified.

Although the notion of arbitral award is likewise undefined in the Convention, here too the national reports do not describe the situation as particularly problematic. But one recurring concern, as the questionnaire itself anticipated, relates to the status of provisional or interim measures issued by an arbitral tribunal, and more specifically the question whether such measures constitute arbitral awards, and are therefore subject to recognition and enforcement under the Convention, or should possibly be made enforceable despite not constituting awards. (If provisional or interim measures issued by arbitral tribunals were considered as arbitral awards, they would also presumably be subject to annulment in the courts of the arbitral situs, but annulment as such lies beyond the scope of this report.)

While uncertainty in the definition of arbitral agreements and arbitral awards has not proven especially problematic, the same may not entirely be said about uncertainty in

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296 The Israeli reporter in particular cites the need for a clearer definition of arbitration agreements, including greater clarity as to formal requirements applicable to such agreements.
297 See note 21 supra, and accompanying text.
298 Ambiguity is not the only difficulty associated with the definition (or failure of definition) of the term “arbitration agreement.” Several national reports, such as the German, Russian, Swiss, and Turkish point to what they describe as a pressing need for modernization of the notion of “arbitration agreement” so as to take due account of technological change. The restrictiveness of the Convention’s form requirements is reportedly causing parties to invoke the more liberal means of enforcing foreign awards under national German law instead.

The Hungarian report is the only one to call specifically for a better definition of terms such as arbitration agreement, arbitral award, and public policy.
299 The Brazilian report singles out the status of interim measures as especially unclear, and urges that consideration be given to addressing the matter in the Convention text itself. Relatedly, according to the Greek national report, “[t]here is no doubt that the authority of an arbitral tribunal to grant protective relief, as well as the enforceability of the relevant foreign award, cause uncertainty in practice. An express provision needs to be added.” See also the national reports for Croatia, Greece, and Malaysia. The Swiss report urges not only clarification of the status of interim measures under the Convention, but an affirmation that interim arbitral measures do constitute awards.
300 As noted (see Part Two, Section D of this report, supra), the UNCITRAL Model Law makes interim measures legally enforceable, without however constituting them awards as such. The Hong Kong would have the Convention specifically declare interim arbitral measures to be judicially enforceable (whether as awards or otherwise).
certain of the Convention’s substantive provisions. We highlight the most salient of them here.

To begin with, uncertainty surfaces in Article II of the Convention which, it will be recalled, requires enforcement of agreements to arbitrate unless they are found to be “null, void, inoperative and incapable of being performed.” National reports express regret not only over doubts surrounding the meaning of that phrase and determination of the law applicable to that issue, but also over doubts concerning the respective roles of courts and arbitrators in making the validity determination that Article II contemplates. According to the Greek report, the Convention does not do enough to address the general problem, in the context of enforcing the arbitration agreement, of parallel arbitral and judicial proceedings. In addition, the German, Israeli and Dutch reports rightly observe that, while the Convention clearly identifies the universe of awards whose recognition and enforcement the Convention mandates (i.e., awards made on the territory of another State), it does not clearly identify the universe of arbitration agreements covered by Article II.

Not only uncertainty, but occasionally controversy, surrounds the Convention’s Article III, which authorizes national courts to follow local rules of procedure in connection with proceedings for the recognition and enforcement of awards. The Convention does not provide much by way of guidance as to what kinds of norms may legitimately be placed within the “procedural” category for these purposes and therefore be governed by domestic law. The central question that Article III raises is really whether leaving an ostensibly procedural matter entirely to domestic law risks undermining the efficacy of the Convention itself. Admittedly, the issue appears to have crystallized only in application by courts of the United States of the doctrine of forum non conveniens to stay or dismiss enforcement actions. It is questionable whether staying or dismissing

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301 See, for example, Austria, Germany, Greece, the Netherlands, and Norway.
302 The Israeli national report identifies both substantive and procedural difficulties in the national courts’ implementation of the Convention.
303 According to the German national report, “[t]he possibility of applying the Convention to any arbitration agreement entailing some kind of international element, regardless of the place of arbitration, has not been pursued by German courts. In that respect, commentators have considered it desirable to clearly define the Convention’s scope of application with regard to agreements to arbitrate.”
304 Figueiredo v. Republic of Peru, 665 F.3d 384 (2d Cir. 2011).
enforcement actions on discretionary grounds, rooted in notions of convenience, is consistent a State’s obligation under the Convention, which after all consists essentially of ensuring that its courts entertain otherwise proper actions for the enforcement of foreign awards.

Some national reports suggest, it would seem rightly, that the contours of Article III could usefully be better defined. The range of issues falling in the Article III category is broad. It includes not only personal jurisdiction and statutes of limitation, as discussed in this report, but also potentially sovereign immunity, standing, and perhaps even such technical matters as filing fees.

Discussion of Article III brings immediately to mind the important further question whether, even assuming reform is warranted, that reform should take place at the international level (as through Convention reform, or possibly Convention guidelines) or at the national level (as through reform of domestic implementing legislation or national case law). None of the national reports addresses this particular question. They generally limit themselves to suggesting that there be consideration and clarification of the matter, without indicating the level at which they should be undertaken. The question that remains is whether Article III itself is ripe for reframing in order to address this set of concerns, or whether the problem is better dealt with at the national level, i.e., on a State by State basis. The answer depends at least in part the importance of the particular issue, its amenability to an international solution, and the degree to which the issue touches closely on core aspects of the national legal system. It properly also depends on whether the concern is viewed chiefly as one simply of uncertainty (in which case clarification at the national level would suffice) or uniformity (in which case Convention reform may be indicated).

305 See, for example, the German national report.
306 Sovereign immunity has evidently been an obstacle to the recognition and enforcement of awards against States and State instrumentalities in Hong Kong. See the cases of FG Hemisphere v. Democratic Republic of Congo and The Incorporated Owners of the Vessel Hua Tian Long.
307 A good example is the issue of statutes of limitation. By the criteria stated above, this issue is a good candidate for reform at the international level, and in fact the Greek report specifically advocates that the Convention itself fix a limitations period, thereby producing greater uniformity in access to the Convention for recognition and enforcement purposes. The Canadian report makes a similar suggestion. Interestingly, the Israeli national report calls for establishment of a limitations period, but would have that accomplished at the national level.
Turning to the grounds for denying recognition and enforcement, the very use of the word “may” in the introductory language to Articles V(1) and V(2) of the Convention has been criticized as ambiguous, leaving unclear just how permissive or mandatory are the defenses to recognition and enforcement.\textsuperscript{308} In this connection, it has been suggested that, notwithstanding what appears to be a strong consensus among national courts that States may, if they so choose, recognize or enforce an award previously annulled by a competent court of the arbitral seat,\textsuperscript{309} the Convention be amended to make this clear.\textsuperscript{310} That is probably as far as reform of this matter could go. It is not realistic to suppose that the Convention could be amended to articulate precise standards as to when enforcement of an annulled award would be appropriate.\textsuperscript{311}

Ambiguity is also to be found in some of the Convention’s individual defenses to recognition and enforcement. By way of example, the Korean report, among others, finds the public policy exception to recognition and enforcement (Article V(2)(b)) to be particularly ill-defined, so that few common understandings prevail about what qualifies as public policy and what constitutes a sufficiently serious violation of it to justify a denial of recognition or enforcement.\textsuperscript{312} The felt need for greater clarity and consistency in the definition of “public policy” is especially salient in the national reports.\textsuperscript{313} One reported consequence is an overuse of the public policy exception as a basis for refusing

\textsuperscript{308} The Chinese report specifically urges that the word “may” in Article V be replaced with the word “shall.”

\textsuperscript{309} See notes 99, 100 \textit{supra}, and accompanying text.

\textsuperscript{310} The Dutch report, for example, seeks clarification of the courts’ authority under the Convention to recognize and enforce awards despite their having been annulled at the arbitral seat. The Greek national report goes further. It would have the Convention modified to expressly make denial of recognition or enforcement mandatory if a defense is established.

\textsuperscript{311} The Chinese reporter suggests that uniform standards be set at the international level for the setting aside of awards in courts of the arbitral seat. In all fairness, however, the drafters of the Convention consciously limited the scope of the Convention to the recognition and enforcement standards and not set aside standards. To extend the Convention to establish uniform annulment standards would be to change the scope of the Convention’s mission. What the Chinese reporter can more reasonably hope to introduce into the Convention, in place of harmonized annulment standards, is a common standard for enforcing foreign awards notwithstanding their annulment.

\textsuperscript{312} The Korean national reporter claims that the courts of Korea have in fact interpreted the public policy exception suitably narrowly, but complains that courts of certain other countries exhibit a tendency to treat the exception as a “catch-all, kitchen sink phrase,” essentially misusing it to limit unduly the recognition and enforcement of foreign arbitral awards. Such countries may include Turkey. The Turkish national report is critical of the courts’ excessive use of the public policy defense. “The courts are usually inclined to deny enforcement relying frequently on the ground of ‘public policy’.”

\textsuperscript{313} See, for example, the national report for Malaysia.
enforcement of awards. In some instances, this overuse reportedly leads to non-
enforcement of awards that are in fact worthy of enforcement; in other instances, the
public policy defense is used at the expense of other Convention grounds for denying
enforcement whose use would have been more apt under the circumstances.314 Other
examples stem from Articles V(1)(c) and V(1)(d) of the Convention, which leave
unresolved the quite important questions, respectively, of whether an arbitrator’s grant of
a remedy foreclosed by the main contract represents an excess of authority315 or whether
an arbitrator’s application of a substantive law other than that chosen by the parties
represents a failure to respect the procedures that the parties established in their
arbitration agreement. The Swiss and Vietnamese reports call for a clearer and more
careful delineation among themselves of the Article V grounds for denying recognition or
enforcement of foreign awards.

Article VII of the Convention also comes in for criticism in some quarters as
obscure in its workings.316 For example, the Austrian reporter considers it regrettably
unclear whether Article VII applies to the enforcement of arbitration agreements as well
as the enforcement of arbitral awards. He is in doubt as to “whether the ‘more favorable
right provision’ leads to a full application of the more favorable national law or if only
single provision[s] are applied.” This is indeed a serious question, since there can be a
world of difference between the award creditor having to accept all features of the
alternative national enforcement regime and the award creditor being able, in effect, to
“cherry-pick” among that regime’s features

Putting issues of vagueness and ambiguity aside, a second general source of some
concern is that, even when an important issue is addressed by the Convention, it cannot
always be told with confidence whether the Convention’s language should be understood
as having a so-called “autonomous” meaning or, rather, as being subject to a choice of
law analysis pointing on any given issue to the application of one or another country’s
internal law. It is significant in this regard that several national reporters describe the
courts of their jurisdiction as insufficiently sensitive to the international character of the

314 See, notably, the national reports for Korea and Russia.
315 The Swiss national report also urges that Article V(1)(c) be redrafted to distinguish clearly between
awards rendered outside the jurisdiction of the arbitral tribunal and awards exceeding the parties’ claims.
316 See, for example, the national report for China.
New York Convention, and more particularly to the need to interpret the Convention in light of that instrument’s purpose, taking due account of the value of uniformity in interpretation across jurisdictions. The Argentine reporter describes the case law interpreting Convention provisions as demonstrating a certain “homeward trend.”

Third, the Convention has been criticized for leaving unaddressed important issues and thereby inviting excessive gap-filling at the national level. Different national reporters cite different gaps that, in their view, could usefully be filled. The national reports repeatedly urge that the Convention provide better guidance on some of the questions that figure prominently in this report, including the following four: (a) the allocation between courts and arbitrators of authority to determine jurisdiction, admissibility and other threshold questions prior to commencement of an arbitration; (b) the question – underscored in particular by the German national report – whether prior judicial determinations by courts of other countries on the availability of a ground for denying recognition or enforcement of awards deserve being treated with deference and possibly even presumptively conclusive; (c) the question of when, if ever, findings by the arbitral tribunal shall be given weight by the enforcing court in determining whether a ground for non-recognition and non-enforcement has been established; and (d) clarification of the waivability by parties of grounds for denying recognition or enforcement of awards. The reports also contain miscellaneous suggestions for Convention reform – suggestions in fact advanced only by a single reporter – and they are a diverse bunch. A sampling follows. The Israeli reporter regrets the uncertainty surrounding the circumstances under which arbitration agreements bind non-signatories, as does the Hong Kong reporter. The Chinese reporter would welcome direction in determining the seat of

317 See the national reports for Argentina, Australia, and, most emphatically, Greece. According to the Malaysian report, disparities among States in application of the Convention would be mitigated by better definition of terms and concepts in the Convention.
318 The Swiss national report makes a special plea for clarification of this issue.
319 See, for example, the national report for Israel, which actually argues that less deference should be shown to such prior judicial rulings.
320 The German report also finds the Convention unilluminating on the question of the weight if any to be given to arbitral findings in determining whether a defense to recognition or enforcement has been established.
321 See, for example, the Greek national report.
an on-line arbitration. The Greek reporter would have the commercial and reciprocity reservations removed. The German report would welcome greater assurances that the choice of law provision in Article V(1)(a), on the validity of the arbitration agreement, would permit application of laws that properly favor weaker parties, such as consumers, employees, franchisees and commercial agents. The Romanian report would essentially eliminate Article V(1)(a) of the Convention on the ground that the validity of the arbitration agreement, if in doubt, should be challenged at the outset of arbitral proceedings, not at the recognition and enforcement phase. The Georgian national report implies that it would be useful (either in the Convention or in national legislation) to exclude the possibility for award creditors to avoid the terms of the Convention by reducing the award to judgment in the place of arbitration and bringing the judgment, rather than the award itself, to a foreign court for enforcement. And the report for Vietnam advances the modest suggestion that the Convention’s official title be modified to make it apparent that the Convention governs not merely the recognition and enforcement of foreign awards, but also the enforcement of agreements to arbitrate.

It is once again fair to ask, with respect to all such asserted gaps in the Convention, whether the proper “locus” of reform, if any, is national (via reform of domestic implementing legislation or national case law) or international (via Convention reform, or possibly Convention guidelines). The answer may well vary from issue to issue. Again, numerous factors come into play, including the importance of the particular issue, the amenability of the issue to an international solution, the degree to which the issue touches closely on core aspects of the national legal systems, and the potential detriment to the Convention’s uniform application and legal certainty more generally.

This section of the report cannot be concluded without underscoring a sentiment among a significant minority of national reports that reform of the New York Convention would be ill-advised.\(^\text{322}\) The Argentine report suggests that the extremely large number of signatory States to the Convention renders agreement on avenues of reform difficult if

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\(^{322}\) These jurisdictions include Argentina, Austria, Canada, the Czech Republic, Germany, Hong Kong, and India. The Irish and U.K. national reports state flatly that there is no need for Convention reform as such. The Swedish national report puts the matter this way: “Given the difficulties in successfully redrafting the Convention and obtaining new ratifications, it may be preferable to work towards more harmonized interpretations and applications of the existing Convention than to attempt reforms.”
not impossible to attain – the price in effect of the Convention’s popularity among States. The Canadian reporter expresses concern that, while some salutary modifications to the Convention could possibly be made, the gains would be outweighed by the risk of reopening issues upon which agreement has been achieved and possibly inviting changes that would in fact lessen the Convention’s contribution to the efficacy of international commercial arbitration. Under these circumstances, the best strategy after all may be for UNCITRAL to produce a guide to interpretation of the Convention – a kind of “soft law” – and that project, as noted at the outset of this report, is well underway.