International Arbitration and Procedures to Enforce Awards in the Relationship between the United States and Germany

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INTERNATIONAL ARBITRATION
AND
PROCEDURES TO ENFORCE AWARDS
IN THE
RELATIONSHIP BETWEEN THE UNITED STATES AND GERMANY

Michael Kronenburg
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International Arbitration and Procedures to Enforce Awards in the Relationship between the United States and Germany (Under the direction of GABRIEL M. WILNER)

This study describes the procedures for the enforcement of arbitral awards in the relation between the United States and Germany. By concentrating on the relevant court decisions a case law approach is chosen.

Because a state party can bar any kind of court proceedings if it successfully invokes its immunity as a sovereign state, the foreign sovereign immunity in both countries has to be discussed in a first chapter.

The multilateral U. N. Convention on the Enforcement of Foreign Arbitral Awards and the bilateral Friendship Treaty are the most important enforcement mechanisms. To give an overview the study could not be limited on court decisions rendered in the bilateral relation. After a description of the procedure as provided by Convention and national law, the study scrutinizes the refusal provisions as an obstacle to the enforcement. The relevant court decisions on every single defense are summarized, and then the two jurisdictions are compared. Where appropriate, further theoretical considerations are added.

The study concludes that the jurisdictions in both countries apply a very similar standards in the enforcement procedures.
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by

MICHAEL KRONENBURG

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to my parents
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VI
Introduction

From the days of the early English "piepowder" courts, where the merchants with the dust of the markets still on their feet stepped into a tribunal of merchants for swift resolution of their disputes, businessmen have preferred arbitration, a process which they think combines finality of decision with speed, low expense, and flexibility in the selection of principles and mercantile customs to be used in solving a problem, over litigation.¹

The dust is gone but the advantages remain: Apart from speed, lower expenses and higher flexibility by adapting the procedure to their needs, expertise of the selected arbitrators² typically forms the basis for a just decision of sophisticated legal disputes. The privacy, confidentiality and contractual character of arbitration normally helps keep animosities lower than in litigation without the destruction of an existing business relation.³


3 id.
In the international cast arbitration proceedings offer "a neutral forum with expertise in the subject matter." A businessman may try to avoid litigation in a foreign country for various reasons: he may be unfamiliar with the proceedings, he may be afraid to find a "forum hostile" because of the different legal and cultural background of the judges in form of an actual bias or unconscious preference for domestic legal theories. Moreover, arbitration avoids "considerable uncertainty... concerning the law applicable to the resolution of disputes arising out the contract." The consequences of a "parochial refusal" to recognize arbitration as an alternative dispute resolution to international litigation are emphatically described by the Supreme Court in Scherk v. Alberto-Culver: it would invite ... mutually destructive jockeying by the parties to secure tactical litigation advantages ... [This] dicey atmosphere of such legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of business to enter into international commercial agreements.


5 Quigley, supra note 1, at 1051; Elise P. Wheeless, Article V (1)(b) of the New York Convention, 7 EMORY INT'L L. REV. 805 (1993); see Oberlandesgericht Hamburg, judgment of Feb. 17, 1989, English language summary in XV Yearbook of Commercial Arbitration (ed. Jan Albert van den Berg) [hereinafter YCA] (1990) 455, 458-461 (discussing broadly possible disadvantages of an arbitration in one of the parties' home countries)


7 id. at 517
Although the advantages of arbitration are generally recognized today, U.S. courts had traditionally disfavored arbitration because it "ousted" the courts from their jurisdiction. This attitude drastically changed with the enactment of the Federal Arbitration Act [FAA] in 1925 "reversing centuries of judicial hostility to arbitration agreements, [the Federal Arbitration Act] was designed ... to place arbitration 'upon the same footing as other contracts...." The major accomplishment of the FAA is its § 2 providing for the validity of a written agreement to arbitrate, 9 U.S.C. § 2. Contrary to U.S. development, arbitration agreement - "known from Roman law tradition" - have been legally recognized for centuries, and the courts refused to hear a case that had been arbitrated.

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9 9 U.S.C. §§ 1-14

10 Scherk, id. at 510-511


13 id. at 16-17 (mentioning as an early example the Prussian Code of Civil Procedure); DOMKE ON COMMERCIAL ARBITRATION, § 2:03 (Gabriel M. Wilner rev. ed., 1993)
Arbitration proceedings have been held constitutional by the Federal Supreme Court.\textsuperscript{14} The provisions governing the arbitration proceedings can be found in the 10th book of the ZPO \textsuperscript{15} in §§ 1025 through 1048.

The value and success of arbitration, however, depend heavily on the possibility to enforce agreement and award.\textsuperscript{16} This is particularly difficult if an award has to be enforced on assets abroad.\textsuperscript{17} Since there are many business transactions between the United States and Germany this question concerns a practical interest of businesspeople in both countries.

Chapter 1 discusses the Foreign Sovereign Immunity, chapter 2 to 4 the procedure to enforce a foreign arbitral award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Chapter 5 scrutinizes other mechanism for the enforcement of a foreign arbitral award.

\textsuperscript{14} Bundesgerichtshof, judgment of July 3, 1975, 65 BGHZ 59, 61-62

\textsuperscript{15} Zivilprozessordnung [Code of Civil Procedure]

\textsuperscript{16} Martinez, supra note 2, at 493; J. Stewart McClendon, Enforcement of Foreign Arbitral Awards in the United States, 4 NW. J. INT’L L. & BUS. 58, 59 (1982)

\textsuperscript{17} David Westin, Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England, 19 LAW & POL’Y INT’L BUS. 325, 325-326 (1987)
Chapter 1: Foreign Sovereign Immunity

Any kind of court proceedings are barred when a State can successfully invoke its immunity as a foreign sovereign. This requires a preliminary discussion of the Foreign Sovereign Immunity.

I. U.S. court decisions

The problems of Foreign Sovereign Immunity are governed in the United States by the Foreign Sovereign Immunities Act, in particular § 1605(a) providing for the "general exceptions to the jurisdictional immunity of a foreign state." The legislative history is ambiguous; it is not clear whether the implicit waiver of immunity relates only to an arbitration of a state party in the United States or in

18 28 U.S.C.A. §§ 1602-1611

19 § 1605(a): A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
(1) in which the foreign state has waived its immunity either explicitly or by implication, ...
(6) in which the action is brought, either to enforce an agreement by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences ..., or to confirm an award pursuant to such an agreement....
any other third party foreign jurisdiction.²⁰ This fact has to be kept in mind when considering the court decisions in which the foreign sovereign immunity was litigated.

In the dictum of Verlinden v. Central Bank of Nigeria, the court stated that a state does not implicitly waive its immunity defense in the U.S. courts simply by agreeing to arbitrate under the law of another (third) country, here the Netherlands.²¹ The prevailing opinion among the courts, however, is a broad interpretation of the waiver provision.

In Ipirade International v. Nigeria, Nigeria had already unsuccessfully invoked its foreign sovereign immunity before the arbitrator. The District Court, basing its decision on § 1601(a), supported its reasoning in a way similar to the opposite Verlinden decision by broadly reading

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²¹ Verlinden B.V. v. Central Bank of Nigeria, 488 F.Supp. 1284, 1301 (D.D.C. 1980); Chicago Bridge Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981, 987 (N.D. Ill. 1980) (for application of national (Iranian) law); after an amendment of the Sovereign Immunities Act, § 1605(a)(6) partly clarifies the situation: if enforcement of the agreement or award are governed by a treaty or an international agreement the foreign state has waived its immunity (see also ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 426 (2nd ed. 1991)). Since the U.S. and Germany are parties to several international treaties involving arbitration issues, the problem of a case not governed by any treaty (and not regulated by § 1605(a)(6)) will not occur in this relation.
the legislative history.\textsuperscript{22} In fact, a different finding might imply the risk of unilateral withdrawal if the winning party tries to enforce the award in another state than the one where the proceedings took place.\textsuperscript{23} The mere stipulation of a the law of a third country, where the state defendant has no assets, would equate an escape from arbitration. Consequently, the U.S. courts recognized the awards. "This is clearly the correct solution, since otherwise sovereign immunity would make a mockery of the arbitration process."\textsuperscript{24} The contrary jurisdiction can after the amendment of § 1605 no longer be upheld with regard to countries which have signed international arbitration agreements with the U.S.

From the agreement to arbitrate and the implied waiver, the Act of State doctrine has to be distinguished. This doctrine was introduced by the Supreme Court in Underhill \textit{v. Hernandez} and requires respect for acts in the governmental authority.\textsuperscript{25} The District Court in the subsequently vacated decision in \textit{Libyan American Oil} apparently failed to draw this distinction: It relied on the Act of State doctrine.


\textsuperscript{23} Ipitrade, \textit{id.}

\textsuperscript{24} Delaume, supra note 20, at 317

\textsuperscript{25} 168 U.S. 250, 252 (1897)
after having found that Libya had waived its foreign sovereign immunity.  Hereby, the court apparently confused a State's sovereign right to nationalize with a method of dispute resolution, and thereby acknowledged a possibility to unilaterally withdraw from a contractual obligation.

II. German court decisions

In its decision of Dec. 2, 1975, the Court of First Instance in Frankfurt recognized in general a foreign sovereign immunity according to § 20 GVG; it added two modifications: first, it distinguished from the state legally independent entities without immunity. Secondly, the Foreign State can object to German jurisdiction only to the extent that acta jure imperii are covered by the proceeding. Acta gestiones, or commercial acts, are subjected to German jurisdiction. The Federal Constitutional Court adopted a similar reasoning recognizing immunity only for acta imperii; it is not possible to seek execution on assets used for

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27 ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, 372 (1981); the LIAMCO decision has been vacated after a settlement during the proceedings before the Court of Appeals on May 6, 1981 (DOMKE ON COMMERCIAL ARBITRATION, supra note 13 at § 45:02)

28 Gerichtsverfassungsgesetz [Basic Law for the German Courts]

public purposes. The immunity can be waived explicitly or by implication and is irrevocable. There is no reason why German courts should not recognize foreign arbitral awards under the same aspects.

III. Post-award execution

The post-award execution concerns the question of immunity of execution. Section 1610 enumerates the "exceptions to the immunity from attachment or execution." Its paragraph (a)(2) has the most practical relevance, if the property was used for commercial activities. According to the jurisdiction of German Federal Constitutional Court, commercial activities of a state do not enjoy immunity. For both jurisdictions the most prudent tactic is to obtain an explicit waiver.

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30 Bundesverfassungsgericht, judgment of Dec. 13, 1977, 46 BVerfGE 342, 345 (no. 5 and 8)

31 Westin, supra note 17, at 358

32 Bundesverfassungsgericht, id. at 402


34 Bundesverfassungsgericht, judgment of April 12, 1983, 64 BVerfGE 342, 343 (no. 8)

35 Westin, supra note 17, at 357; Bundesverfassungsgericht, judgment of Dec. 13, 1977, 46 BVerfGE 342, 404
Chapter 2: The U.N. Convention and its enforcement procedure

I. Introduction

"[T]he New York Convention can be considered as the most important Convention in the field of arbitration and as the cornerstone of current international commercial arbitration."\(^{36}\) As mentioned earlier, the value of arbitration is determined by the possibility of enforcement of the agreement and the award. The goal of the Convention was to encourage the recognition and enforcement of commercial arbitration, that is, "to create a dependable system of laws in all trading nations under which enforcement of awards is obtained, regardless of the place of the hearing or the nationality of the arbitrators."\(^{37}\) It is a "unified, efficient and trustworthy method of insuring that the manner they have chosen to resolve their transnational disputes will be effective."\(^{38}\) To underline the advantages of the New York Convention, it is usually contrasted with the 1927 Geneva Convention. Generally three problems arising out of the latter are emphasized which complicated enforcement. It is

\(^{36}\) VAN DEN BERG, supra note 27, at 1

\(^{37}\) Martinez, supra note 2, at 491

\(^{38}\) Martinez, id. at 488
submitted that those problems are clearly to be avoided by the U.N. Convention:

(1) the Geneva Convention placed the burden of proof on the plaintiff,\textsuperscript{39}

(2) its applicability depended on a diversity-of-citizenship requirement involving varying national doctrines on citizenship,\textsuperscript{40}

(3) the requirement that an award be "final."\textsuperscript{41} In general, the Convention embodies a "pro-enforcement philosophy."\textsuperscript{42}

The United States acceded the Convention in 1970 and implemented it through §§ 201 to 209 as the second chapter of the Federal Arbitration Act. The Federal Republic of Germany joined the Treaty in 1961;\textsuperscript{43} since the Convention as an international treaty has full force of law a special implementing legislation was not necessary in Germany.\textsuperscript{44}

This study concentrates on international commercial arbitration. However, before the details of the enforcement


\textsuperscript{40} Quigley, supra note 1, at 1055

\textsuperscript{41} Pieter Sanders, A Twenty Year's Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 13 INT'L LAW. 269, 273 (1979)

\textsuperscript{42} Wheeless, supra note 5, at 810

\textsuperscript{43} 1961 Bundesgesetzblatt [BGBl.] II, 121-142

\textsuperscript{44} Westin, supra note 17, at 353-354
and its refusal are scrutinized, a few preliminary remarks must be made about the requirements of the application of the Convention; if the Convention is not applicable its procedures cannot be used. After this the study focusses on the procedures for enforcement and the refusal provisions. The study uses a "case law approach" to discuss the single provisions of the Convention. According to its nature, case law is not structured, but as a whole, it gives an overview of the consistent jurisdiction of the courts and their mode of interpretation of a statute. Despite the title "procedures for the enforcement of awards," the distinction between the enforcement of an agreement and the award is not strictly upheld. Landmark decisions, such as the Supreme Court Mitsubishi decision on the enforceability of an agreement to arbitrate an antitrust claim, cannot be disregarded. They generally employ the same criteria as those in the award enforcement stage. The discussion of the provisions is structured as follows: the relevant provision is quoted, then its application by the national courts in the U.S. and Germany is described before the two jurisdictions are compared. In a further step it is - where appropriate - dealt with more theoretical problems.

Once the applicability of the New York Convention has been positively determined, two articles directly address the substantive and formal requirements under which a foreign
arbitral award has to be enforced in the signatory states: Art. III and IV.

II. Applicability of the Convention

The U.N. Convention applies to "foreign" arbitral awards. To determine when an award is "foreign" the Convention embodies in its Art. I(1) two different doctrines. According to the territoriality doctrine an award is foreign when it is "made in the territory of a State other than the State where ... enforcement of such award are sought...." Art. I(1) also recognizes a German specialty. The procedural doctrine considers an award as foreign when it "was subject to the arbitration rules of a foreign state." 45 Both countries made the reservation on commercial matters which are not defined by the Convention,46 the U.S. in addition also made the reciprocity reservation. The latter is evidently of no importance in the U.S.-German relation. The same is true of the former because "[t]he interpretation of commercial matters in the United States as well as in West


46 not defined by the Convention (see McClendon, supra note 16, at 62)
Germany\textsuperscript{47} is so broad that it will rarely encroach upon the application of the New York Convention.\textsuperscript{48}

III. The domestic procedure the Convention

A. The substantial requirements under Art. III

Art. III reads as follows:

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, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition and enforcement of domestic arbitral awards.

Thereby, Art. III describes the basic obligation for all the signatory states and embodies the purpose of the Convention. Both countries, the U.S. and Germany, follow the Convention's directive and equate in principle the procedures for the confirmation of domestic and international awards.

1. The procedure in the United States

The procedure for recognition and enforcement of foreign arbitral awards in the U.S. is governed by § 207 of title 9

\textsuperscript{47} see 9 U.S.C. § 2 and § 343(1) HGB [Handelsgesetzbuch] [German Commercial Code]

\textsuperscript{48} Sandrock & Hentzen, id. at 54; see Swisher, supra note 11, at 456 (stating that a commercial relationship within the meaning of the § 202 is broader than the one provided by the FAA. § 202 does not limit the applicability of the Convention to the subject matter of the FAA); DOMKE ON COMMERCIAL ARBITRATION, supra note 13, at § 45:03
U.S.C. providing for confirmation of awards under the Convention. Section 207 reads:

Within three years after an arbitral award has been falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the ground for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Most important are three aspects:

1. Section 207 provides for confirmation, i.e. recognition and enforcement. Only one proceeding is required.

2. A prevailing party has to apply for confirmation within the time limit of three years.\textsuperscript{49}

3. The refusal provisions are limited.

U.S. implementing legislation does not add any ground for refusal. The court can only refuse the confirmation on Art. V grounds. Despite the express language, the defendant challenged the confirmation proceedings invoking "aspects incidental to the enforcement procedure which are not [explicitly] governed by the Convention."\textsuperscript{50} However, U.S. courts generally have recognized that Art. III is not an


affirmative defense in the sense of Art. V. The grounds on which the respondents opposed the procedure might be systematized as follows: "discovery of evidence, estoppel or waiver, set-off or counterclaim against award, the entry of judgment clause, interest on the award." 52

Discovery: In Imperial Ethiopian v. Baruch-Foster, the defendant had found out some time after the award had been rendered that one of the arbitrators had worked (16 years before) for one of the parties, and therefore sought to oppose the enforcement proceedings. To support his allegation of the arbitrator's disqualification BFC demanded discovery. 54 Concerned about mere dilatory tactics, the court declined an unqualified right to pursue discovery unless there is "any semblance of substance." 55 If it were held otherwise the losing party could "freeze the confirmation proceedings ... and indefinitely postpone judgment by merely requesting discovery." 56

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52 van den Berg, id.
53 Imperial Ethiopian Gov't. v. Baruch-Foster Corp. 535 F.2d 334, 336 (5th Cir. 1976)
54 id.
55 id. at 337
56 id.
Estoppel/Waiver: On the award enforcement stage U.S. courts usually reject a defendant's attempt to prevent enforcement by introducing "new" objections against the award. The courts generally argue that the defendant has "waived" these objections if he could have presented them to the panel during the arbitration proceeding, or at least earlier without inexcusable delay. This estopps him from invoking these facts now. In particular, pursuing a state court action instead of participating in the arbitration proceedings were not excepted as an excuse. Accordingly, it was held that foreign states had waived their immunity as foreign sovereigns once they agreed upon arbitration.

Set-off/Counterclaim: A set-off, or counterclaim, are another possibility to oppose enforcement; they have been judged differently by U.S. courts. In Audi v. Overseas the court found that "counterclaims are inappropriate in a confirmation proceeding." The court in Fertilizer v. IDI


followed the same line and dismissed IDI’s counterclaim as time barred. Inspite the fact that the confirmation proceedings follow the rules for motion practice, the court distinguished the former as "not an original action" but a post-judgment enforcement proceeding against which a counterclaim seems inappropriate.60 Differently, the District Court in Jugometal v. Samincorp held that "[i]t would be inequitable to permit this plaintiff to recover a judgment here against the defendant on the concededly valid arbitral award in its favor, and at the same time to withhold enforcement of the three counterclaims...."61 A factual difference between Audi and Fertilizer on the one hand, and Jugometal on the other is that in Audi and Fertilizer the defendant had merely claimed its own rights; in Jugometal he could present evidently valid, undisputed arbitral awards in its favor.62 Additionally, all claims were identical in their nature of motions to enforce foreign arbitral awards.63

Entry of judgment clause: According to § 9 FAA, a federal court has jurisdiction only if the parties have agreed "that a judgment of the court shall be entered upon


62 Kwong Kam Tat, id. at 798

63 id.
the award ...." Chapter 2 implementing the Convention does not make any express statement with regard to foreign awards.\(^{64}\) In absence of any express statement, reference to the applicable arbitration rule has to be made.\(^{65}\) If these rules also lack any statement, a clause in the contract providing that an award "shall be final" is regarded as "sufficient to imply consent to entry of judgment of an arbitration award."\(^{66}\) An additional hint for the parties' intention might be their conduct.\(^{67}\)

Interest: In several U.S. decisions the question was discussed whether U.S. District courts can award a prejudgment interest. Under domestic law, the award of prejudgment interest is at the discretion of the District Courts.\(^{68}\) In absence of any statement in the U.N. Convention, the court in Waterside v. International Navigation found that the same policy considerations apply because it is the only way "a person wrongfully deprived of his money be made whole.

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\(^{64}\) VAN DEN BERG, supra note 27, at 242

\(^{65}\) In re I/S Stavborg v. National Metal Converters, Inc. 500 F.2d 424, 426 (2nd Cir. 1974)


\(^{67}\) I/S Stavborg, id. (parties invoked federal courts); VAN DEN BERG, supra note 27, at 242

\(^{68}\) Waterside Ocean Navigation Co. v. Int'l Navigation Ltd., 737 F.2d 150, 153 (2nd Cir. 1984)
for the loss." Prejudgment interest is only excluded "under exceptional circumstances," such as bad faith of the party seeking interest.

According to § 203 the district courts have original jurisdiction. Venue is generally determined by the place of arbitration. Otherwise, any court is competent where an action with respect to the controversy could have been brought, § 204.

2. The German procedure

The parties' agreement determines the competence of a court of first instance (Amts- or Landgericht), §§ 1045(1), 1046 ZPO. Lacking an agreement, the general rules, §§ 12-37 ZPO (venue), §§ 23, 71 GVG (jurisdiction) apply; subsidiarily, the district of the court where the arbitration took place determines the venue.

In Germany § 1044 ZPO governs the enforcement procedure for foreign arbitral awards. The ZPO does not provide for two different procedures of recognition and enforcement, the

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70 Reefer Express, id.

71 Gerichtsverfassungsgesetz [Basic Law for the German Courts]
declaration of enforceability already implies recognition. However, § 1044 ZPO has only a subsidiary function to the extent that no international treaty provides for a special proceeding. Enforceability according to German law requires the following elements:

A "foreign" arbitral award: contrary to the majority of arbitration laws, the German law adheres to the so-called procedural doctrine: an arbitral award is foreign if it has been rendered under the procedural rules of a foreign state. Where it has been rendered is irrelevant. Consequently, an arbitral award rendered in New York City under German procedural rules is not considered foreign.

Binding effect according to the applicable law:
Generally Art. V(1)(e) supersedes § 1044 ZPO. The criteria, however, for the determination as to when an award is considered to be binding, are the same: an award is binding when no more confirming order by the state or another institution is required and an arbitral judicial appeal is excluded according to the applicable law.

72 MAIER in 3 MUECHNER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, § 1044 no. 1 (1st ed. 1992) [hereinafter MUEKO-MAIER]


74 Bundesgerichtshof, judgment of Oct. 21, 1965, 21 BGHZ 365, 367; MUEKO-MAIER, id. at no. 2

No refusal grounds: The application of the refusal provisions evidences again the subsidiary function of the German procedural law. The refusal provisions of Art. V supersede those of § 1044(2), however, according to art. VII the prevailing party is free to choose the procedure of § 1044 (as a whole) if its requirements are lower.\(^76\) The latter provides mainly for parallel refusal grounds:
- Invalidity of an award under the applicable law (no. 1). An award is invalid if it was vacated, if the arbitration agreement was void or contrary to the foreign legal order, or the award was beyond the scope of submission to arbitration. Normally, invalidity can only be invoked if the defendant is still able to oppose the award under applicable foreign law.\(^77\)
- Public policy (no. 2).
- Lacking representation during the proceedings (no. 3).
- Ability to present the case (no. 4). The latter provisions are to be determined according to German law.\(^78\)

As to mentioned "incidental aspects of an enforcement procedure" the German courts follow a line similar to the U.S. courts. The courts held that a defendant is barred to invoke objections he could have raised before the panel, i.

\(^76\) MUEKO-MAIER, \textit{id.} at no. 18-19
\(^77\) BAUMBACH, \textit{supra} note 73, at § 1044 no. 8
\(^78\) BAUMBACH, \textit{id.} at § 1044 no. 9-13
they also apply the idea of a waiver.\textsuperscript{79} In regard to set-offs, the Court of Appeals in Hamburg generally recognized the possibilities to consider them in the enforcement proceeding.\textsuperscript{80} The problem of interest rates does not arise in Germany since according to § 291 BGB\textsuperscript{81} a 4% interest rate (§ 288(1) BGB) is awarded upon pendency; the same is true for the problem of time limits because according to § 128 BGB the time limit for application for confirmation is thirty years.\textsuperscript{82}

Compliance with the required procedure: Domestic German arbitration law requires certain formalities, § 1039 ZPO. Those do not apply to foreign awards, § 1044(1) ZPO. Art. IV is lex specialis for an enforcement procedure under the Convention. If the winning party, however, chooses the domestic procedure, a request (§ 1042b(1) ZPO) and a translation (§ 184 GVG) are required.

An oral hearing is not required but generally recommended because of the lacking familiarity of a court with foreign law; it is mandatory if a party raises the


\textsuperscript{80} Oberlandesgericht Hamburg, judgment of March 27, 1975, English language summary in II YCA (1977) 240, 241

\textsuperscript{81} Bürgerliches Gesetzbuch [German Civil Code]

\textsuperscript{82} Westin, supra note 17, at 354
defenses in § 1044(2) ZPO.\textsuperscript{83} Since the Art. V defenses replace § 1044 (2) ZPO in the international context, the same is true when a defendant invokes these defenses.

B. The formal requirements under Article IV

Art. IV regulates the formal requirements for the enforcement and is rather self explanatory:

(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 duly certified copy thereof;
(b) The original agreement referred to in art. 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 party seeking enforcement of its award has to bring forward in "duly authenticated" form:
(a) the award, (b) the agreement, (c) a translation of both if they are written in language different than the official language of the exequatur state. Although a duly authorized copy does not prove the due legislation of the original, such a copy is generally recognized.\textsuperscript{84} The court of First Instance

\textsuperscript{83} KARL-HEINZ SCHWAB & GERHARD WALTER, SCHIEDSGERICHTSBARKEIT, Kap. 30, no. 27 (4th ed. 1990)

in Munich did not recognize sales confirmations as a sufficient agreement in writing. A sales confirmation did not contain "corresponding declaration" (meeting of the minds) as expressed in an exchange of letters.\(^{85}\) Also, a copy certifying only the conformity of the signatures but not the conformity with the original was not held sufficient.\(^{86}\) Accordingly, an enforcing party is recommended to comply with the formal requirements as set out by the Convention very carefully. Since the purpose of the legislation is to obtain the same probative value, an award obtained in Germany under foreign law\(^{87}\) does not met this legitimation.\(^{88}\) Applicable law is the exequatur state's law.\(^{89}\) Whose countries national's shall certify the translation is questioned. To protect the justified interests of the exequatur state, it seems preferable to require a certification by the latter officials.\(^{90}\)

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\(^{85}\) Landgericht Muenchen, judgment of June 20, 1978, English language summary in V (1980) 258, 259

\(^{86}\) Oberlandesgericht Koeln, judgment of June 10, 1976, IV YCA (1979) 258, 259

\(^{87}\) i. e. a foreign award

\(^{88}\) MUEKO-GOTTWALD, id. at Art. IV no. 5

\(^{89}\) id. at no. 7

\(^{90}\) MUEKO-GOTTWALD, supra note 84, at Art. IV no. 13; but: van den Berg, commentary, supra note 29, at 453
The Convention allows only seven defenses against the enforcement of a foreign arbitral award. A court may refuse the enforcement of a foreign arbitral award for one of the five enumerated procedural defects in Art. V(1), or for a jurisdictional problem at the place of enforcement, Art. V(2).91 Furthermore, paragraph (1) and (2) can be distinguished from a systematic point of view: The first five defenses have to be invoked by the defendant, whereas the last two defenses in paragraph (2) can be raised by the enforcing court ex officio on its own motion.

I. The procedural defenses of Art. V(1)

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where recognition and enforcement is sought, proof that....

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91 McClendon, supra note 16, at 63
A. Incapacity of the parties or invalidity of the agreement

1. Introduction

The first ground for which a court may refuse recognition and enforcement is Art. V (1)(a). It reads as follows:

The parties to the agreement referred to in article II were, under the law applicable to them under some incapacity, or 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;...

Art. V (1)(a) acknowledges two grounds upon which a court may deny enforcement of a foreign arbitral award:

(1) incapacity of a party or

(2) the invalidity of the arbitration agreement itself.

In short: "There should be no enforcement of an award of an award against a party who had never agreed to arbitrate."\(^92\)

\(^92\) Quigley, supra note 1, at 1067; McClendon, supra note 16, at 63 enumerates several questions concerning the possible invalidity:
- whether there was an agreement;
- whether there was an agreement to be bound by an arbitrator's decision;
- or merely to submit the dispute to an umpire; whether the dispute was arbitrable;
- whether the agreement was valid (or induced by fraud, duress?);
- whether the invalidity of the agreement can be determined independently of the main contract?
2. U.S. court decisions

The defense has been rarely discussed in U.S. courts: In Audi NSU v. Overseas Motors the defendant asserted that the arbitrators had applied Swiss law instead of German law as stipulated by the agreement. The court, requiring a causal connection, rejected Overseas' defense: There was no showing that the decision would have been different under German procedural law. Secondly, the court noted that Art. V(1)(a) "rationally interpreted applies only to substantive and not procedural law." Two aspects of this decision are interesting: The first is the applicability of the Art. V(1)(a) defense only to substantive law. Although this statement correctly assumes that the validity of an agreement as a contract is typically determined by substantive and not procedural law, it appears doubtful. Additionally, the rationale of this decision itself is surprising: in a consequent application of its holding the court would have had to review the merits if a sufficient showing had given reason to believe that the result would have been different. This a consequence the court apparently tries to avoid by the

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94 id. at 293

95 id.
dictum that prohibits further review of the application of procedural law.\textsuperscript{96}

Of greater practical importance is the decision Corcoran v. Ardra. It discussed the impact of bankruptcy proceedings on the capacity to be a party in arbitration proceedings:\textsuperscript{97}
The State Superintendent of Insurance in his function as liquidator of Nassau Insurance sued Ardra for reinsurance balances. Ardra moved to dismiss the complaint and compel arbitration under the Convention. Although the Supreme Court found the inapplicability of the Convention\textsuperscript{98}, it referred explicitly to Art. V(1)(a) and adopted the scholarly opinion stating that Art. V(1)(a) relates to the moment the arbitration arises with the consequence that an insolvent party under U.S. law is under some incapacity.\textsuperscript{99}

\textsuperscript{96} Geotech Lizenz AG v. Evergreen Systems, 697 F.Supp. 1248, 1253 (1988) (discussing the question whether an alleged settlement agreement had superseded the arbitration agreement. As there was no unanimity about the binding effect of this second agreement it could not render the arbitration agreement "invalid" within the meaning of this defense); Gould v. Ministry of Defense, 9th Cir., judgment of Oct. 23, 1989, English language summary in XV YCA (1989) 605, at 607 (holding that even though there was never the required written agreement (Art. V(1)(a) referring back to Art. II(1)) between an American and Iran party the Algiers Accords themselves establishing the Iran-U.S. Claims Tribunal represent this written agreement)

\textsuperscript{97} Corcoran v. Ardra Ins., 553 N.Y.S.2d 695 (1990) (App. Div.)

\textsuperscript{98} non commercial relation

\textsuperscript{99} Corcoran v. Ardra Ins., id. at 698 (1990)
Although it affirmed the decision, the Court of Appeals\textsuperscript{100} did not uphold the latter interpretation and ruled that a "commercial nature of the relationship is determined at the inception of the agreement...."\textsuperscript{101} It is likely that the Court of Appeals (implicitly) did not want to adhere to the District Court's reasoning. The court did not discuss Art. V(1)(a) at all, but based its affirming decision on Art. II(3) and V(2)(a) holding the nonarbitrability of the subject matter.\textsuperscript{102} For these reasons the lower court decision is for the interpretation of Art. V(1)(a) of less precedential value.

As its only substantial contribution to the interpretation of Art. V(1)(a) the U.S. courts state that "law" within the meaning of Art. V(1)(a) encompasses only substantive law. Bankruptcy proceedings at least seem to have no influence on the parties' capacity.

The paucity of cases might be a result of the \textit{Prima Paint v. Flood Manufacturer}.\textsuperscript{103} In this decision - not yet under the Convention - the Supreme Court followed the

\textsuperscript{100} Corcoran v. Ardra Ins., 77 N.Y.2d 225 (Ct. App. 1990)
\textsuperscript{101} id. at 231
\textsuperscript{102} id. at 231-233
\textsuperscript{103} Prima Paint Corp. v. Flood Manufacturer, 388 U.S. 395, 400 (1967); Philip R. West, \textit{The Express Defenses of the N.Y. Convention on Foreign Arbitral Awards}, 5 N.Y.L.SCH.J.INT'L & COMP. L. 103, 111 (1983); Martinez, supra note 2, at 498
separability doctrine\textsuperscript{104} and limited the review competence of courts drastically to the extent that they "may consider only issues relating to the making and performance of the agreement to arbitrate" and not the contract in general.\textsuperscript{105} It is unclear how the invalidity of the arbitration clause can be separated from the validity of the main contract, i.e. how the incapacity of a party to conclude a contract can be without impact on the arbitration agreement.\textsuperscript{106} Since an alleged incapacity of a party therefore would jeopardize the whole contract, the court's review competence is limited to the arbitration clause. This fact impliedly might have discouraged defendants to invoke Art. V(1)(a).\textsuperscript{107}

3. German court decisions

In the first reported German decision the Supreme Court\textsuperscript{108} had to consider, an infringement of § 1025(2) ZPO\textsuperscript{109} invalidated an arbitration agreement. The Supreme

\textsuperscript{104} this will be discussed broadly under Art. V(1)(c) in the context of "Kompetenz-Kompetenz"

\textsuperscript{105} id. at 404

\textsuperscript{106} West, id. at 110

\textsuperscript{107} West, id. at 111

\textsuperscript{108} Bundesgerichtshof, judgment of March 6, 1969, English language summary in II YCA (1977) 235

\textsuperscript{109} § 1025(2) ZPO provides:

2. The arbitration agreement is not valid if one of the parties has used any superiority it possesses by virtue of economic or social position in order to constrain the other party to make this agreement or to accept conditions therein,
Court looking at the applicable Czechoslovak law, denied this question. Since Czechoslovak law did not contain a similar provision the court rejected the defense.\textsuperscript{110} This result is doubtful because § 1025(2) ZPO is designed to protect a weaker party who is typically not aware of the risk of a choice-of-law clause. It may be submitted that in this particular case the defendants as businessmen were not regarded as needing this legal protection.

Furthermore, the Supreme Court considered the impact of time limits on the existence of an arbitration agreement. It is questioned whether time limits are to be dealt within Art. V(1)(a) or (d), as concerning the existence of an agreement or the composition of the panel and procedure. The court held in the sense that this had to be "considered by the court on the basis of the applicable law."\textsuperscript{111} The court applied Art. V(1)(a) and referred to the law governing the arbitration agreement.\textsuperscript{112} In application of this the court has consistently held that it will respect time limits set by the domestic law. However, German defendants raised the

resulting in the one party having an advantage over the other in the procedure, and more especially in regard to the nomination or the non-acceptance of the arbitrator.

(Translation by XIV YCA (1989) 631)

\textsuperscript{110} id. at 236

\textsuperscript{111} Bundesgerichtshof, judgment of Feb. 12, 1976, English language summary in II YCA (1977) 242, 243

\textsuperscript{112} VAN DEN BERG, supra note 27, at 290 note 169
defense several times that the award was not invalid under the applicable law. The Supreme Court, then, referred to the law applicable to the award including the domestic procedural law. Consequently, the court did not permit the defense to claim that an award would have been invalid under the applicable law. The defense cannot be raised any more in the country of issuance because a time limit elapsed and the defendant failed to act in time. Conversely, the Supreme Court is very likely not to enforce a foreign arbitral award if the defendant is enabled to oppose the award under the applicable (U.S.) law.

The Court of First Instance in Hamburg addressed a common problem: the form requirement for the authorization of an agent. The court ruled that apparent authority does not meet the writing requirement of Art. II: "Since in any case one cannot speak of an arbitration agreement signed by the respondent." This lack of form then led to the inapplicability of the New York Convention. The result reflects the German domestic law according to which form

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113 not always under Art. V(1)(a)


115 id.


117 id.
requirements usually have a protective function. This decision is the only German decision in which an Art. V (1)(a) defense has been successfully raised.

The court decisions evidence a consequent reference to the applicable domestic law of the country where the award is made; this is also true even in cases with backgrounds touching domestic public policy. The choice of law rule prevails even over mandatory German procedural law protecting a weak party.

4. Comparison

The mentioned U.S. and German court decisions can be substantially distinguished as to the interpretation of the term "law." According to Audi v. Overseas, Art. V(1)(a) only applies to substantive law. The German Federal Supreme Court found that the applicable law also encompasses "procedural

118 Sandrock & Hentzen, supra note 45, at 56 (stating that "the form requirements are designed to warn the principal for whom the agent acts, as well as to protect the other party to the contract relying upon the binding nature of the agreement.")

119 see generally Oberlandesgericht Karlsruhe, judgment of March 13, 1973, English language summary in II YCA (1977) 239 (deciding a rather particular case concerning the determination of the applicable law: a Dutch and a German party had provided for arbitration by the German-Dutch Chamber of Commerce without any reference to the applicable law nor a place of arbitration. An ordinary court designated by an unsatisfied party should be competent if the decision is not acceptable to either party. Since the Court failed to determine any applicable law, it interpreted the clause as an attempt for conciliation)

120 see under Art. V(2)(b)
Why a limitation to substantive law should be rational remains unclear. It might be submitted as well that arbitration itself is a procedural device, the "shell" to resolve the substantive dispute, and therefore "law" only refers to the arbitration and not to the contract. Although the validity of a contract is typically determined by substantive and not procedural law, the interrelation between both cannot be denied. When the parties agree upon an applicable procedural law, this can have a substantial impact on the existence and validity of the agreement, such as the ICC rules providing for time limits. The procedural law may also provide for other specifications, limitations, requirements. Therefore, the term "law" in Art. V(1)(a) should be read in a broad sense as encompassing procedural law as well.

The previous discussion has to be distinguished from the question of the choice of law; here, only a possible defensive effect of procedural provisions was discussed, and not the question how the procedural law can be determined. The idea of a causal connection, an impact between the infringement of the procedure and the award, has been also employed by German courts. Bankruptcy and its influence on arbitration were scrutinized in Germany under due process (Art. V(1)(b)) and public policy aspects (Art. V(2)(b)), whereas the U.S. jurisdiction focussed on the arbitrability (Art. V(2)(a)) and public policy defense (Art. V(2)(b)).
Although § 1025(2) ZPO as a codification of public policy as a matter of fact influences the validity of an agreement, public policy and related issues are normally dealt with under Art. V(2)(b). Time limits, in particular Art. 18(I) of the ICC-rules, gave raise to court decisions on almost every Art. V(1) defense in Germany. In the U.S. Art. 18(I) ICC-rules has been dealt with only under Art. V(1)(d).

Parallel to the strict jurisdiction of the German Supreme Court, U.S. courts held that once a time-limit for the motion to vacate has expired, a party is prevented from raising this motion as a defense. However, a U.S. court will hardly have to consider German time limits. The domestic motion to vacate (Aufhebungsklage) in § 1041 ZPO provides for vacation under a very narrow standard, similar to the Art. V defenses. The ZPO does not provide for a time limit (30 years). Contrary to the ZPO, the FAA (§ 12 of title 9 U.S.C.) provides for a time limit of three months whereas the prevailing party has one year to get a confirming judgment (9 U.S.C. § 9). According to the mentioned decision, the German Supreme Court will not hesitate to enforce an award if this time limit for the motion to vacate has expired.

5. Further theoretical considerations
a) Agreement referred to in article II

Following explicit language, Art. V(1)(a) relates to "parties to the agreement referred to in article II." Art. II, therefore, is a requirement for the recognition of an arbitration agreement. The reference, however, is surprising within the context of Art. V. It deals with the second stage, the enforcement, while Art. II concerns itself with the first stage of an arbitration agreement. Therefore, from a systematic point of view the reference to art. II is illogical.¹²²

The clear and unambiguous wording of article V(1)(a), however, opposes the mentioned systematic objections. A strict systematic interpretation¹²³ would cause another inconsistency instead: an agreement not satisfying the writing requirement under Art. II(2) - and therefore not

¹²² In fact the Italian Supreme Court (Corte di Cassazione (sez. 1), judgment of April 15, 1980, English language summary in VI YCA (1981) 233, 235) had adopted a similar reasoning, namely that Art. V "operates on a different level", i. e. the enforcement level. Underlying rationale for this decision is supposedly the suspicion of the court that a defendant participates in the whole arbitration proceeding without challenging the validity of the agreement before - on the enforcement stage - he claims its voidness following Art. V: "he should not be allowed to sit back and wait until the enforcement stage." (BERG, supra note 27, at 286). Meanwhile the Court has changed its opinion (Corte di Cassazione, judgment of March 28, 1991, English language summary in XVII YCA (1992) 562, 563)

¹²³ into two subdivisions: one dealing with the agreement, recognition and enforcement, article II, and the other dealing with the award and its recognition and enforcement, Art. III-V respectively
enforceable under the Convention - could be a valid basis of an enforceable award under the applicable national law.\textsuperscript{124} Not only Art. V but also Art. IV (1)(b) refers to Art. II.\textsuperscript{125} This underlines that the Convention is not a compilation of single provisions, each referring to particular recognition and enforcement problems. Rather, it is one body of interrelated provisions.\textsuperscript{126} It should be regarded as a whole to serve better the goal of uniformity at all stages.\textsuperscript{127} Therefore Art. II is applicable.

b) Incapacity of a party

aa) The applicable law

The incapacity of parties has to be determined "under the law applicable to them" which makes clear that this law does not have to be the same governing the agreement.\textsuperscript{128} Since the Convention leaves open the question of how to determine this law, the general conflict of law rules of the United States and Germany are applicable:\textsuperscript{129} in the United

\textsuperscript{124} VAN DEN BERG, supra note 27, at 286

\textsuperscript{125} How could a prevailing party present a copy if the agreement was not in writing? (Quigley, supra note 1, at 1067)

\textsuperscript{126} VAN DEN BERG, supra note 27, at 286

\textsuperscript{127} VAN DEN BERG, id.

\textsuperscript{128} VAN DEN BERG, id. at 277

\textsuperscript{129} PETER SCHLOSSER in: 7/2 STEIN/JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG (21st ed. 1992), Anhang zu § 1044 no. 61 [hereinafter STEIN/JONAS-SCHLOSSER]
States the capacity of a person is determined either by the law of the place of conclusion of the agreement or the law governing the agreement. A particular personal law is unknown. Since the capacity of a party is a matter closely related to fundamental fairness, this provision was apparently included to protect the own nationals. The U.S., however, so far did not claim such a necessity. The general rule can be applied. There is no obligation to create a personal statute.

For Germany, Art. 7(1) of the Introductory Code for the BGB [EGBGB] provides: "Legal and contractual capacity of a party are governed by the law of the state whose national the person is." The capacity of a party to conclude a contract is governed by §§ 104-113 BGB.

bb) The time when a party's capacity is determined

Controversially, the issue has been discussed whether Art. V(1)(a) provides for non recognition when a party is under some incapacity at the moment the agreement is made or

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130 VAN DEN BERG, supra note 27, at 277
131 VAN DEN BERG, id.; STEIN/JONAS-SCHLOSSER, id.
132 West, supra note 103, at 112
133 PETER SCHLOSSER, DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT, no. 326 (2nd ed. 1989)
134 BERG, supra note 27, at 277
135 Burgerliches Gesetzbuch [German Civil Code]
the arbitration proceedings arise, a problem typically linked to a bankruptcy proceeding.

It has been argued that Art. V(1)(a) only at a glance refers to the time when the agreement was made because the drafters were, in fact, concerned with the proper representation of both parties. Proper representation is a problem which apparently arises during the proceedings.\textsuperscript{136}

It is added that this provision refers to the law of the party's home, i. e. in case of a (bankrupt) U.S. party, U.S. (bankruptcy) law would apply.\textsuperscript{137} This argument is doubtful for several reasons: it remains unclear why one has to look at a historical background in consideration of a clear language. Using the past tense the provision refers back to the time of the agreement.\textsuperscript{138} It seems unconvincing to invoke legal history against a clear language; this would mean giving more weight to the mere point of discussion during the negotiations than to the final draft upon which the participants finally agreed. Although proper representation might have been part of the discussion on (a), the legislative history also evidences that the word "proper" was


\textsuperscript{137} id. at 615 Fn. 74

\textsuperscript{138} Corcoran v. AIG Multi-Line Syndicate, Inc., 143 Misc.2d 62, 71 (N.Y. Sup. Ct. 1989) (referring to "... the parties were ...")
included in ground (b) just for the case of misrepresentation.\textsuperscript{139}

Since misrepresentation appears to be more a matter of the procedure itself rather than a prerequisite (such as capacity) for the procedure, the latter interpretation is preferable for systematical reasons. If a party was not "under some incapacity" at the time of the agreement, an incapacity occurring under the applicable law after this moment is irrelevant for the arbitration proceedings.

c) The applicable law to the agreement

Art. V(1)(a) makes reference to two laws applicable for the determination of the validity of an agreement: the law to which the parties have subjected it or the law of the country where the award was made. The language ("...failing...") clearly indicates the subsidiary role of the law of the country where the award was made. Therefore, one has to look primarily at the choice-of-law expressed by the parties in the agreement. Difficulty may, however, arise if the parties do not make express reference to a law governing the arbitration agreement.

\textsuperscript{139} VAN DEN BERG, supra note 27, at 276
aa) Express choice of substantive law and implied choice of procedural law

At a glance, this statement may be surprising if the parties agreed upon the applicable law for the main contract. One could argue that the choice of law for the main contract implies the parties' will that the arbitration dealing with this contract shall be governed by the same rules. It strikes, however, that the language in (a) and (d) clearly refers to procedural questions.\(^{140}\) The principal distinction between the law applicable to the contract and the agreement is underlined by the different objects of the two choices of law:

the main contract concerns the relationship between the parties as to the substance; the arbitral clause is concerned with the procedure for settling disputes arising out of the main contract.\(^{141}\)

Due to these two different purposes, a choice of law for the main contract cannot be deemed to be the same for the arbitration agreement. The distinction precludes an application of the general choice of law.\(^{142}\) Even though a different choice of law is possible, it will occur rarely in practice.\(^{143}\)

\(^{140}\) SCHLOSSER, supra note 132, at no. 216

\(^{141}\) VAN DEN BERG, supra note 27, at 293

\(^{142}\) id.

\(^{143}\) VAN DEN BERG, id. at 291
bb) Implied choice of procedural law

If there is no explicit choice of law, it is questioned whether a possible implied consent of the parties would meet the requirements of the first conflict rule. With respect to the importance attributed to the parties' agreement with Art. V (evidenced by the conflict of law rules), such an implied consent should be permitted.\textsuperscript{144} Its practical relevance, however, is little as there is hardly any convincing indication of the parties' will in spite of the determination of the seat of the arbitration panel and the applicable law: for example, common residence, nationality of the parties or the arbitrators.\textsuperscript{145} Consequently, the primary indication, in fact only the location where the arbitration takes place,\textsuperscript{146} should be subsumed systematic preferably under the subsidiary conflict of law rule expressly referring to this (as an indication of the parties' will). Since it could be as well treated as the implied will of the parties, the choice of the location should not be treated only subsidiary to an implied will.\textsuperscript{147}

\begin{itemize}
  \item \textsuperscript{144} SCHLOSSER, \textit{supra} note 132, at no. 236; MUEKO-GOTTWALD, \textit{supra} note 84, at Art. V no. 9; REDFERN \& HUNTER, \textit{supra} note 21, at 123; \textit{but see} VAN DEN BERG, \textit{supra} note 27, at 293
  \item \textsuperscript{145} SCHLOSSER, \textit{supra} note 132, at no. 243
  \item \textsuperscript{146} SCHLOSSER, \textit{id.} at 239
  \item \textsuperscript{147} SCHLOSSER, \textit{id.} at 241; finally this problem is only a "theoretical nicety" (BERG, \textit{supra} note 27, at 294).
  
  If there is more than one location where the proceedings took place, a "main" location has to be determined (SCHLOSSER, \textit{id.} at 242)
\end{itemize}
B. Due process requirements

Art. V(1)(b) reads:

The 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 the case; ...

1. Introduction

The second defense provides for two defenses:
(a) missing proper notice of the appointment of the arbitrators or the arbitration proceedings, or
(b) inadequate opportunity to present the case.

The second alternative was introduced to deal with force majeure and similar events.148 Contrary to Art. V (1)(a) the present defense has been invoked many times and has met some success as the decisions discussed below will evidence. Proper notice and the ability to present the case are essential, interconnected parts of due process; this defense is similar to that one of § 10(c) FAA.149

2. U.S. court decisions

The first reported decision dealing with the Art. V (1)(b) defense is Parsons and Whittemore Overseas v. Societe

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148 Quigley, supra note 1, at 1067

149 McClendon, supra note 16, at 64
Generale de l'Industrie du Papier (RAKTA). The arbitration court had refused to postpone a hearing for one the Parsons witnesses who had a speaking engagement at an American university at the same time. For that reason the defendant claimed he was "not given proper notice...or was otherwise unable to present his case."

The Second Circuit did not follow this line of reasoning and argued instead that first "the inability to produce one's witnesses before an arbitration tribunal is a risk inherent in an agreement to submit to arbitration." By agreeing upon arbitration, the defendant had - according to the court - given up some litigation advantages such as subpoena power; secondly the court turned to

the logistical problems of scheduling hearing dates convenient to parties, counsel and arbitrator scattered around the globe argues against deviating form an initially mutually agreeable time plan unless a scheduling change is truly unavoidable.

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150 Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier (RAKTA), 508 F.2d 969 (2nd Cir. 1974) (Parson, a U.S. company, and the Egyptian RAKTA had an agreement according to which Parsons had to construct and manage a papermill in Egypt. In 1967 Egypt broke diplomatic ties with the U.S. and required for all Americans a special visa. Parsons abandoned the project and invoked force majeure for its excuse; RAKTA sought damages. A threeman panel awarded RAKTA three-fourth of the alleged sum. (id. at 972))

151 id. at 975

152 id.

153 id.
The court did not regard a prior commitment to a lecture as important enough that it would have obliged the arbitrators under the notion of fundamental fairness to postpone the hearing.\textsuperscript{154} Thirdly, the witness had provided the court with an affidavit of "...the information to which I would have testified."\textsuperscript{155} That cuts the ground for the complaint that the arbitrators did not consider critical evidence and moderates the complaint to the extent that only a personal questioning did not take place.\textsuperscript{156} Therefore, the court concluded that due process rights were not infringed by the denial to postpone the hearing.

In *Biotronik v. Medford*\textsuperscript{157} Medford had based its defense partially on Art. V (I)(b) claiming not a direct or formal but a substantive infringement of its due process rights, in particular of notice and ability to present its case. Medford argued that it was

\begin{quote}
unable to present its case within the meaning of Art. V(1)(b) because its rights and liabilities did not mature.\textsuperscript{158}
\end{quote}

Following Medford, an alleged 3% commission could not be calculated until the end of 1973 while the arbitration

\textsuperscript{154} id.

\textsuperscript{155} id.

\textsuperscript{156} Martinez, *supra* note 2, at 500


\textsuperscript{158} id. at 140
proceedings had already begun in February 1973.\(^{159}\) The District Court did not apply this interpretation emphasizing that due process primarily requires notice of the proceedings and the opportunity to be heard, i. e. merely formal notice of the proceedings and the opportunity to be heard.\(^{160}\) Consequently, this does not substantively have to be the best opportunity to present the case. Furthermore, the court added that Medford could have made this fact known already during the proceeding. So Medford's ability to present the case was not limited.

The idea behind this decision seems to be clear: the parties must fully participate in the arbitration proceedings. The result of a different decision could provoke a defendant to retain information which he, eventually, discloses at the enforcement stage - a certainly contraproducive effect.

The judgment in Geotech v. Evergreen fits systematically in the same category.\(^{161}\) Evergreen challenged the award on ground of an Art. V (1)(b) violation. Although fully informed about the proceedings, given requested time extension and every opportunity to present its case, it preferred to pursue a state court action to stay arbitration and refused to

\(^{159}\) id.

\(^{160}\) id.

participate in the arbitration proceedings.\footnote{162} Since it was given ample notice of the arbitration, it had sufficient opportunity to present its case and therewith full knowledge of the risk of its (non)action.\footnote{163} Consequently, the court could not find a lack of notice required by Art. V (I)(b).\footnote{164}

Contrary to Biotronik and Geotech Art. V (1)(b) was successfully invoked in Sesostris v. Transportes Navales\footnote{165} in which BCI was involved as a third party, a mortgagee of the cargo ship Unamuno. In Dec. 1988 BCI had requested "notice of when and where the proceedings" would be held. Sesostris replied only that "it is our understanding that arbitration proceedings are presently being pursued in Madrid, Spain."\footnote{166} They neither stated that the arbitration procedures were currently being negotiated, nor disclosed that a counsel would represent, nor gave any information about the schedule of the proceedings beginning the same week.\footnote{167} A month later BCI was informed that the arbitration was complete. Since BCI, as depositor, was the party against whom the awards were invoked, the District Court held that

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\begin{itemize}
\item \footnotemark[162] \textit{id.} at 1253
\item \footnotemark[163] \textit{id.}
\item \footnotemark[164] \textit{id.}
\item \footnotemark[166] \textit{id.} at 742
\item \footnotemark[167] \textit{id.}
\end{itemize}
BCI did not receive proper notice within the meaning of Art. V (1) (b). The court did not accept Sesostris' defense that BCI as a third party was not the one "against whom the award is invoked because Sesostris clearly knew that BCI as a depositor of a security had moved for the stay to arbitration."\(^{168}\)

BCI, as a third party, had a justified interest in participating in the proceedings. This decision makes the borderline evident and contributes substantially to the more formal interpretation in Biotronik: Proper notice requires information in the sense that a party can determine the time and location of the proceedings in order to be able to present the case and participate in the proceedings.\(^{169}\)

Because the case Laminoirs v. Southwire\(^{170}\) takes place in an international surrounding it is frequently named as an example for the "ability to present a case" standard although the defendant did not explicitly rely upon the U.N.

\(^{168}\) id. at 742 note 7

\(^{169}\) Compagnie des Bauxites de Guinee v. Hammermills, Inc., No. 90-0169 (JGP), 1992 U.S. Dist. LEXIS 8046 (D.D.C. 1992), *1, 10-15 (discussing a defendant's argument that he had no proper notice that the legal costs were an issue of the proceedings because those costs were not incurred by Hammermills but its insurer, i. e. there were no costs for the party. Referring to the ICC-Rules and the Terms of Reference both by making express reference to the "costs of arbitration," and to the fact that CGB could have raised this issue during arbitration, the court rejected this argument as dubious.)

Convention. Since the arbitrators were afraid that Southwire would use the questioning for inappropriate purposes, they limited it to "matters of fact albeit recent matters of fact which might conceivably have some bearing on what was the intent of the several parties several years ago." Southwire contended that this was a violation of § 10(c) FAA which similarly to paragraph (1)(b) provides for a vacation of the award "where the arbitrators were guilty of misconduct ... in refusing to hear evidence pertinent and material to the controversy." The District Court, however, held that "arbitrators are charged with the duty of determination what evidence is relevant and what is irrelevant." As long as the defendant cannot show a clear abuse of the arbitrators' discretion, the court will not vacate an award.

The second successful decision on the Art. V (1)(b) defense - this time, however, under the aspect of "present a case" - is Iran Aircraft Industries v. AVCO. The Court of Appeals refused to enforce a foreign arbitral award on grounds of Art. V (1)(b). During the pretrial hearing the

171 eliciting admissions from the witness as to the future course of conduct which was without any relation to the proceedings, id. at 1067

172 id.

173 id.

174 id. at 1067

175 Iran Aircraft Industries v. AVCO Corp., 980 F.2d 141 (2nd Cir. 1992)
Arbitration Tribunal had suggested to AVCO a certain method of presenting evidence which AVCO later on used in the hearing. In the final award the Tribunal refused to grant AVCO’s claim because AVCO had failed to bring pertinent evidence in the form of the invoices, i.e. the originally manner that AVCO had proposed to present evidence.\textsuperscript{177}

Referring to the due process standard that

\textit{fundamental requirement of due process is the opportunity to be heard an a meaningful time and in a meaningful manner}\textsuperscript{178}

the court held that the Tribunal denied AVCO the possibility to present its case in a meaningful manner because AVCO was not aware, that contrary to an earlier understanding, the Tribunal now required the original invoices as evidence.\textsuperscript{179}

Therefore, the court denied enforcement on the base of Art. V(1)(b).

In \textit{International Standard Electric v. Bridas},\textsuperscript{180} Bridas asserted that it was unable to present its case because of a secret expert.\textsuperscript{181} The court did not discuss the material

\begin{itemize}
  \item to avoid "kilos and kilos of invoices" an internationally recognized public accountant should prepare an affidavit, \textit{id. at 143} \item \textit{id. at 144} \item \textit{id. at 146} \item \textit{id. at 146} \item International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F.Supp. 172 (D.S.D.N.Y. 1990) \item \textit{id. at 178}
\end{itemize}
influence that a secret witness may have on due process rights; it started from a more formal point of view that ISEC did not express any concern about the witness during the proceedings, and therefore had waived any objections.\textsuperscript{182} The court supports his holding using two arguments: "A party cannot remain silent, raising no objection during the arbitration proceeding, and when an award adverse to him has been handed down complain of the situation of which he had knowledge from the first."\textsuperscript{183} And secondly, at the enforcement stage this means a violation of the goal of the Convention "to expedite the recognition and enforcement of arbitration awards."\textsuperscript{184} However, even if the defendant had raised these objections earlier, a substantive discussion seems not very likely, since the court then might have argued that the arbitrators had already dealt with this issue.

This pro-enforcement bias was also the basis for the standard of "a substantial prejudice" used by the District Court in \textit{P.T. Reansuransi v. Evanston}\textsuperscript{185} to define a (narrow) due process infringement. PTR was duly informed about the

\begin{itemize}
\item \textsuperscript{182} \textit{id.} at 180
\item \textsuperscript{183} \textit{id.} quoting \textit{Cook Indus. v. Itoh & Co.} 449 F.2d 106, 107-108 (2nd Cir. 1971)
\item \textsuperscript{184} \textit{id.} quoting \textit{Imperial Ethiopian Govt. v. Baruch-Foster Corp.} 535 F.2d 334, 335 (5th Cir. 1976)
\end{itemize}
demand to arbitrate and the selection of the other party's arbitrator. However, it was not informed about the commencement of the arbitration proceedings. Nevertheless, the court held that PTR was sufficiently notified.\textsuperscript{186}

All in all, the U.S. jurisdiction is very reluctant to vacate an award for a due process violation unless the award is a result of a "manifest injustice."\textsuperscript{187}

3. German court decisions

A 1990 Federal Supreme Court\textsuperscript{188} decision gives a brief summary of the "right to present a case" positively stating its requirements:

The parties' right to present their case before the arbitral tribunal complies in any case that the tribunal must take into consideration the parties' arguments; the award must contain the tribunal's position toward the key arguments. The parties must be given the opportunity to discuss all facts that will underlie the tribunal's decision. In this respect domestic and foreign arbitration are governed by the same rules.\textsuperscript{189}

Similar to \textit{International Standard Electric}, the first reported German case deals with a related aspect of secrecy,

\textsuperscript{186} Rather special circumstances in National Development Company \textit{v.} Kashoggi, 781 F.Supp. 959, 960 (D.S.D.N.Y. 1992) were rejected as "frivolous": the concern of being taken into custody for extradition to face criminal charges in the U.S. as reason not to attend the arbitration.

\textsuperscript{187} Wheeless, \textit{supra} note 5, at 820

\textsuperscript{188} Bundesgerichtshof, judgment of Jan. 18, 1990, English language summary in \textit{XVII YCA} (1992) 503

\textsuperscript{189} \textit{id.} at 508
a secret panel.\textsuperscript{190} The German defendant successfully invoked the Art. V(1)(b) defense against a Danish arbitral award on the ground that he had never been given notice of the appointment of the arbitrators and had never been informed about their names - except for the President’s.\textsuperscript{191} The court argued that by withholding the names of the panel members, the defendant could not control their impartiality or the exclusion of members challenged by him what caused an infringement of Art. V(1)(b).\textsuperscript{192}

Not successful, however, was a German defendant who refused expressly to participate in the arbitration proceedings because of an allegedly invalid arbitration agreement.\textsuperscript{193} Nevertheless, he was still asked three times to appoint his arbitrator. The court held that he was duly notified of the proceedings and complied with due process standards.\textsuperscript{194}

As shown by the following cases time limits provided by the arbitral rules cannot only have an impact on the validity of an arbitration agreement but also on due process rights: In a case before the Federal Supreme Court the defendant

\textsuperscript{190} Oberlandesgericht Koeln, judgment of June 10, 1976, English language summary in IV YCA (1979) 258

\textsuperscript{191} id.

\textsuperscript{192} id. at 259

\textsuperscript{193} Landgericht Zweibruecken, judgment of Jan. 11, 1978, English language summary in IV YCA (1979) 262

\textsuperscript{194} id. at 263
claimed that his due process rights were violated because the time limits for a decision had expired, Art. 18(1) ICC Arbitration rules.\textsuperscript{195} Paragraph (2) the Rules allows the Court of Arbitration to extent the arbitrator's mandate, but does not provide for an automatic extinction of his mandate.\textsuperscript{196} Regarding to the personal continuity in the panel - the mandate had been extended several times - the court could not find an infringement of due process rights because the defendant had been duly informed about the original appointment;\textsuperscript{197} a mere extension did not equate the appointment of a new arbitrator.\textsuperscript{198}

Time limits under the aspect of the "opportunity to present the case" were the issue before the Hanseatic Court of Appeals.\textsuperscript{199} Although the defendant had been notified about the hearing and had been asked to give the names of the witnesses one month in advance, the defendant informed the panel only three days before the hearing that one of the witnesses was prevented to come because of a business trip. Immediately the panel responded that he could present an

\begin{itemize}
\item \textsuperscript{195} Art. 18 of the 1975 ICC Rules of Arbitration reads: 1. The arbitrator shall make his award within six months ... (as quoted by XV YCA (1990) 453)
\item \textsuperscript{196} id. at 453
\item \textsuperscript{197} id. at 454
\item \textsuperscript{198} id.
\item \textsuperscript{199} Hanseatisches Oberlandesgericht, judgment of July 27, 1978, IV YCA (1979) 266
\end{itemize}
affidavit instead. The court found that this procedure sufficiently guaranteed an opportunity to present the case.\(^{200}\) Another question was whether the fact the defendant had received documents only the evening before the hearings was sufficient to meet due process requirements.\(^{201}\) The court underlined that due process rights also require active participation.\(^{202}\) The defendant, however, did willingly not take notice; therefore, despite the short period of time, due process rights were not regarded as violated.\(^{203}\) The court’s reasoning reveals that it had the impression of dilatory tactic even though it could neither verify their importance for the decision nor whether they were already known to the defendant.\(^{204}\) The decision should be considered against this background - otherwise an evening before the oral hearings seems to be a very short time limit. It could provoke the opposing party to delay documents until the last minute to prevent that the other party be well prepared for the oral argument. Arbitration should be fast, but not at any price.

A rather extreme example of due process violation is another decision of the Hanseatic Court of Appeals, the only

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\(^{200}\) id. at 267

\(^{201}\) id.

\(^{202}\) id.

\(^{203}\) id.

\(^{204}\) id.
case enforcement was stayed in the U.S. German relation.\textsuperscript{205} Even though the case was not yet decided under the Convention, it referred to the ability to present a case in an international cast and it is likely that a similar standard would have been applied under Art. V(1)(b). Starting from the distinction between domestic and international public policy the court stated that not every violation, but rather only extreme cases infringe German public policy.\textsuperscript{206} In the present case, a single arbitrator did not permit an oral hearing, did not forward a letter of the U.S. party to the German defendant who consequently had no knowledge about its content, and did not take into account another letter submitted by the defendant.\textsuperscript{207} Requiring a causal connection the court found that it could not be excluded that without this violation a fair hearing could have led to another decision. The court denied enforcement.\textsuperscript{208}

\textsuperscript{205} Oberlandesgericht Hamburg, judgment of April 3, 1975, English language summary in II YCA (1977) 241; Peter Schlosser, \textit{Verfahrensintegrität und Anerkennung von Schiedssprüchen im deutsch-amerikanischen Verhältnis}, 31 \textit{NEUE JURISTISCHE WOCHENSCHRIFT} [NJW] 455, 457 (1978) (stating that the due process violation probably was caused by mere negligence of the AAA) [hereinafter Schlosser, \textit{Verfahrensintegrität}]

\textsuperscript{206} \textit{id.} at 241

\textsuperscript{207} \textit{id.}

\textsuperscript{208} \textit{id.}
In a case before the Court of First Instance Bremen,\textsuperscript{209} the court had to deal with the influence of bankruptcy proceedings on the enforcement of an arbitral award: A Portuguese company sought enforcement of an arbitral award rendered by the Grain and Feed Trade Association in London against a German company. Meanwhile, however, bankruptcy proceedings against the German defendant had started whereon the trustee based its first objection. Since the proceedings had been initiated before the bankruptcy proceedings, the court could not find any effect of the bankruptcy on the arbitration proceedings despite the fact that the trustee had no knowledge of the proceedings.\textsuperscript{210} The court, however, adopted the defendant’s second objection\textsuperscript{211} holding that the German party’s due process rights were violated because it could not properly present its case without being informed about the opponent’s arguments.\textsuperscript{212} Its due process rights were violated. The request had to be dismissed unter Art. V (1)(b).\textsuperscript{213}


\textsuperscript{210} id.

\textsuperscript{211} the company could only turn in documents concerning the disputed contract and give its view without knowing the arguments of the Portuguese company, id. at 487

\textsuperscript{212} id.

\textsuperscript{213} id.
4. Comparison

These court decisions show a certain reluctance to accept the Art. V(1)(b) defense. Unanimously the U.S. and German courts apply a narrow standard of a due process violation emphasizing that "a party cannot remain silent"\(^ {214}\) or that an "active participation"\(^ {215}\) is required; the same reasoning is followed concerning parallel state court litigation which does not exempt a party from participation in the arbitration proceedings.\(^ {216}\) The idea behind is to prevent a dilatory tactics. A party may not withhold arguments until the enforcement stage. It seems that the "United States courts generally look at the overall result."\(^ {217}\) The same seems to be true for the German courts.

A certain tension might be located in two areas: the "secrecy-decisions" and the decision concerning the arbitrator’s power to determine the relevant evidence.

In two of the discussed decisions the non-disclosure of names (witness/arbitrator) was a main issue. In the U.S. case the defendant’s non-participation overlapped this question


\(^{215}\) Oberlandesgericht Hamburg, judgment of April 3, 1975, II YCA (1977) 241


\(^{217}\) McClendon, supra note 16, at 64; Martinez, supra note 2, at 500
and prevented a material discussion of it. A different result could hardly be justified: a similar line of reasoning (as in the German secret panel case) can be applied to witnesses. If the witness's identity is unknown it is impossible for a party to challenge the credibility of a witness and to disclose possible connections of a party with a witness. The witness's identity should be regarded as so essential as to make it to make it to a due process requirement.

In spite of the relatively broad scope of the arbitrators to determine what evidence is relevant and how it has to be presented, due process sets a certain limit. Laminoirs, Sesostris and the OLG Hamburg and Bremen decisions shed some light upon this aspect. Laminoirs, on the one hand, stands for a minor violation of the right to be heard. It is justified by reasonable considerations to prevent misuse of the hearing, and therefore does not reach the standard of a due process violation. The three other decisions indicate when the threshold line has been crossed:

- when an arbitrator literally does not hear evidence because he refuses to hold an oral hearing;
- when parties are not informed about the opponent's arguments;
- when the panel refuses a manner of presenting evidence it had approved before.
5. Further theoretical considerations

a) The applicable law

Art. V (1) (b) does not refer to any law. U.S. and German courts consistently apply the enforcing state's due process standard: "This provision essentially sanctions the forum state's standards of due process."\(^{218}\) This "does not require that the underlying activity occur in the enforcing state."\(^{219}\) There are several theoretical possibilities discussed concerning which law has to be applied:

To avoid an undue influence of a possibly parochial national law, Art. V (1) (b) could be regarded as an intent "to fix an international standard."\(^{220}\) Consequently, a recourse to a national law is not possible. This interpretation bears two major problems: since there is no international standard of due process, a court will have to "find inspirations in the municipal rules of the forum state,"\(^{221}\) i.e., through the backdoor is introduced what was


\(^{220}\) GEORGIO GAJA, INTERNATIONAL COMMERCIAL ARBITRATION NEW YORK CONVENTION, I.C.3

\(^{221}\) id.
just excluded explicitly, namely the reference to a national law. A genuinely autonomous interpretation in addition may not give sufficient weight to a parties' agreement modifying procedural questions such as service or summons to appear (short time limits to guarantee fast proceedings).

As the due process rights are closely linked with the procedure itself, the applicable law could be determined in analogy to Art. V(1)(d). This must lead to the conclusion that Art. V (1)(b) is superfluous because every alleged due process infringement would have to be considered under exactly the same law as the arbitral procedure. The broader term of "procedure" logically covers every due process violation as part of the whole procedure. For systematic reasons an analogous application of Art. V (1)(d) is excluded. A combination of both doctrines does not offer a real alternative as it is subjected to the same doubts. Therefore, with the consistent jurisdiction of the courts the latter doctrine, i. e. application of the forum state's due process standard, is preferable. The courts in both countries consistently hold that the exequatur state's law has to be applied. This indicates, however, that the due process standard in an international context is less stringent than

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222 see also VAN DEN BERG, supra note 27, at 298

223 MUEKO-GOTTWALD, supra note 84, at Art. V no. 14

224 id.
in a domestic context. It is limited on serious violations.\textsuperscript{225}

b) The relation between Art. V(1)(b) and (2)(b)

Similar to the mentioned problem of the relation to sec.(d) as a broader, more general provision toward a more specific provision, a line has to be drawn between para. (1)(b) and (2)(b). This distinction is of importance for a systematic reason with practical consequences: the paragraph 1 defenses, like (b), are only to be taken into account, at the request of a party, whereas the court has to consider ex officio the paragraph 2 defenses. One could argue that the express language in (b) excludes any reference to due process requirements within the field of application of the public policy defense. This idea would ground on the doubtful presumption that amounts to the assertion that due process does not appear as part of a country’s due process.

Another interpretation is preferable: to underline the importance of the due process rights they are explicitly mentioned in Art. V(1)(b). This, however, does not exclude the due process rights from the Art. V(2)(b) protection.\textsuperscript{226}

Art. V(1)(b) compared to Art. V(2)(b) should only be applied

\textsuperscript{225} Mitsubishi v. Chrysler Soler-Plymouth, 473 U.S. 614, 629 (1985); Bundesgerichtshof, judgment of Jan. 18, 1990, English language summary in XVII YCA (1982) 503, 504; VAN DEN BERG, supra note 27, at 297; Sandrock & Hentzen, supra note 45, at 58

\textsuperscript{226} VAN DEN BERG, id. at 300
subsidiarily.\textsuperscript{227} As a defendant has a very high interest in raising all possible defenses, it is very likely that he will challenge any due process violation. Therefore, this question is of a less practical interest.\textsuperscript{228}

c) The question of a causal connection

Finally, the question has to be discussed as to whether every infringement of due process rights meets the requirements of the Art. V(1)(b) standard. The pro-enforcement bias of the Convention could be circumvented if every (minor) infringement would bring about a violation of due process. Therefore, it requiring a causal connection between the violation and the final decision is generally accepted.\textsuperscript{229} The test is whether it is possible that the decision would have been different if the due process rights had not been violated.\textsuperscript{230} A legal justification can be found in the wording of Art. V stating that enforcement "may" be refused.\textsuperscript{231} However, this test has to be applied narrowly by the courts: if a court engages too deeply in the question of

\begin{itemize}
  \item \textsuperscript{227} SCHLOSSER, supra note 132, at no 823
  \item \textsuperscript{228} VAN DEN BERG, id. at 299; SCHLOSSER, id. at no. 827
  \item \textsuperscript{229} MUEKO-GOTTWALD, supra note 84, at Art. V no. 16
  \item \textsuperscript{230} Oberlandesgericht Hamburg, judgment of Apr. 3, 1975, English language summary in II YCA (1977) 241
  \item \textsuperscript{231} VAN DEN BERG, id. at 302
\end{itemize}
how different an arbitrator’s decision could have been, this would amount to a review on the merits.232

C. Award is beyond scope of submission to arbitration

1. Introduction

Art. V(1)(c) provides:

The text deals with a difference not contemplated by or not falling within the terms of submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the two decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contain decisions on matters submitted to arbitration may be recognized and enforced; ...

The Art. V (1)(c) defense consists of two parts. In a strict sense, only its first part represents a defense whereas the second part - following the pro-enforcement bias - immediately sets a limit to a refusal of the enforcement. Therefore, enforcement can be refused if the award exceeds the arbitrator’s authority but only to the extent to which no part of the award correctly based on the arbitrator’s authority, i. e. within the scope of submission to arbitration, can be separated. The second half has never been applied by a U.S. or a German court.

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232 id.
2. U.S. court decisions

The leading U.S. case for the interpretation of this defense is again the Parsons & Whittemore decision.\textsuperscript{233} Parsons challenged the award on Art. V(1)(c) grounds because it included an amount of $185,000 for loss of production despite a provision in the contract that "neither party shall have any liability for loss of production."\textsuperscript{234} Referring to its own interpretation of other Art. V refusal provisions, the court stated that "once again a narrow construction would comport with the enforcement-facilitation thrust of the Convention."\textsuperscript{235} Therefore, "a powerful presumption has to be overcome to prove that the arbitration court had not acted within its powers."\textsuperscript{236} In applying this test the court held that the scope of submission to arbitration had not been exceeded. The presumption had not been overcome. The court did not regard the panel's decision as a mere non-consideration of the clause but an interpretation of the said clause "not to preclude its jurisdiction on the subject matter."\textsuperscript{237} As long as the arbitrators base their award on (their interpretation of) the contract, it is "not apparent

\textsuperscript{233} Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier (RAKTA), 508 F.2d 969 (2nd Cir. 1974)

\textsuperscript{234} id. at 976

\textsuperscript{235} id.

\textsuperscript{236} id.

\textsuperscript{237} id.
that the scope of submission to arbitration has been exceeded." The use of the word "apparent" stands for a very low standard of control. Only in cases where the excession of the scope by "simply ignoring" a contractual limitation is it obvious that the enforcement might be refused. In the following paragraph the court reveals the underlying rationale: it was concerned that Overseas might otherwise try to "secure a reconstruction of the contract in the court - an activity wholly inconsistent with the deference due arbitral decisions on the law and the fact." The Convention "does not sanction second-guessing the arbitrator's construction of the parties' agreement." The court did not want to engage in any review on the merits by interpreting the arbitrator's interpretation.

The court's narrow standard is understandable. The decision's rationale, however, is unconvincing in its last consequence. The court recognized "that an award may not be

\footnote{\textit{id.} at 976}

\footnote{\textit{id.} at 976}

\footnote{\textit{id.}}

\footnote{\textit{id.} at 976; if this presumption has to be understood as a general review standard it differs significantly from the German jurisdiction. In the context of public policy, the German Federal Supreme Court consistently holds that a court is not bound by the factual and legal findings of the arbitrators on public policy; it has to consider public policy independently (Bundesgerichtshof, judgment of May 5, 1972, 25 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2180, 2181 (1972); see Schlosser, \textit{Verfahrensintegritaet}, supra note 205, at 456)
enforced where predicated on a subject matter outside the arbitrator's jurisdiction."\textsuperscript{242} However, it objected "a second-guessing of the arbitrator's construction of the parties' agreement."\textsuperscript{243} The standard of control the court wanted to apply remained unclear. The court did not state under which conditions or circumstances a refusal under Art. V(1)(c) could be affirmed. For the determination of the applicability of one of the defenses, it has to engage somehow in an interpretation. The court's interpretation of its own rule in controlling arbitration is so narrow that it amounts to zero. Applying its own standard of an "apparent excession" of the arbitral powers, the court could have denied enforcement just by using the plain meaning of the wording and without a review on the merits: the contract provided for no liability for loss; the panel awarded for loss of production. A submission agreement would be useless if the arbitrator can "interpret away" any limitation of the scope. A different result might be justifiable in the case of a panel empowered to act as "amiable compositeur."

The Fertilizer v. IDI\textsuperscript{244} case was decided against a very similar background: the contract between the two parties had

\textsuperscript{242} id. at 976

\textsuperscript{243} id. at 977

\textsuperscript{244} Fertilizer of India v. IDI Management, Inc. 517 F.Supp. 948 (D.S.D. Ohio 1981)
clearly excluded consequential damages.\textsuperscript{245} The arbitrators, however, rendered a large award, "based almost exclusively on consequential damages"\textsuperscript{246} by using the concept of "fundamental breach."\textsuperscript{247} This theory opened the possibility to pass over the limitation of a damages clause and to award damages contrary to a contractual written provision.\textsuperscript{248} Relying expressly on \textit{Parsons}, the court emphasized the narrow standard of judicial review and refused in a consequent application of this standard to engage in an in-depth analysis to avoid the usurpation of an arbitrator's role.\textsuperscript{249} Since the award was the result of a thorough decision-making process and gives "colorable justification," the court held that the arbitrators did not exceed their authority.\textsuperscript{250} Here, already a criticism appears more difficult because the arbitrators had applied a legal theory to justify their damage award. The result remains, nevertheless, doubtful: The court stopped its analysis with the finding that the fundamental breach doctrine is a "viable theory of law."\textsuperscript{251} An arbitrator's competence, first of all, is derived from the

\textsuperscript{245} id. at 958
\textsuperscript{246} id.
\textsuperscript{247} id. at 959
\textsuperscript{248} id.
\textsuperscript{249} id.
\textsuperscript{250} id.
\textsuperscript{251} id.
parties' agreement to arbitrate. The mere fact that a certain theory is "viable" does not give it further authority. Only a correct application of the theory may enable an arbitrator to award "consequential damages" in contrary to a party's agreement because it otherwise lacks competence.\textsuperscript{252} Because a review of the application of this theory by the arbitrators would amount to a review on the merits, the court avoids this consequence by simply stating that it offers "colorable justification."

The following decisions mainly deal with the same issue: an additional compensation - allegedly beyond the arbitration's scope. This was also subject to review in Management & Technical v. Parsons-Jurden.\textsuperscript{253} The court interpreted the agreement with the presumption of federal policy in favor of arbitration in mind, in particular the term "any dispute" should be resolved by arbitration.\textsuperscript{254} As there was no limitation or exception mentioned in the language of the agreement the court chose a "broad construction" of the word "any," finding that it "logically includes not only the dispute, but the consequences naturally flowing from it - here the amount of additional

\textsuperscript{252} Steven Jonas and Mary Schlosser, supra note 129, at no. 70

\textsuperscript{253} Management & Technical Consultants S.A. v. Parsons-Jurden International Corp., 820 F.2d 1531 (9th Cir. 1987)

\textsuperscript{254} id. at 1534
compensation." Therefore, a refusal of enforcement would not have been justified following Art. V(1)(c).

In *National Oil v. Libyan Sun Oil* the defendant challenged the arbitral award claiming a violation of Art. V(1)(c). He alleged that the arbitrators had exceeded the submission to arbitration acting as "amiable compositeur." They had not based the damage award on the evidence presented to reach a legal result. Again, the District Court relied on a narrow construction of the refusal provisions allowing only very limited court review of "completely irrational" awards. To control the rationality of the decision the court reviewed (a) jurisdiction and (b) rationale for damages. The arbitration clause was very broad, containing one provision dealing with the question to what relief, if any, each party is entitled. Therefore, the issue of damages was properly before the arbitrators. Since there is only a limited review and no reexamination of an arbitral award, the court examined only the tribunal's method of finding a damage award for *National Oil*. It concludes that the tribunal "carefully considered the applicable law and the

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255 *id.*


257 *id.* at 816

258 *id.* at 817

259 *id.*
parties' arguments.\textsuperscript{260} Therefore the award was not "irrational," Art. V(1)(c) not applicable.\textsuperscript{261} The court did not make any statement about the theoretical problem as to how it would have decided in case of an equity decision.

Art. V (1)(c) was discussed against a similar background in \textit{International Standard Electric}.\textsuperscript{262} The arbitrators had allegedly awarded damages based more on equity than on law, in other words outside the scope of submission to arbitration as they acted rather as amiable compositeurs.\textsuperscript{263} ISEC claimed that the damages were awarded on factual findings which were only possible if the arbitrators understood their function as amiable compositeur.\textsuperscript{264} A review of this allegation, however, would have required a reconsideration of the factual findings of the arbitral panel. The court regarded itself as "forbidden" to do so\textsuperscript{265} and refused to follow the Art. V(1)(c) argument.\textsuperscript{266}

\textsuperscript{260} \textit{id. at 818}

\textsuperscript{261} \textit{id. at 819}


\textsuperscript{263} \textit{id. at 178}

\textsuperscript{264} \textit{id. at 181}

\textsuperscript{265} \textit{id.}

\textsuperscript{266} for completeness' sake two decisions might be worth mentioning: Corcoran v. Ardra Insurance Co., Ltd., 533 N.Y.S. 2d 695, 698 (App. Div. 1990) (finding that a legal dispute with the Liquidator is a difference not contemplated within the submission to arbitration); Ministry of Defense of the
The threshold issue in these decisions is the scope of an arbitration agreement which is closely linked with the definition of the function of an arbitrator. An arbitrator has to find the "right" balance between the parties' interests.\textsuperscript{267} The problem, however, is determining which rules are "right": since the arbitration panel's authority derives from the parties' agreement, an arbitrator has to look at the agreement first. This would parallel the structure of the U.N. Convention that in the choice of law clauses in paragraph (a) and (d) focussing on the parties agreement. Therefore, a conflict between the applicable law and provisions in the agreement have to be resolved in favor of the more specific agreement, the express will of the parties. From this point of view the Parsons and Fertilizer decisions are beyond the scope of the submission to arbitration as in both cases the award provided for damages clearly excluded by the agreement. The explanation that the arbitrators "interpreted" the clauses seems rather complex and artificial. The remaining decisions interpret the arbitrator's role out of broad arbitration clauses and do not have to overcome a clear wording. Therefore, these clauses

\textsuperscript{267} STEIN/JONAS-SCHLOSSER, supra note 129, at no. 70
can be interpreted as giving the arbitrator the competence to find a final balance of interests.

3. German court decisions

Contrary to the United States, there is only one reported case dealing expressly with Art. V(1)(c). Most of the German decisions quoted in the Art. V(1)(c) context deal with the problem of "Kompetenz-Kompetenz" in purely national cases.

In one case before the Federal Supreme Court a Rumanian and a German firm had agreed upon arbitration and added the following clause to the contract: "Any claim for arbitration formulated after 6 months from the date of arrival of the goods at the final station ... is null." A dispute arose and the Rumanian party referred to arbitration. The Court of First Instance and the Court of Appeals refused to enforce the award because after the six-month period the tribunal no longer had competence, and therefore the arbitrators exceeded the terms of the arbitration agreement (Art. V(1)(c)). The Supreme Court did not follow this reasoning arguing that the six month clause was ambiguous. The clause only dealt with the legal

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269 id.

270 id. at 649
effect, i. e. the voidness of an award formulated after the six month period, and not with a temporary limited competence of the arbitrators. Consequently, the Supreme Court did not interpret the clause in a procedural sense of a derogation and prorogation clause: after six months an arbitration tribunal would lose its competence in favor of a state court. The court found that the word "claim" in the German translation was also ambiguous as to the exclusion only of the procedural means or the contractual claim (substantive law). The court granted the arbitrators the competence to interpret this clause even with the risk of an incorrect decision. As a time limit typically influences the validity of an agreement the court should not have referred to paragraph (c). In such a case dealing with the incompetence of the arbitrators due to the expiration of a time limit, paragraph (a) forms the more specific rule according to which the arbitrator's competence should have been decided.

Under domestic law, the Court of Appeals in Celle broadly interpreted the clause "any dispute arising out of

\begin{itemize}
\item[271] id.
\item[272] id.
\item[273] VAN DEN BERG, supra note 27, at 318; but MUEKOGOTTWALD, supra note 84, at Art. no. 27
\item[274] Oberlandesgericht Celle, judgment of Nov. 1, 1957, 12 MONATSSCHRIFT DES DEUTSCHEN RECHTS [MDR] 172 (1958)
\end{itemize}
this contract", finding that usually such a clause indicates the parties' will to submit not only the contents of contracts but also the validity of the contract itself to arbitration. The court argued that the latter interpretation meets the requirement of a greater practicability because the arbitral decision would otherwise be only temporary subject to extensive (delaying) judicial review. This would contravene the parties' intent for a fast and final dispute resolution. Therefore, the court concluded that in absence of other intentions the arbitrators can decide over the validity of the contract as a whole.

The Supreme Court adopted the same line of reasoning explaining first of all the negative consequences of an opposing attitude against broad competence of arbitrators. Very often one party of an agreement will claim the voidness of the contract. Consequence of a narrow interpretation would either be that

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275 "alle Streitfragen aus dieser Vereinbarung", id.
276 id. at 173
277 id.
278 id.
279 id.
280 Bundesgerichtshof, judgment of Feb. 27, 1970, 53 BGHZ 315, 320
281 id. at 322
(a) the arbitrator has to submit the dispute to a state court and the arbitration proceeding can continue only after a favorable decision of the court or
(b) the arbitration proceeds under the risk that a state court later on holds that the contract was void and sets the award aside.\textsuperscript{282}

In 1986 the Court\textsuperscript{283} had to decide a similar case like National Oil dealing with an alleged equity award. The court held that an equity decision is only possible if the arbitration clause provides for it.\textsuperscript{284} The incorrect application of the stipulated (correctly) applicable law, however, is no basis for the vacation of an award.\textsuperscript{285}

4. Comparison

The court decisions on Art. V(1)(c) are difficult to compare as they deal mainly with different aspects of the scope of submission. With regard to the broad interpretation of the panel's competence by German courts great differences unlikely. As to the allegation that the arbitrators acted as

\footnotesize{\textsuperscript{282} id. at 323; similar Bundesgerichtshof, judgment of May 5, 1977, 68 BGHZ 356, 367 (holding a "Kompetenz-Kompetenz" clause valid if the parties have the power to enter into amicable settlement within the meaning of § 1025 ZPO)

\textsuperscript{283} Bundesgerichtshof, judgment of Sept. 26, 1985, 39 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1436 (1986)

\textsuperscript{284} id. at 1437

\textsuperscript{285} id.; see also MUEKO-GOTTWALD, supra note 84, at Art. V no. 22}
"amiable compositeur" only the German jurisdiction positively stated that such a status needs to be stipulated. However, like the U.S. decision, the court avoided to apply this standard and circumvented it on factual grounds. In addition to the similar jurisdiction on equity, a further possible excess of the arbitrator's competence should be mentioned: the case that the arbitrator decides a dispute relying upon another law than the one the parties had agreed upon. Here, a distinction has to be drawn: If the panel by mistake applies a law other than the stipulated law, this choice of law is not the result not of a misapplication of procedural but substantive law. Such a misapplication is not reviewable by a state court. Only an arbitrary decision of a panel to apply the incorrect substantive law may result in a refusal of enforcement. A domestic award can be vacated whereas a foreign award can be recognized although the arbitrators based their decision on equity rather than on law.

286 MUEKO-GOTTWALD, supra note 84, at Art. V no. 24

287 MUEKO-GOTTWALD, id.; SCHLOSSER, supra note 132, at no. 863

288 SCHLOSSER, id.
5. Further theoretical considerations

a) The applicable law

Art. V (1)(c) does not make any reference to the applicable law. For its determination, two other subsections - (a) and (d) - refer to the parties' agreement or the law of the country where the award was made. None of the provisions in paragraph (1) refers - contrary to paragraph (2) - to the law of the country where recognition and enforcement is sought. From a systematic point of view, the most homogenous approach, therefore, is to apply the law chosen by the parties or the one of the country where the award was made.289 Contrary to Art. V (1)(a) paragraph (c) requires a (valid) agreement, the problem dealt with is its scope. A parallelism to Art. V (1)(a) arises when the arbitrator decides a dispute outside the scope of submission. One might argue that for such a subject matter no valid agreement exists and Art. V (1)(a) is applicable. Art. V (1)(a) as the more specific provision should be, nevertheless, applied.

b) The problem of Separability and "Kompetenz-Kompetenz"

The issue of "Kompetenz-Kompetenz"290 is frequently mentioned as a main difference between the U.S. and German

289 VAN DEN BERG, supra note 27, at 312; MUEKO-GOTTWALD, supra note 84, at no. 21; Sanders, supra note 41, at 274

290 the literal translation of "Kompetenz-Kompetenz" would be "competence-competence" which is irritating because of the different meaning in both legal systems
jurisdiction. Although apparently the same term is used in both legal systems it has to be noted that the legal meaning is not exactly congruent.\(^{291}\) Instead of creating more confusion by trying to define "separability", "competence competence" (within the U.S. meaning) and "Kompetenz-Kompetenz" (within the German meaning), this discussion will be limited to an abstract description of the involved problems.

The first problem to address arises out of the situation that a defendant might try to escape from enforcement by claiming the invalidity of the contract. Assuming that the arbitration clause is only a paragraph within the whole (main) contract, its invalidity would include a consequent and invalid arbitration award.

However, it has been unanimously recognized that an arbitrator has at least the competence of a preliminary ruling on his own competence;\(^ {292}\) otherwise mere dilatory tactics would be supported.\(^ {293}\) The nature of such a "preliminary ruling" implies the temporary effect and the risk of long litigation to find out whether the arbitration panel or a state court was competent. This would contravene

\(^{291}\) SCHLOSSER, supra note 132, at no. 553; but see REDFERN & HUNTER, supra note 144, at 276 note 76 (for an example of a misunderstanding of "Kompetenz-Kompetenz")

\(^{292}\) SCHLOSSER, id. at no. 546, REDFERN & HUNTER, id. at 177 and 275

\(^{293}\) VAN DEN BERG, supra note 27, at 312
the arbitration's goal of speed and simplicity.\textsuperscript{294} Typically, parties refer "any" claim arising out of a contractual relation to arbitration, i.e. they (usually) do not want to exclude disputes about the validity of the agreement itself.\textsuperscript{295} In addition to that, a court might be easily involved in a review on the merits by reviewing the arbitrator's holding on the validity of the (whole) contract.\textsuperscript{296}

Against this background, U.S. and German courts adhere to the idea of a separate arbitration agreement. By agreeing upon a contract containing an arbitral clause,

they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement.\textsuperscript{297}

In the leading U.S. case, \textit{Prima Paint},\textsuperscript{298} the Supreme Court affirmed the Second Circuit's view that "arbitration clause [...] are 'separable' from the contracts in which they are embedded,"\textsuperscript{299} by holding that "a federal court may consider only issues relating to the making and the

\textsuperscript{294} STEPHEN M. SCHWEBEL, The Severability of the Arbitration Agreement, in \textit{INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS}, 1, 4 (1987); but see REDFERN & HUNTER, \textit{id.} at 281 (stating that this has the advantage of an early final decision)

\textsuperscript{295} \textit{id.} at 3

\textsuperscript{296} SCHWEBEL, \textit{supra} note 294, at 6

\textsuperscript{297} \textit{id.} at 5

\textsuperscript{298} Prima Paint Corp. v. Flood Mfg., 388 U.S. 395 (1967)

\textsuperscript{299} \textit{id.} at 404
performance of the agreement to arbitrate."\textsuperscript{300} The German Federal Supreme Court referred to similar arguments as mentioned above (broad arbitration clause - obstructing effects)\textsuperscript{301} distinguishing between main contract and arbitration clause.

The second problem might be briefly described by the term "Kompetenz-Kompetenz." Particularly in the relationship with Germany, the use of this term can - as already mentioned - cause confusion. In the U.S. what is termed "competence-competence" is regarded as the corollary to the separability doctrine, described above.\textsuperscript{302} As such this doctrine only recognizes one contract and the competence of the arbitrator to determine the existence and scope of the arbitration clause, its validity...,\textsuperscript{303} however, is fully reviewable by a court. This competence has only a preliminary effect;\textsuperscript{304} the U.S. Supreme Court decision in Prima Paint apparently

\begin{itemize}
  \item \textsuperscript{300} id.
  \item \textsuperscript{301} Bundesgerichtshof, judgment of Feb. 27, 1970, 53 BGHZ 315, 323
  \item \textsuperscript{303} id. at 608
  \item \textsuperscript{304} SCHLOSSER, supra note 132, at 553; KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION, 358 (1993); MAURO RUBINO-SAMARTANO, INTERNATIONAL ARBITRATION LAW, 329 (1990)
\end{itemize}
assumes this. Very recently, the Supreme Court scrutinized again the scope of an arbitration agreement (arbitrability of a dispute) and the review standard of courts in the decision First Options of Chicago v. Kaplan. In general the Court acknowledged the power of a panel to decide arbitrability if the parties [explicitly] agreed to submit also arbitrability questions to arbitration. However, if such a clear and unmistakable agreement was lacking "[c]ourts should not assume that parties agreed to arbitrate arbitrability."

The German understanding of "Kompetenz-Kompetenz" as embodied in the doctrine of "Kompetenz-Kompetenz" allows the parties to extent the arbitration agreement and leave it to the arbitrators to decide with a binding effect on the existence and validity of the arbitration agreement. The jurisdictional control is then limited to the review of the validity of the agreement to include "Kompetenz-Kompetenz"

\[305\] Prima Paint, id. at 404; see also REDFERN & HUNTER, supra note 144, at 281 (stating that "[a]ny decision given by an arbitral tribunal as to its jurisdiction is subject to control by the courts of law.")


\[307\] id. at 1923

\[308\] id. at 1924

\[309\] Bundesgerichtshof, judgment of May 5, 1977, 68 BGHZ 356, 367; BERGER, id. at 359 (stating that a "Kompetenz-Kompetenz" clause precludes the courts from examining the jurisdiction of an arbitral tribunal)
into the arbitration agreement, i.e. the parties submitted to arbitration disputes arising out of
- the contract and
- the arbitration clause.\textsuperscript{310} The German approach bases on the parties' contractual autonomy: The idea behind the "Kompetenz-Kompetenz" doctrine is easily understandable in a two-step explanation:
- First step: the parties enter into an agreement containing a main contract (describing the purpose of the agreement) and an arbitration clause.
- Second step: the arbitration clause empowers the arbitrators to judge a dispute on the main contract. If some time later - arbitration proceedings are started and the question arises as to the validity of the (separate) arbitration clause, the parties can either create another panel to decide the (in)validity of the first clause or they can extend (contractual freedom!) the competence of the initial panel to this question.\textsuperscript{311} Against this background there is no reason that could justify a prohibition of such an extension at an earlier moment, i.e. when the first contract is signed.

As the "Kompetenz-Kompetenz" further limits the state court's competence, a severe standard of interpretation

\textsuperscript{310} id. at 366

\textsuperscript{311} SCHLOSSER, supra note 132, at no. 556; BERGER, supra note 304, at 359
regarding its clearness/express has to be applied.\textsuperscript{312} The second agreement, the agreement upon Kompetenz-Kompetenz, is reviewable by a state court.\textsuperscript{313} The panel has no final decision on the interpretation of such a clause.\textsuperscript{314} "Kompetenz-Kompetenz" is limited; the parties are not allowed to agree upon the arbitrability of non-arbitrable subject matters.\textsuperscript{315} It has to be underlined that, in general, the legal situation will be the same like in the U.S. because a "Kompetenz-Kompetenz" clause requires the clear and express intent of the parties. Since the jurisdiction of the German Supreme Court provides for the "Kompetenz-Kompetenz," German courts are likely to interpret an arbitration agreement in a broad sense\textsuperscript{316} whereas U.S. courts are prohibited to assume the intention of parties to include arbitrability of the dispute in the arbitration clause. Accordingly, the difference between the U.S. and the German jurisdiction is that German courts are simply more likely to assume a broad jurisdiction of the panel including the arbitrability issue.

\textsuperscript{312} ROLF A. SCHUETZE ET AL., HANDBUCH DES SCHIEDSVERFAHRENS, no. 118 (2nd ed. 1987); SCHLOSSER, supra note 132, at no. 555

\textsuperscript{313} Bundesgerichtshof, id. at 367

\textsuperscript{314} id. at 366

\textsuperscript{315} SCHLOSSER, id. at no. 556

\textsuperscript{316} Sandrock & Hentzen, supra note 45, at 57
Therefore, parties to an arbitration agreement are well advised to address this issue expressly in the contract.\textsuperscript{317}

The U.S. courts' reluctance in recognizing a binding "Kompetenz-Kompetenz" is surprising in the light of their general pro-enforcement attitude. The Supreme Court justified its reluctance by distinguishing the question of arbitrability from a partial submission to arbitration. According to the contractual character of arbitration\textsuperscript{318} the Court focussed on the parties' intentions when they sign the submission agreement. In the case of a partial submission the parties gave some thoughts to the scope of the agreement which justifies a broad reading of an arbitration clause.\textsuperscript{319} In case of arbitrability the Court relied on the idea to protect a party that might not have understood the significance of such a broad power of arbitrators.\textsuperscript{320} This distinction appears artificial. A broad reading of a partial submission involves also arbitrability questions. The reasoning of the Supreme Court bears the risk - as emphasized by the German courts - that a defendant immediately raises

\begin{footnotes}
\item[317] id.
\item[318] The arbitration tribunal is created by the parties' agreement. The state courts' jurisdiction on issues the parties have submitted to arbitration is very limited. Accordingly, an arbitrator's decision on those issues can only be set aside under narrow a circumstances; see First Options of Chicago, Inc. v. Kaplan and MK Investments, 115 S.Ct. 1920, 1923 (1995)
\item[319] First Options, id. at 1924
\item[320] id. at 1925
\end{footnotes}
the arbitrability issue to obstruct the arbitration proceeding. U.S. courts could apply their pro-arbitration doctrine on arbitrability issues since sufficient control is safeguarded by a review of the state courts on the enforcement stage.

Regarding the mentioned advantages of avoiding a time and money consuming removal to a state court, one German commentator proposes the following distinction: in absence of an express statement he wants to assume the parties' will in favor of a "Kompetenz-Kompetenz" clause if the claimant initiates proceedings before an arbitration panel; conversely, he denies the power of a panel to rule on its own jurisdiction with a binding effect when the claimant starts a state court action.321 However, the "Kompetenz-Kompetenz" could not develop any significant importance in international arbitration.322

6. Partial enforcement

Two forms of awards requiring a partial enforcement have to be distinguished: (a) the infra petita award that decides less questions than submitted to arbitration, and (b) the ultra or extra petita award that decides more than submitted. In both cases distinctions have to be made. In the former case issues decided by the arbitrators have to

321 Sandrock, supra note 12, at 49
322 STEIN/JONAS-SCHLOSSER, supra note 129, at no. 67
be separated from the ones left undecided, in the latter the submitted issues from the non-submitted. A partial award is generally enforceable (if it can be separated), however, it should not be enforced if the enforcement is an unreasonable burden for the defendant.\textsuperscript{323}

D. Incorrect procedure or composition of the panel

1. Introduction

The forth defense is as follows:

The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; ....

The defense deals with the improper composition of the panel or improper procedure as a ground for refusal. Art. V (1)(d) has been rarely discussed in courts and the defense has been always rejected by U.S. and German courts.

2. U.S. court decisions

The first reported Art. V (1)(d) case is Imperial Ethiopian v. Baruch-Foster.\textsuperscript{324} The written agreement between Imperial and Baruch-Foster mentioned that the third arbitrator should "have no connection either directly or

\textsuperscript{323} STEIN/JONAS-SCHLOSSER, id. at no. 68 (also stating that an ultra petita award typically involves a due process infringement); VAN DEN BERG, supra note 27, at 321

\textsuperscript{324} Imperial Ethiopian Gov't v. Baruch-Foster Corp. 535 F.2d 334 (5th Cir. 1976)
indirectly with either Government or BFC...."  
Six months after the award the award had been rendered, Baruch-Foster found out that the president of the panel had drafted the civil code for the Ethiopian government. They, therefore, claimed a material connection between arbitrator and one party. The District Court rejected Baruch's defense on grounds that BFC had waived any objection. The Fifth Circuit affirmed the District Court's decision but did not apply the waiver theory. First, it found that first the defense was raised belatedly. Secondly, BFC "had brought forward nothing to show any semblance of substance" that the earlier engagement disqualified the arbitrator, and therefore denied any discovery.  
Interestingly, the Court of Appeals declined to follow the waiver theory of the District Court. The court's reasoning using the argument of a belated defense and the requirement of a "semblance of substance" for discovery offered a more flexible approach than the relatively rigid

325 id. at 335 note 1
326 id. at 336; Prof. David had on worked for the Government between 1954-1958, about 16(!) years before the arbitration proceedings, id. at 337
327 id. at 335
328 id.
329 six months after notification of the award, id. at 336
330 id. at 337
331 id.
waiver theory of the District Court that only imposes a time limit. The latter does not allow any substantive review. The Court of Appeals keeps a backdoor open to review more closely a relationship between a party and an arbitrator even a few months after an award has been rendered if a lack of impartiality is more likely than in the present case: As there is no unqualified right to discovery proceedings, a party will have to bring some other grounds to show that an alleged lack of impartiality is probable. Otherwise - like Baruch - the court will assume a lack of good faith and that a defendant merely wants to delay the enforcement proceedings. Thus, it is likely to deny any requested discovery. All in all, the Art. V(1)(d) defense is promising even after months provided a defendant is able to prove a possible impartiality.

In Al Haddad v. M/S Agapi an Diakan the parties agreed upon a panel of two arbitrators - one appointed by each party.\textsuperscript{332} In case the arbitrators did not agree, the arbitration clause provided for an umpire appointed by the two arbitrators.\textsuperscript{333} Even though Al Haddad had notice of the arbitration proceedings, it neither nominated an arbitrator nor presented any defense, or participated somehow in the


\textsuperscript{333} see clause 51 as quoted, \textit{id.}
proceedings. Diakan, then, asked its arbitrator to serve as sole arbitrator. He rendered an award in favor of Diakan. Because the composition of the panel (sole arbitrator instead of umpire) did not meet the requirements the parties had agreed upon, Al Haddad challenged the award on Art. V(1)(d) grounds. Despite the fact that the award was not rendered in accordance with the parties' agreement, the court considered the award enforceable nevertheless. It reasoned that the "Convention allows recognition of an award which, although not in accord with the parties' agreement, complied with the laws of the country where the arbitration occurred." The British arbitration statute provided for a sole arbitrator if one of the parties did not appoint an arbitrator and the other called upon him to do so. The prevailing party fully complied with the British procedure. Therefore, Art. V(1)(d) could not be invoked.

334 id. at 207
335 id. at 207
336 id.
337 id. at 210
338 id. at 208
339 id. at 210
340 id.
341 id.
This decision evidences that even though a court looks primarily at the parties' agreement, it will not hesitate to apply lex fori secondarily. The underlying rationale is to avoid obstructive, anti-arbitration tactics. The defendant shall not retain all evidence and objections until the enforcement stage to prevent enforcement; in the present case the plaintiff raised the lack-of-arbitration provision argument 16 months after the court had originally stayed litigation to allow arbitration. This was additionally an unexcusable delay.342

Consequently, a party to an arbitration agreement is well advised to participate in the arbitration proceedings. Mere reliance on the fact that the arbitration proceeding did not comply with the agreement is likely not succeed before U.S. courts, if the winning party complies with a procedure as provided by the lex fori.

342 id.; see also Associated Bulk Carrier of Bermuda (Bermuda) v. Mineral Export of Bucharest (Rumania), no. 79 Civ. 5439, U.S. District Court, S.D.N.Y. judgment of Jan. 30, 1980, summary in IX YCA (1984) 462, 463-465 (deciding a similar case: the parties had agreed upon a three arbitrator panel. The defendant did neither appoint an arbitrator nor attended the hearing. Applying the same reasoning as the Haddad Court the District Court referred to § 7(b) of the English Arbitration Act which provides for such a procedure. Consequently, the court could not find a violation of the agreement of the Convention.)
In *Societe Nationale v. Shaheen*\(^{343}\) the defendant asserted that a three member panel contravened the arbitration agreement and ICC Rules.\(^{344}\) The contractual arbitration clause, however, provided for one or more arbitrators according to ICC Rules. These rules leave it to the ICC Administration to decide whether one or three arbitrators are appropriate.\(^{345}\) Additionally, *Shaheen* claimed a procedural defect because the award had not been rendered within the time limit of six months as provided by the ICC Rules.\(^{346}\) The court also rejected this defense on two grounds: The party could have raised this objection before the panel, and as it did not, it thereby waived its objection.\(^{347}\) Secondly, the ICC Rules allow an extension on the time period by the ICC Court of Arbitration; it appeared that the ICC Court had complied with its rules.\(^{348}\) Therefore, Art. V(1)(d) was no valid defense.\(^{349}\)


\(^{344}\) *id.* at 64

\(^{345}\) *id.* at 65

\(^{346}\) *id.* at 65

\(^{347}\) *id.* at 65

\(^{348}\) *id.* at 65

\(^{349}\) *see also* American Construction Machinery & Equipment Corp. Ltd. v. Mechanized Construction of Pakistan Ltd., 659 F.Supp. 426, 428-429 (rejecting an Art. V(1)(d) defense after the defendant had signed a contract agreeing (a) to have the
3. German court decisions

There are only two German court decisions dealing with an Art. V (1)(d) issue. In the first case the Hamburg Court of Appeals\(^{350}\) enforced an award even though the award was rendered without reasons. According to German law an award has to be vacated if the arbitrators did not provide the reasons for an award unless the parties had waived this right.\(^{351}\) Referring to the applicable English law the court could not find a violation of Art. V (1)(d) because under English law arbitral awards were generally issued without reasons.\(^{352}\) If, however, an award is rendered without reasons contrary to the parties' agreement, this would constitute an infringement of Art. V(1)(d).\(^{353}\)

Similarly to the U.S. case in Societe Nationale, the defendant in SpA Ghezzi v. Jacob Boss\(^{354}\) invoked Art. V (I)

\(^{350}\) Oberlandesgericht Hamburg, judgment of July 27, 1978, IV YCA (1979) 266

\(^{351}\) § 1041(1)(no.5), (2) respectively; § 1044 ZPO, the specific provision, for the non-enforcement of foreign award does not mention the lack of reason as a ground for a refusal. Accordingly, it cannot be regarded as a violation of German public policy; SCHLOSSER, supra note 132, at no. 852

\(^{352}\) id. at 267

\(^{353}\) MUEKO-GOTTWALD, supra note 84, Art. V at no. 33

\(^{354}\) Bundesgerichtshof, judgment of April 14, 1988, English language summary in XV YCA (1990), 450
(d) to oppose enforcement because the arbitration procedure was allegedly inconsistent with the ICC Arbitration Rules (Art. 18).\textsuperscript{355} Art. 18(1) of the ICC Rules provides that an arbitrator shall render an award within six months. The present award was made about three years after the initiation of the proceedings. Taking into consideration the language of Art. 18 (1) ICC Rules the Supreme Court held that this article does not provide for an automatic extinction if the six month period is exceeded.\textsuperscript{356} On the contrary, the ICC Rules leave it up to the ICC Court to replace an arbitrator "if appropriate," or to extend the time limit (Art. 18(2) and (3)). The ICC Court extended the time limit several times, and, consequently, complied with its own rules which excluded an Art. V(1)(d) violation.\textsuperscript{357} Furthermore, the court held that the protective purpose of the time limit can also be attained by its extension:

A refusal to extend the time limit would result in the decision on the merits being deferred to a different arbitrator. The protection given under Art. V (1)(d) of the New York Convention, however, does not cover the mere possibility that the new arbitrator would have decided differently on the merits.\textsuperscript{358}

\textsuperscript{355} id. at 453

\textsuperscript{356} id. at 453; Art. 18(1) ICC rules reads:" The arbitrator shall make his award within six months..."

\textsuperscript{357} id. at 452-453 sub [3]

\textsuperscript{358} id. at 454 sub [5]
4. Comparison

Art. 18 ICC Rules have been discussed in the U.S. and Germany - without success for the defendant: The District Court in Shaheen and the Federal Supreme Court in SpA Ghezzi refused a stay to enforcement, since the ICC Court extended the time period to render an award according to the rules. The U.S. decision in Al Haddad indicates that a U.S. will at least subsidiarily apply the law of the forum. The question of impartiality concerns the principle of fundamental justice of a proceeding. In particular the German jurisdiction considered proceedings with an impact on the composition of the panel, such as § 7(b) of the English Arbitration Act and similar contractual proceedings, primarily under the public policy defense of Art. V(2)(b). The U.S. courts also acknowledge the public policy aspect of the arbitrator's impartiality, however, less pronounced than the German courts.

5. Further theoretical considerations

a) The applicable law

Art. V(1)(d) gives rise to the question of the relationship between first, the rules concerning the composition of the panel, secondly, the procedure as set by the parties' agreement and, thirdly, a - possibly contravening - law of the country where an award was made. This is a result of two contravening conceptions during the
negotiations: one in favor of contractual freedom to create an independent, supranational arbitral procedure, the other arguing for a subjection of the panel to the law of the country of issuance. 359 "The result is in full accordance with neither position and is capable of two interpretations." 360 Contrary to Art. V(1)(a) which refers expressly to a stipulated law, 361 Art. V(1)(d) does not provide for a choice of law but makes reference only to the agreement. 362 Conversely, it has been pointed out that Art. V(1)(d) can be so construed that the parties' choice of law is limited to that of a particular country. 363 However, the systematic and wording of Art. V(1)(a) and (d) underline the broad scope the parties have to formulate an agreement. 364 The parties are not bound by any procedural law, especially not the lex fori, or arbitration rules of international

359 Quigley, supra note 1, at 1068; Swisher, supra note 11, at 290 (explaining that the ICC regarded as a main defect of the Geneva Convention that an award had to comply strictly with the procedure of the country where the arbitration took place. Therefore, the ICC advocated the idea of an "international award" that is rendered completely independent of any national law.); Contini, supra note 39, at 299 (referring to the same problem of the Geneva Convention)

360 West, supra note 103, at 116

361 "the law to which"

362 MUEKO-GOTTWALD, supra note 84, at Art. V no. 29

363 Martinez, supra note 2, at 503; West, id.

364 MUEKO-GOTTWALD, id.
organizations such as the ICC or the AAA.\textsuperscript{365} A court has to look primarily at the parties' agreement\textsuperscript{366} and the (apparently) chosen law.\textsuperscript{367} Key expressions in the language of paragraph (d) are the express reference to the "agreement of the parties" and that only "failing such agreement" the law of the forum shall be applied. Consequently, it cannot be a successful defense to claim that the panel's composition or the procedure did not comply with the mandatory domestic arbitration law even though in accordance with the agreement.\textsuperscript{368} It is, however, generally recognized that the law of the country where the arbitration took place still fulfills two functions: the first one results directly from the wording of the provision: it is applicable if the parties have provided nothing (subsidiary function);\textsuperscript{369} the second is a complementary function for aspects for which the parties did not provide any rule.\textsuperscript{370}

The contractual autonomy of the parties is not unlimited because if the award violates mandatory domestic law in the

\textsuperscript{365} MUEKO-GOTTWALD, \textit{id.}; Quigley, \textit{supra} note 1, at 1068

\textsuperscript{366} MUEKO-GOTTWALD, \textit{id.}

\textsuperscript{367} STEIN/JONAS-SCHLOSSER, \textit{supra} note 129, at no. 75

\textsuperscript{368} VAN DEN BERG, \textit{supra} note 27, at 327; STEIN/JONAS-SCHLOSSER, \textit{id.} at no. 76

\textsuperscript{369} VAN DEN BERG, \textit{id.} at 325; STEIN/JONAS-SCHLOSSER, \textit{id.}

\textsuperscript{370} \textit{id.}; in matter of arbitration between InterCarbon Bermuda Ltd. v. Caltex Trading and Transport Corp., 146 F.R.D. 64, 72 (D.S.D.N.Y. 1993) (applying this function)
country of its origin, it can be set aside in that country which leads to a denial of its enforcement according to Art. V (1)(e).\(^{371}\) Freedom of contract it is additionally limited by Art. V (1)(b) and (2)(b).\(^{372}\) If the parties modify the mandatory law of the country where the proceedings take place, this may cause the following "unfortunate but inevitable side-effect."\(^{373}\) If the arbitrator follows the mandatory law contrary to the agreement an exequatur court may deny enforcement on grounds of Art. V (1)(d); conversely, if they follow the rules as provided by the agreement, they risk that their award may be set aside by a local court due to a violation of local mandatory law.\(^{374}\) In the country of issuance the Convention is not applicable.\(^{375}\)

b) The standard for infringement of procedural rules

After determining the applicable law, one has to determine what constitutes a violation of this law. Not every infringement\(^{376}\) during the proceedings should be deemed a

\(^{371}\) MUEKO-GOTTWALD, supra note 84, at Art. V no. 30

\(^{372}\) id.

\(^{373}\) VAN DEN BERG, supra note 27, at 330

\(^{374}\) VAN DEN BERG, id.; MUEKO-GOTTWALD, id.

\(^{375}\) STEIN/JONAS-SCHLOSSER, supra note 129, at no. 74; note that the problem of appearance of impartiality due to particular proceedings, like § 7(b) of the English Arbitration Act, will be discussed under Art. V(2)(b)

\(^{376}\) however, SCHLOSSER, supra note 132, at 819
violation of the rules because this would probably provoke dilatory tactics by the losing party in an enforcement court. Following the systematic of the provision, the standard for determining whether there is a violation should be set by applicable procedural law. Therefore, a procedure is improper within the meaning of Art. V(1)(d) if the award could be vacated under applicable domestic law. There is no reason to apply a different procedural, the enforcing state's, standard for the determination of a violation rather than for the procedure itself. The reasons for a vacation under domestic U.S. laws are enumerated in § 10 FAA, for Germany in § 1041 ZPO.

377 MUEKO-GOTTWALD, supra note 84, at Art. V no. 34; Compagnie des Bauxites de Guinee v. Hammermills, Inc. (1992 U.S. Dist. LEXIS 8046 *1, 16 (D.D.C. 1992).(mentioning the same standard in the dictum (the court could not find any violation of procedural rules): In the light of the "general pro-enforcement bias" the court only wanted to set aside an award if a "violation worked substantial prejudice to the complaining party," (id. at 17) i. e. the court apparently would have excluded minor infringements; see also in the matter of arbitration between P.T. Reasuransi Umum Indonesia v. Evanston Insurance Co., 1992 WL 40073, *1, 1-3 (D.S.D.N.Y. 1992)

378 MUEKO-GOTTWALD, id.

379 id.

380 id.
E. Binding effect of an award

1. Introduction

The fifth and last affirmative defense is Art. V (1)(e):

The 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.

Art. V(1)(e) offers two defenses to a potential defendant: an award
- has not yet become binding or
- has been set aside or suspended by a competent authority.

It reflects the inability of the Conference to agree on the solution of the 'double exequatur.' No one wanted the Convention to require judicial proceedings in confirmation of the award in both the rendering and the enforcing State. At the same time, an award which had been set aside by competent authority in the State where rendered should hardly be granted enforcement in another State.\(^{381}\)

In both the United States and Germany Art. V (1)(e) gave rise to many court decisions dealing with all parts of the defense. "The most troublesome area is the effect of a pending appeal at the place of arbitration."\(^{382}\) The following the court decisions are classified in several parts of subparagraph (e).

\(^{381}\) Quigley, supra note 1, at 1069; Contini, supra note 39, at 303-304 (stating that the exact meaning of the term "binding" was not clarified during the negotiations and giving the interpretations as proposed by several representatives)

\(^{382}\) McClendon, supra note 16, at 66
2. Court decisions
   a) Binding effect
      aa) U.S. court decisions

      The first reported case, and still the leading U.S. authority, is *Fertilizer Corp. of India v. IDI*\(^{383}\) in which IDI tried to evade enforcement by referring to Art. V(1)(e). At that time the award was under review by an Indian Court. Allegedly any error of law prevented a binding effect.\(^{384}\) FCI countered that following Indian law, ICC Rules and the parties' agreement, the award is binding and compared the situation with an appealable, albeit binding District Court decision.\(^{385}\) After analyzing Indian jurisdiction in depth the court found that the award was final and binding,\(^{386}\) and additionally referred to a comment by Professor Aksen stating that a binding effect is only excluded if there is a further arbitral recourse to prevent obstructing (litigation) tactics by a losing party trying to avoid enforcement of an award.\(^{387}\)

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\(^{383}\) *Fertilizer Corp. of India v. IDI Management, Inc.* 517 F.Supp. 948 (D.S.D. Ohio 1981)

\(^{384}\) id. at 956

\(^{385}\) id.

\(^{386}\) id. at 957

This last statement is inconsistent to the further reasoning of the court. If the test is simply whether there is an "arbitral appeal," the whole discussion of the legal background in India was superfluous and irritating. It is unclear whether a court has to engage in a detailed analysis of the law of the country of issuance to determine a binding effect, or whether it simply must determine whether there is an arbitral recourse. At the end of a very long opinion the court reaches what appears to be a conclusion, yet the language is ambiguous. One might argue that Aksen's comment represents a conclusion of the court or the test to be applied. Doubts remain. It is often submitted that the Fertilizer finding has to be "viewed in the light of article VI." Instead of Art. V(1)(e), the court used the more flexible provision of Art. VI. According to Art. VI a court can require a security.

Applying the mentioned test, an enforcing U.S. court will have to look at German law. It will recognize that the ZPO does not provide for any kind of full review on the merits. The only possible recourse is the claim for annulment (§ 1041 ZPO) which allows a vacation of the award - similar

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388 Michael H. Strub, Resisting Enforcement of Foreign Arbitral Awards under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines, 3 SW. U. L. REV. 1031, 1053 (1971)

389 Martinez, supra note 2, at 506; West, supra note 103, at 119

390 Fertilizer, id. at 962
to the U.N. Convention and § 10 FAA. This is used in rather extreme cases on limited grounds. Such a legal remedy does not fulfill the standard of ordinary means of recourse. Therefore, an award rendered under German law can be regarded as binding.

In Dworkin-Cosell v. Avraham\textsuperscript{391} the problem of a "binding" award was discussed from a more formal point of view: the necessary clarity to determine the extent of the binding effect of an award. Since in the present case the award did not specify exactly "whether, and to what extent" the parties' dispute was decided,\textsuperscript{392} it remains unclear to what extent a binding effect was reached. The court affirmed that an incomplete, ambiguous or contradictory award would not be enforced.\textsuperscript{393} Therefore, it remanded the award for further clarification to the arbitration panel.\textsuperscript{394} This case reflects - as mentioned - a more formal aspect of the problems of interpreting "binding."

bb) German court decisions

The first reported German case on the binding effect of an award arose between a French and a German party about a


\textsuperscript{392} id. at 162

\textsuperscript{393} id.

\textsuperscript{394} id. at 161
transaction in woolen products. The Court of First Instance in Bremen\textsuperscript{395} interpreted the word "binding" in the sense that an "award is not open to arbitral or judicial appeal, irrespective of the inadmissibility of an action for setting aside."\textsuperscript{396} This definition has been employed by other German courts since then, including the Federal Supreme Court. The latter considers an award "binding" when it can neither be appealed before an arbitration board with appellate jurisdiction, nor can it be attached in a state court by means of legal remedies. The possibility of subsequently setting aside the arbitral award in the country of rendition by means of legal action similar to the German action for annulment does not affect its binding character.\textsuperscript{397}

This jurisdiction can be summarized in the distinction between ordinary and extraordinary means of recourse, i. e. only the further allowing a review on the merits and hindering a binding effect.\textsuperscript{398} American law allows a challenge of an award only on the mentioned limited grounds according to § 10 FAA. Section 10 does not provide for a review on the merits, a vacation of an award can be based

\begin{itemize}
\item \textsuperscript{395} Landgericht Bremen, judgment of June 8, 1967, English language summary in II YCA (1977) 234
\item \textsuperscript{396} id.
\item \textsuperscript{397} Bundesgerichtshof, judgment of May 10, 1988, English language summary in XV YCA (1990) 450, 452; also Bundesgerichtshof, judgment of May 10, 1984, English language summary in X YCA (1985) 427, 427 (stating somewhat shorter that an award has become binding if "recourse on the merits to an arbitral appeal tribunal or a court is no longer available against the award.")
\item \textsuperscript{398} Sandrock & Hentzen, supra note 45, at 61
\end{itemize}
only on the violation of the mentioned fundamental principles. This does not meet the requirements of an ordinary means of recourse. Consequently, once an award is rendered, it can be considered as binding.

cc) Irritual award and consideration of national law

In both jurisdictions the rather specific question of an Italian "irrituale award" was discussed. Italian law distinguishes between two types of arbitration: "arbitrato rituale" and "arbitrato irrituale." The latter was only regarded as a contract and, as such, was fully reviewable by Italian courts, whereas an "arbitrato irrituale" award as a "real" award could be only challenged on limited grounds. Since those differences do not exist in U.S. or German arbitration laws the particular value of these decisions in how far the courts consider the law of the country where the award was made to determine its binding effect.

In Spier v. Calzaturificio Tecnica the parties had presented contrary evidence on this issue to the court. Reviewing the legislative history the court acknowledged the nature of the Convention as a compromise "between national

399 Sandrock, supra note 12, at 62


401 id.
interests and international aspirations." The national interests are evidently taken into consideration by Art. V(1)(e) providing for a refusal ground in case of a successful challenge in the country of issuance. The permissible scope of a challenge linked with the question of the nature of an "irrituale" award had to be considered under Italian law by an Italian court. Although the court indicated own jurisdiction to decide whether the "arbitrato irrituale" falls within the Convention, it did not involve any discussion as to the binding effect under the Convention.

Somewhat differently from the U.S. court, the Hamburg Court of Appeals started its discussion from the question whether Italy intended to include this type of award under the Convention. It observed that - if applicability was assumed - this would lead to unjustified differences in enforceability (enforceability only abroad), and secondly that the prevailing opinion determined the enforceability according to the law of the country where the award is made.

\[\text{id. at 875; see Quigley, supra note 385}\]
\[\text{id. at 875}\]
\[\text{id.}\]
\[\text{id. at 875: "That question, although it arises here, would not seem to arise in Italy, since the award was rendered in Italy and is challenged in Italian courts."}\]
\[\text{id. at 226}\]
Therefore, the court did not assume that Italy intended to include the "lodo irrituale," and denied a binding effect on the parties. These two decisions, both referring to national law bear the risk that a strong reference to national law reintroduces a "double exequatur" proceeding.

The problem of the binding effect of this specific Italian arbitral award raises the more general question how this effect has to be determined, when an award can be considered to be "binding". Two countervailing legal opinions can be distinguished:
- an award is binding when it is regarded as "binding" under the law of its origin or
- according to a more autonomous interpretation "binding" simply means that no ordinary means of recourse are available, because any other interpretation would render Art. VI meaningless.

Underlying rationale for the first interpretation is an alleged greater certainty of law, whereas the second legal opinion stresses the danger of a re-introduction of a "double-exequatur" in case of too much reliance upon national


409 SCHLOSSER, supra note 132, at no. 787

410 Sanders, supra note 41, at 275

411 MUEKO-GOTTWALD, supra note 84, at Art. V no. 35
arbitration laws.\textsuperscript{412} Unanimously, it has been found that one of the main goals of the U.N. Convention was eliminate the "double exequatur" which required a confirming judgment and an enforcing judgment, a rather impractical procedure, consuming time and money.\textsuperscript{413} However, if the binding effect has to be determined according to the law of the award's origin this may lead to the re-introduction of double exequatur if the domestic law provides for it. Problems arising out of formal requirements for domestic awards might create the necessity of introducing exemptions to such a rule, i. e. exemptions to the national law.\textsuperscript{414} Although this doctrine might claim a higher certainty of the law, the double exequatur is a consequence that was - after the negative experiences with the Geneva Conventions - clearly to be avoided. To avoid problems with domestic formal requirements exemptions might have to be created against the rule.\textsuperscript{415} The fact that the New York - in contrary to the Geneva Conventions - employs the term "binding" instead of "final"\textsuperscript{416} favors an independent, autonomous interpretation

\footnotesize
\textsuperscript{412} Sanders, \textit{id.}

\textsuperscript{413} VAN DEN BERG, supra note 27, at 337; Contini, \textit{supra} note 39, at 304; McClendon, \textit{supra} note 16, at 66; Strub, \textit{supra} note 388, at 1045

\textsuperscript{414} SCHLOSSER, \textit{supra} note 132, at no. 787

\textsuperscript{415} \textit{id.}

\textsuperscript{416} finality of an award had in the practice of the Geneva Convention required a leave for enforcement in the country where the award was rendered (Sanders, \textit{supra} note 41, at 272-
to avoid possible domestic exequatur requirements: to avoid possible domestic exequatur requirements: the distinction between ordinary and extraordinary means of recourse offers such an autonomous interpretation and avoids the difficult determination as to when an award is binding under the applicable foreign law. However, a reference to a national law cannot be avoided in order to determine the legal possibilities of a review on the merits. Therefore, an award can be deemed "binding" once it is rendered.

Both jurisdictions seem to adhere to the latter, supranational doctrine. They underline the fact that an award can be regarded as "binding" if there is no arbitral recourse. A different interpretation might render Art. VI meaningless.

b) Merger

The problem of a merger of an arbitral award into a judgment is usually discussed under Art. V(1)(e) even though

273)

417 VAN DEN BERG, supra note 27, at 342; Sanders, supra note 41, at 275

418 id.

419 id.; see the problems arising out of the distinctions under Italian law

420 VAN DEN BERG, supra note 27, at 342

421 VAN DEN BERG, id. at 345

422 Sanders, supra note 41, at 275
it does not really fit into these exceptions. With a confirming court decision an award has in any case binding effect, but its character as an arbitral award may be questioned. In many common law countries a confirming judgment has an absorbing effect according to the merger doctrine: the award is no longer an award but is treated as a court decision.423

This doctrine has been implicitly affirmed by Victrix Steamship v. Salen Dry Cargo.424 Even though the court apparently assumes that a confirming judgment absorbs an award, it found that "federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy."425 Referring to Waterside,426 it is clear that the Convention is not applicable to foreign judgments confirming foreign arbitral awards. The court, however, wants to indicate that this distinction will not cause a great practical difference.

The merger doctrine has been also discussed before German courts. In one case the Federal Supreme Court had to

423 VAN DEN BERG, supra note 27, at 346; SCHLOSSER, supra note 132, at no. 788


425 id. at 713

decide whether an award confirmed by the Supreme Court of the State of New York could be still enforced as a foreign award.\footnote{Bundesgerichtshof, judgment of March 27, 1984, English language summary in X YCA (1983) 426} In this decision the Supreme Court relied upon an extraterritorial effect of the merger doctrine. Consequently - as only a judgment was left - this had to be enforced according to §§ 722 et seq. ZPO.\footnote{those are the rules for the enforcement of a judgment; \textit{id.} at 427}

In a more recent decision\footnote{Bundesgerichtshof, judgment of May 10, 1984, English language summary in X YCA (1983) 427} the court modified this attitude drastically and found that a party has a choice between the enforcement of the award or the confirming judgment. The court excluded an extraterritorial effect of a confirming judgment on the enforcement of the award (according to § 1044 ZPO).\footnote{\textit{id.} at 429; SCHLOSSER, supra note 132, at no. 784 (doubting the denial of the extraterritorial effect and assumes that a confirming judgment does not influence the independent existence of an award)}

c) Partial award

The question of the extent of a binding effect\footnote{Dworkin-Cosell Interair Courier Services, Inc. v. Avraham, 727 F.Supp. 156 (D.S.D.N.Y. 1989)} has to be clearly distinguished from the problem of a partial award that allegedly does not decide the entire award but
leaves open the possibility of a further arbitration. The court in Island Territory v. Solitron\textsuperscript{432} found that the possibility of another arbitration at some time in the future does not prevent an actual award from being "final" and "definite",\textsuperscript{433} i. e. enforceable. This dispute was decided under § 10(d) FAA but arose in an international context, and can, therefore, be deemed a guideline for the enforcement of a partial award. Partial awards are enforceable in Germany as in the U.S.\textsuperscript{434}

d) Award set aside or suspended and the problem of the competent authority

Compared to the proceeding of first alternative of Art. V(1)(e), there is relatively little jurisdiction about the setting aside or the suspension of an award by a national court. There is no reported U.S. case contributing substantively to the interpretation of the second alternative.

In Germany the Supreme Court ruled that the German Court can only annul an award if it was rendered in an another


\textsuperscript{433} id. at 12

\textsuperscript{434} SCHLOSSER, supra note 132, at no. 770; MUEKO-GOTTWALD, supra note 84, at Art. V no. 36
contracting state under German law.\textsuperscript{435} This means a German court can set aside an award rendered in the U.S. as long as German law was applicable. If an award is rendered under German procedural law, considered a German award according to procedural theory.\textsuperscript{436}

The Court of Appeals in Cologne,\textsuperscript{437} although it had refused to enforce the award, did not set it aside. The court recognized a justified interest of the German defendant, however, found that a setting aside would "mean an impermissible interference with arbitration."\textsuperscript{438} The applicable law in this case was Danish law. Therefore, the court correctly applied the aforementioned principle of the Supreme Court.\textsuperscript{439}

These decisions reflect the problem of determining the "competent authority." The language only refers to "the competent authority of the country in which, or under the law of which, that award was made." In the context of the Convention this language is somewhat ambiguous: the plain meaning seems to create a broad jurisdiction for the court in the country where or under the law of which the award is

\begin{itemize}
  \item \textsuperscript{435} Bundesgerichtshof, judgment of Feb. 12, 1976, English language summary in V YCA (1980) 242, 243
  \item \textsuperscript{436} see also Sanders, \textit{supra} note 41, at 276
  \item \textsuperscript{437} Oberlandesgericht Koeln, judgment of June 10, 1976, English language summary in IV YCA (1979) 258
  \item \textsuperscript{438} \textit{id.} at 260
  \item \textsuperscript{439} see also Sanders, \textit{id.} (mentioning this principle)
\end{itemize}
made; on the other hand, this language might refer (only) to the different (alternative) designations of an award as "foreign," either according to the territorial ("country of which...") or procedural ("or under the law of which...") doctrine.

If the discussed sentence has to be interpreted literally, this would give courts a broad jurisdiction: a U.S. court could set aside every award rendered in the U.S. and in addition to those rendered abroad under U.S. procedural law. It has been argued that Art. V(1)(e) parallels Art. V(1)(a) in a reverse order of priority because it mentions "country of which" before "law of country."\textsuperscript{440} Although Art. V(1)(a) refers to the same choices of law it does not establish any order of priority.\textsuperscript{441} The formulation "failing any indication thereof" which creates in (a) such a priority of the parties' agreement does not exist in (e). Art. V(1)(e) uses the equal ranking term "or." It is much more likely that Art. V(1)(e) refers to the designation of the nationality of an award (in Art. I(1))\textsuperscript{442} That would explain the reference to an authority of a country "under the law of which..." in accordance with the German procedural

\textsuperscript{440} Strub, supra note 388, at 1049; VAN DEN BERG, supra note 27, at 350

\textsuperscript{441} however: Strub, \textit{id.} at 1049 (not taking into consideration of Art. V(1)(a))

\textsuperscript{442} VAN DEN BERG, supra note 27, at 350; MUEKO-GOTTWALD, supra note 84, at Art. V no. 40
theory. Assuming that competent is only an authority of the country of the award's origin, for the determination of this origin the two doctrines have to be applied, i. e. a German court is competent when German procedural law had been applied, an American court when the award was rendered on U.S. territory.

A problem arises when a German court has to recognize a U.S. decision on an award rendered under German law in the U.S. In this case both courts are competent to set an award aside.\textsuperscript{443} Another problem may arise if after the granting of enforcement a competent authority sets the award aside.\textsuperscript{444} This question should be resolved according to Art. III under the law of the enforcing country:\textsuperscript{445} For the U.S. the FAA does not provide for an explicit solution, but a reopening of the confirmation proceedings might be possible; in Germany this situation would lead to an analogous application of §§ 1044(4), 1043 ZPO, the provisions governing the annulment of a domestic arbitral award.\textsuperscript{446}

\textsuperscript{443} Quigley, supra note 1, at 1069; MUEKO-GOTTWALD, id.
\textsuperscript{444} VAN DEN BERG, supra note 27, at 350
\textsuperscript{445} id.
\textsuperscript{446} for the U.S.: Landegger v. Bayerische Hypotheken und Wechsel Bank, 357 F. Supp. 692, 695-696 (D.S.D.N.Y. 1972) (mentioning this possibility for a similar problem under the Treaty of Friendship, Navigation and Commerce); for Germany: SCHLOSSER, supra note 132, at no. 899; MUEKO-GOTTWALD, supra note 84, at Art. V no. 43
It is not clear what the drafters intended with the "suspension defense"\textsuperscript{447} but it is likely that suspension means a court decision temporarily vacating the binding effect among the parties.\textsuperscript{448} The second part has no practical relevance.

F. Adjournment of decision and suitable security

Art. VI provides:

If an application for setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Art. VI is frequently mentioned within the context of Art. V(1)(e), it parallels and complements the problems of Art. V(1)(e): the problem of two (parallel) court proceedings, one to enforce an award in the exequatur state, the other to revoke the foundation of such an enforcement by contesting the award in the country of issuance.

The mechanics as introduced by the U.N. Convention is result of the negative experiences with the 1927 Geneva Convention requiring an award to be final. This was a very low requirement to delay the enforcement proceedings.\textsuperscript{449} The

\textsuperscript{447} VAN DEN BERG, id. at 351; MUEKO-GOTTWALD, supra note 84, at Art. V no. 45

\textsuperscript{448} SCHLOSSER, supra note 132, at no. 789

\textsuperscript{449} VAN DEN BERG, supra note 27, at 353
New York Convention went a step further and raised the requirements for an adjournment of enforcement slightly but effectively: Art. V(1)(e) requires a binding, not necessarily "final" award, it limits the defense to arbitral recourse, on the other hand the Convention still takes into account parallel proceedings in the country of issuance, Art. VI. The substantial difference to the Geneva Convention results from the fact that Art. VI leaves it to exequatur court to adjourn its decision on the enforcement, and provides for a security. Especially the latter discourages a "let's-just-try-it attempt," an obstructionist tactics.\textsuperscript{450}

There are only two cases reported in the U.S. In both cases the defendants successfully relied upon Art. VI and the court adjourned the decision on the enforceability. In Fertilizer v. IDI, a District Court made a first attempt to find a standard for its own discretion to adjourn the proceedings: In a first step it interpreted the language of Art. VI as giving "unfettered grant of discretion."\textsuperscript{451} In absence of any specific guideline for the standard of adjournment the court emphasized the general purpose of the Convention to facilitate the enforcement procedure. It balanced this purpose against the risk of a vacating decision and concluded to adjourn enforcement "to avoid the

\textsuperscript{450} Contini, supra note 39, at 304

\textsuperscript{451} Fertilizer Corp. of India v. IDI Management, Inc. 517 F.Supp. 948, 961 (D.S.D. Ohio 1981)
possibility of an inconsistent result." The last step seems inconsistent with the court's further reasoning; this reasoning had exactly suggested an opposite result. In the light of the often-quoted general pro-enforcement bias of the Convention, the enforcement could have been easily justified. It would have been more convincing if the court had applied its argumentation in an opposite order, stating, for example, that despite the pro-enforcement bias the clear wording requires a different interpretation.

In Spier v. Calzaturificio Tecnica a New York District Court adjourned the decision on enforcement. It balanced "national interests and international aspirations," and stressed the importance of the possibility to refuse enforcement if the award has been successfully challenged in the country of issuance. Apparently the court understood this provision as expression of respect for another jurisdiction. Against this background the court concluded that the question, like the nature of an Italian award, has to be considered by the competent court of the country where the award was made. Only in the case of a "transparently

452 id. at 962
453 Strub, supra note 388, at 1055
455 id. at 875
456 id. at 875
frivolous" litigation the court would permit enforcement. Thus, to avoid a different jurisdiction in the country of issuance and enforcement, the court adjourned its decision.\textsuperscript{457}

It may questioned whether this approach better serves the necessities of the Convention. In fact the court's reasoning not to enforce an award unless the litigation is "transparently frivolous" appears to contradict the general pro-enforcement attitude. The latter would suggest enforcement unless the litigation is very likely to be successful. In fact the court "shifted the burden of proof to Spier to show why the award should be enforced rather than placing the burden on Tecnica to show why it should not be enforced."\textsuperscript{458}

There is no German case reported which contributes to the interpretation of Art. VI. Both (U.S.) decisions reflect the concern of the courts about an inconsistent decisions, one confirming, another vacating an award. The proposed standard of a "prima facie" conviction\textsuperscript{459} evidences its weakness in the Spier case where both parties offered law journal articles, expert's opinions and court decisions to

\textsuperscript{457} id.

\textsuperscript{458} Strub, supra note 388, at 1054; Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2nd Cir. 1974); see also: VAN DEN BERG, supra note 27, at 353; MUEKO-GOTTWALD, supra note 84, at Art. VI, no. 1

\textsuperscript{459} VAN DEN BERG, id.; MUEKO-GOTTWALD, id.
support their positions. With respect to the pro-enforcement goal, enforcement of the award would have been preferable. Since arbitral awards are rarely set aside the court's concern about an opposite decision is not justified. This is particularly true for both U.S. and German jurisdiction. The present application of the American courts bears the risk of an abuse of Art. VI by simply starting court proceedings in the country of origin without just cause. This dilatory tactic admittedly loses some part of its attractiveness through possibility of Art. VI to require "suitable security."

II. The public policy defenses of Art. V(2)

Art. V(2) provides:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

Systematically different from paragraph (1) a court can refuse enforcement on public policy grounds without the request of a party on its own motion. Although the conference tried to limit the number of defenses, the public policy defense was inevitable in consideration of domestic public

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461 Strub, supra note 388, at 1054
policy. The public policy defense bears the risk of becoming "a major loophole in the Convention's mechanism for enforcement" unless it is not interpreted narrowly. It leaves "the ultimate decision on the applicability of the Convention to the good faith of the contracting countries." 

A. Distinction between a national and international standard

Both jurisdictions distinguish between a domestic and international public order. For the U.S., in the area of arbitration, the Supreme Court applied a different standard to a "truly international agreement" for the first time in Scherk v. Alberto-Culver in order to comply with the necessities of international business. This standard has been affirmed by the same court in the Mitsubishi case where "at least" in international business an arbitration clause deciding antitrust matters was enforced. The German Federal Supreme Court draws the same distinction "in the

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462 Sanders, supra note 41, at 270; Aksen, supra note 387, at 13

463 Parsons & Whittemore v. Societe Generale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2nd Cir. 1974)

464 Aksen, id.


466 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 629 (1985)
interest of international trade.\textsuperscript{467} The courts normally apply a less stringent standard for international arbitration.

B. The nonarbitrability defense

1. Introduction

Art. V(2)(a) reads:

The subject matter of the difference is not capable of settlement by arbitration under the law of that country;...

Mainly historical reasons lead to the distinction between the nonarbitrability and the public policy defense.\textsuperscript{468} Arbitrability is already a requirement for the proceedings, Art. II(1). An "unfortunate" effect of Art. V(2)(a) is that arbitration can proceed to the award enforcement stage, and then the award is held unenforceable because the subject matter was inarbitrable.\textsuperscript{469} Consequently, arbitrability has to be tested twice, under the applicable


\textsuperscript{468} VAN DEN BERG, supra note 27, at 358

\textsuperscript{469} Aksen, supra note 387, at 13; REDFERN & HUNTER, supra note 144, at 146 (stating that in the worst case three national system can be involved: "The question may fall to be determined first, under the law governing the arbitration agreement; secondly under the law of the place of arbitration; and, thirdly, under the law (or laws) of the country (or countries) of enforcement")
law for the proceedings and for the enforcement.\textsuperscript{470} Art. V(2)(a) is widely regarded as a mere subdivision of the broader public policy defense in Art. V(2)(b). The latter overlaps Art. V(2)(a).\textsuperscript{471} Although Art. V(2)(a) may be deemed superfluous,\textsuperscript{472} it should be distinguished to the degree possible;\textsuperscript{473} a systematic approach in the broad public policy defense offers the a greater chance of clarity. Art. V(2)(a) might be regarded as dealing with substantive law infringements whereas paragraph (2)(b) is focussed more on procedural defects.

1. U.S. court decisions

The problem in dealing with U.S. court decisions on Art. V(2)(a) is that they have often avoided a clear distinction between nonarbitrability and the public policy defense.\textsuperscript{474} However, a distinction is preferable for clarity's sake.

\textsuperscript{470} MUEKO-GOTTWALD, supra note 84, at Art. V no. 47 note 86


\textsuperscript{472} VAN DEN BERG, supra note 27, at 368; Sanders, supra note 41, at 270

\textsuperscript{473} Heather Evans, The nonarbitrability of subject matter defense to enforcement of foreign arbitral awards in the United States federal courts, 21 N.Y.U.J. INT'L L. & POL. 329, 335 (1989)

\textsuperscript{474} Evans, id. at 335; Pietrowski, supra note 8, at 66
a) Development

The development toward a pro-arbitrability attitude is evidenced by several landmark decisions: Wilko v. Swan,475 M/S Bremen v. Zapata,476 Scherk v. Alberto-Culver,477 Mitsubishi,478 and Shearson/AmericanExpress v. McMahon.479

In 1953 the Supreme Court held in Wilko v. Swan480 that agreements to arbitrate are invalid under § 14 of the 1933 Securities Act for two reasons:481 first, the court found that "arbitration lacks the certainty of a suit of law under the Act to enforce one's rights;"482 and secondly the Securities Act of 1933 was designed to protect investors.483 Therefore an agreement to arbitrate was held void under § 14 of the Act.484

476 407 U.S. 1 (1972)
478 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 473 (1985)
480 346 U.S. 427 (1953)
481 as read by the Court in DeQuijas v. Shearson/AmericanExpress, Inc., 490 U.S. 477, 480 (1989)
482 id. at 432
483 id. at 435 (referring to 431-432)
484 id. at 434-439
These misgivings changed considerably in the 70's with the Supreme Court decision in *M/S Bremen*. This decision did not yet involve the U.N. Convention, but already clearly indicated a willingness to give up domestic legal concepts in favor of international business:

We cannot have trade and commerce in world markets and international water exclusively on our terms, governed by our laws, and resolved in our courts.

The court stressed the advantages of international arbitration as "neutral forum with expertise in the subject matter," avoiding much uncertainty and great inconvenience. Shortly after this decision, in 1974 the Supreme Court again considered arbitration and securities. It distinguished the facts in *Scherk v. Alberto-Culver* to *Wilko* because the former was a "truly international agreement." The court applied a reasoning similar to *M/S Bremen*. It acknowledged the necessity of arbitration for international business as it guarantees orderliness and predictability in particular with regard to the applicable law:

486 *id.* at 9
487 *id.* at 12
488 *id.* at 13
490 *id.* at 515
A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.\(^{491}\)

The landmark\(^{492}\) decision providing the direction for the next years is the 1985 *Mitsubishi*\(^{493}\) decision in which the Supreme Court held antitrust claims were arbitrable. Antitrust was an area of law traditionally held non-arbitrable. Relying upon *Bremen* and *Scherk* the Court found a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions.\(^{494}\)

It did not regard arbitration as the improper forum, even for the application of a treble damages provision, at least in an international setting.\(^{495}\) In the court’s opinion sufficient control has been guaranteed by a "substantive review at the award-enforcement stage."\(^{496}\) The just described trend is clearly confirmed by the 1989 Supreme Court decision in

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\(^{491}\) id. at 516-517

\(^{492}\) Pietrowski, supra note 8, at 61

\(^{493}\) Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985)

\(^{494}\) id. at 631

\(^{495}\) id. at 636

\(^{496}\) id. at 638
DeQuijas v. Shearson/AmericanExpress\textsuperscript{497} which finally overruled Wilko.\textsuperscript{498}

Despite the broad pro-arbitration policy, U.S. courts have traditionally declared certain statutes inarbitrable because they involved the public interest.\textsuperscript{499} Only the most important statutes for international business are mentioned in the following. U.S. courts have discussed the following "categories of law"\textsuperscript{500} as non-arbitrable under U.S. law.

b) Foreign policy

The Second Circuit in Parsons\textsuperscript{501} addressed an Art. V(2)(a) defense for the first time. The court found two contravening policies of U.S. courts: one recognizing the exclusive competence of the judiciary for certain subject matters,\textsuperscript{502} the other calling for a narrower standard of non-arbitrability in the international context.\textsuperscript{503} Overseas

\textsuperscript{497} DeQuijas v. Shearson/American Express, Inc. 490 U.S. 477 (1989)

\textsuperscript{498} id. at 484

\textsuperscript{499} McClendon, supra note 16, at 68; Pietrowski, supra note 8, at 59

\textsuperscript{500} Evans, supra note 473, at 332

\textsuperscript{501} Parson & Whittemore Overseas Co. v. Societe Generale de l’Industrie du Paper (RAKTA), 508 F.2d 969 (2nd Cir. 1974)

\textsuperscript{502} id. at 975 (quoting American Safety Equipment Co. v. J.P. Maguire & Co. 391 F.2d. 821 (2nd Cir. 1968))

\textsuperscript{503} id. (quoting Scherk v. Alberto-Culver, 417 U.S. 506 (1974))
invoked the Art. V(2)(a) defense juxtaposing "United States foreign policy" and private foreign arbitrators "whose loyalties are to foreign interests." Although the Second Circuit agreed with Overseas that a special national interest may lead to the non-arbitrability of a subject matter the court found that

simply because acts of the United States are somehow implicated in a case one cannot conclude that the United States is vitally interested in its outcome.

The court refused to apply Art. V(2)(a).

c) Nationalization

Similar to Parsons, the LIAMCO decision on nationalizations in Libya has also a strong political background. In a first step the court denied to apply foreign sovereign immunity in Libya's favor because Libya had waived its defense by agreeing upon the arbitration clause. In a second step the court determined that the procedure for the confirmation of the award was set by U.N. Convention. Subject matter of the difference between LIAMCO and Libya was the

504 id.
505 id. (referring to American Safety, id. at 826-827)
506 id.
508 id. at 1178
nationalization of LIAMCO's assets\textsuperscript{509} which the court found a classic example of an act of state.\textsuperscript{510} Such an sovereign act is not justiciable under Art. V(2)(a).\textsuperscript{511}

The decision's precedential value is doubtful. It was vacated during the course of appeal when the parties settled.\textsuperscript{512} Apparently in this decision the court confuses the rights to nationalize and a method of dispute settlement.\textsuperscript{513} The court's argumentation is inconsistent because on the one hand it recognized a binding effect of the arbitration clause, and denied on the other hand such an effect of the award. This allows a state to unilaterally revoke its contractual obligation to arbitrate.\textsuperscript{514}

d) Antitrust and punitive damages

Antitrust law was described by the Supreme Court as the "Magna Charta of Free Enterprise."\textsuperscript{515} It reflects a strong public policy. Until 1985 this was the underlying rationale

\textsuperscript{509} id.

\textsuperscript{510} id. at 1179

\textsuperscript{511} id.

\textsuperscript{512} McClendon, supra note 16, at 69

\textsuperscript{513} VAN DEN BERG, supra note 27, at 372

\textsuperscript{514} id.

\textsuperscript{515} United States v. Topco Assoc., 405 U.S. 596, 610 (1972)
of the leading decision, American Safety. The court had introduced a four-pronged rationale for the non-arbitrability of antitrust claims: national interest; the unlike intention of Congress to promote contracts of adhesion; the complexity of antitrust issues; and the lack of expertise of arbitrators to decide issues of great public interest.

Starting from a "strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions" in the Mitsubishi decision, the Supreme Court rejected the American Safety doctrine. As to the risk of contracts of adhesion the court found that "the mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum." The Court required instead some showing of fraud or comparable reasons showing a deprivation of due process rights. The Court did not adopt the complexity concerns of the Second Circuit because arbitrators are typically experts in their fields. It declined to assume an "innate hostility" by the arbitrators.

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516 American Safety Co. v. J.P. Maguire & Co., 391 F.2d 821 (2nd Cir. 1968)

517 id. at 427


519 id. at 632

520 id.

521 id. at 633
to business constraints like antitrust.\textsuperscript{522} In a last step the Court turned to "the core of the American Safety doctrine - the fundamental importance to American democratic capitalism of the regime of the antitrust laws."\textsuperscript{523} High national public interest and the penal character the Antitrust Laws call into question the application of the antitrust statutes by private persons. The inconsistency, however, is established by the legal construction of antitrust laws themselves.

A private party acts not only on its own behalf, but similar to "a private attorney-general who protects the public's interest."\textsuperscript{524} Chief tool in the enforcement is the treble damages provision. Despite its penalizing character for the violator, the Supreme Court concluded that the treble damages provision was primarily construed as a private remedy for the individual providing a strong incentive for the injured competitor.\textsuperscript{525} The character as a private cause is underlined by the fact that there is no obligation to bring an antitrust suit.\textsuperscript{526} Consequently, the prospective litigant must be allowed to refer a future dispute to arbitration to

\begin{itemize}
\item \textsuperscript{522} id. at 634
\item \textsuperscript{523} id.
\item \textsuperscript{524} id. at 635 (quoting American Safety Co. v. J.P. Maguire & Co. 391 F.2d 821, 826 (1968))
\item \textsuperscript{525} id. at 635-636
\item \textsuperscript{526} id. at 636
\end{itemize}
avoid unnecessary uncertainty in the international cast. The Court did not regard arbitration as an improper forum because if the parties had agreed upon the applicability of U.S. law, the panel is bound to apply U.S. law and recognize statutory remedies. If it fails to do so the court announced "little hesitation" to refuse enforcement of the award as against public policy. By these means the court tried to cut the ground for concerns about foreign arbitrators "who are charged with the execution of no public trust and whose loyalties are to foreign interests." Applying the less stringent international standard, the Court indicated that for domestic antitrust the outcome might have been different.

527 id.
528 id. at 638
529 id. at 636-637
530 id. at 637 note 19
531 id.
532 Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969, 975 (2nd. Cir. 1974) (where the appellant expressed such an concern; it appears equally applicable here)
533 "at least", Mitsubishi, id. at 636; GKB Caribe v. Nokia Mobira, XVI YCA (1991) 635, 640 (applying the same reasoning for the arbitrability of domestic antitrust claims)
The *Mitsubishi* case is widely regarded as a landmark decision in favor of arbitration, greatly impacting the arbitrability of other areas of law. It clearly acknowledged the competence of an arbitral tribunal to award punitive damages, but also emphasizes that an arbitration clause interpreted as an implied waiver of such statutory remedies such as punitive damages would be contrary to public policy.\(^{534}\)

e) Securities laws

There are two principal securities laws in the U.S.: the Securities Act of 1933 and the Securities Exchange Act of 1934. The interpretation of those laws with respect to arbitrability provide an excellent example to describe the development of the jurisdiction.

Originally held nonarbitrable in Wilko, the Court finally overruled its decision in *DeQuijas*:\(^{535}\) The Supreme Court had earlier ruled that predispute agreements to arbitrate under § 29(a) of the Securities Exchange Act are arbitrable.\(^{536}\) Section 29(a) declares "any condition, stipulation, or provision binding any person to waive

\(^{534}\) Mitsubishi, *id.* at 637 Fn. 19; Evans, *supra* note 473, at 340

\(^{535}\) *DeQuijas* v. Shearson/AmericanExpress, 490 U.S. 477, 484 (1989)

\(^{536}\) Shearson/AmericanExpress v. McMahon, 482 U.S. 220, 228 (1987)
compliance with any provision..." void.\textsuperscript{537} The "provision" in the arbitrability context is § 27 (15 U.S.C. § 78aa) providing exclusive jurisdiction of the District Courts. Limiting the § 29(a) prohibition on "substantive obligations," the Court could conclude that § 29(a) is not applicable on (the procedural rule of) § 27.\textsuperscript{538} The two years after, in a decision on the arbitrability of claims under § 12(2) of the Securities Act, the Court stressed that the two acts "should be construed harmoniously because they 'constitute interrelated components of the federal regulatory scheme governing transactions in securities.'"\textsuperscript{539} The Securities Act contains in § 14 a provision parallel to § 29 of the Securities Exchange Act. Therefore, the court concluded that it made little sense to allow arbitration only under one Act, since the claims and the facts are similar and arose within a single federal regulatory scheme.\textsuperscript{540} Wilko was overruled and the Court held claims under § 12(2) of the Securities Act arbitrable.\textsuperscript{541}

\textsuperscript{537} 15 U.S.C. § 78cc(a)
\textsuperscript{538} Shearson, \textit{id.} at 228
\textsuperscript{539} DeQuijas, \textit{id.} at 484-485 (referring to Ernst & Ernst von Hochfelder, 425 U.S. 185, 206 (1976))
\textsuperscript{540} \textit{id.} at 485
\textsuperscript{541} \textit{id.}
f) RICO

RICO, the Racketeer Influence and Corrupt Organizations statute, - like antitrust - allows a recovery of treble damages and litigation expenses.\textsuperscript{542} The Supreme Court, relying upon its reasoning in \textit{Mitsubishi}, allowed arbitration of RICO claims.\textsuperscript{543} It expressly stated that even the criminal character does "not preclude arbitration of bona fide civil actions brought under § 1964(c)."\textsuperscript{544}

g) Patent Law

The same development is true for patent law. Originally held inarbitrable, now after an amendment of U.S. patent law, arbitrators can decide the validity of patents and infringement issues (35 U.S.C. § 294(a)\textsuperscript{545} (1982)).

h) Bankruptcy

Bankruptcy is another area of a high public concern. Nevertheless, the Second Circuit (however under Art. V(2)(b),

\textsuperscript{542} 18 U.S.C. § 1964
\textsuperscript{543} Shearson/AmericanExpress Inc. v. McMahon, 482 U.S. 220, 242 (1987)
\textsuperscript{544} id. at 240; Development Bank of the Philippines v. Chemtex Fibers Inc., 617 F.Supp. 55, 57 (D. S.D.N.Y. 1985) and Genesco, Inc. v. Kakiuchi & Co. 815 F.2d 840, 851 (2nd Cir. 1987) (for RICO claims in international setting)
\textsuperscript{545} § 294(a) reads: "A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract...."
held in favor of arbitration if the arbitration proceedings had started before the bankruptcy proceedings.\textsuperscript{546} The Court of Appeals of New York, the highest state court, reached a different result. According to Art. II of the U.N. Convention, it referred its discussion of arbitrability to the domestic law and stated that the Superintendent of Insurance as liquidator has never been granted the authority to engage in arbitration.\textsuperscript{547} Therefore it held that the bankruptcy proceedings were not capable of settlement by arbitration in the meaning of Art. II, V(2)(a).\textsuperscript{548} Public policy justified the exclusive jurisdiction of the state courts.\textsuperscript{549} The court did not consider the case under a less stringent international standard. The bankrupt company was owned by New York citizens and the court assumed an intention of the owners to circumvent mandatory domestic law by incorporating a foreign company.\textsuperscript{550}

i) Labor Law

Special attention must given to labor arbitration. The Federal sector is generally governed by Title VII of the

\textsuperscript{546} Fotochrome v. Copal 517 F.2d 512, 517 (2nd Cir. 1975)

\textsuperscript{547} Corcoran v. Ardra Ins. Co. 77 N.Y.2d 225, 232 (Ct. App. 1990)

\textsuperscript{548} id. at 233

\textsuperscript{549} id.

\textsuperscript{550} id. at 234
Civil Service Reform Act (1978).\textsuperscript{551} In the private sector the Supreme Court’s decision in \textit{Barrentine v. Arkansas-Best Freight}\textsuperscript{552} gives an overview of the arbitrability of labor law disputes. Section 173(d) of the Labor Management Relations Act (Taft-Hartley Act) provides

final adjustment by a method agreed upon by the parties is declared to be to the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

In principle this opens the way for arbitration of most labor law disputes arising out of the application of the bargaining agreement. The Supreme Court had recognized only a very few limited functions of the courts when the parties have submitted all questions out of the contract to arbitration.\textsuperscript{553}

In \textit{Barrentine} the Court distinguished between two sorts of claims distinguishing between statutory and non-statutory rights. Arbitrable are claims arising out of the collective bargaining agreement. "Different considerations apply where the employee’s claim is based on rights out of a statute designed to provide minimum substantive guarantees to

\textsuperscript{551} William O. Ashkraft & Robert L. Woods, Trying your first labor arbitration - what you should know, 35 A.F. L. REV. 215 (1991); note that the scope of application of the Convention is broader than the one of the FAA (Swisher, supra note 48)


\textsuperscript{553} \textit{id.} at 736; United Steelworkers of America v. American Manufacturing Co. 363 U.S. 564, 567-568
individual workers."\textsuperscript{554} The Court, thereby, excluded arbitration of Fair Labor Standard Act claims whose purpose is "to protect all covered workers from substandard wages and oppressive working hours."\textsuperscript{555} The arbitrator "'has no general authority to invoke public laws that conflict with the bargain between the parties.'\textsuperscript{556} His task is limited to construing the meaning of the collective-bargaining agreement so as to effectuate the collective intent of the parties."\textsuperscript{557} All in all, labor disputes are generally arbitrable unless they involve the interpretation of public protective legislation.

3. German court decisions

The only decision reported that directly deals with Art. V(2)(a) is a decision of the Court of Appeals in Hamm.\textsuperscript{558} It states that

for the question of arbitrability of the subject matter (Art. V(2)(a) U.N. Convention) the law of the State where the enforcement is sought is decisive. Under German law a commercial matter is judiciable, because the parties can settle it by agreement, § 1025 ZPO.\textsuperscript{559}

\textsuperscript{554} id. at 737
\textsuperscript{555} id. at 739
\textsuperscript{556} id. at 744 (quoting Alexander v. Gardner-Denver Co. 415 U.S. 36, 53 (1974))
\textsuperscript{557} id.
\textsuperscript{558} Oberlandesgericht Hamm, judgment of Nov. 2, 1983, English language summary in XIV YCA (1989), 629
\textsuperscript{559} id. at 631
That means that arbitrability is determined by the ability of a party to resolve a dispute by amicable settlement.\textsuperscript{560}

a) Industrial property and patent law

In the area of industrial property German law does not recognize any limitations of arbitrability.\textsuperscript{561} As to patents, § 81 German Patent Law excludes certain patent law matters from arbitration: the proceedings for a declaration of nullity, for withdrawal of a patent, or for the grant of a compulsory license, § 81(1) of the law. Disputes on those matters have to be pursued in state courts.

b) Antitrust

Generally, an arbitration panel also is competent to decide the validity of contracts under antitrust aspects.\textsuperscript{562} The arbitrability of antitrust matters is governed by § 91 Gesetz gegen Wettbewerbsbeschraenkungen.\textsuperscript{563} In general, it provides for the voidness regarding future legal disputes of certain restrictive trade practices unless they do not

\textsuperscript{560} Sandrock & Hentzen, supra note 45, at 63

\textsuperscript{561} Sandrock, supra note 12, at 41

\textsuperscript{562} Bundesgerichtshof, judgment of Oct. 25, 1966, 46 BGHZ 365, 368

\textsuperscript{563} [GWB] [German Act against the Restraints of Competition] (Martin Heidenhain & Hannes Schneider trans., 4th ed. 1991)
exclude the right of a contracting party to bring the dispute before an ordinary court instead of the arbitration tribunal. The "certain restrictive trade practices" are §§ 1 through 5(c), 7, 8, 20 and 21,\textsuperscript{564} 29, 99(1)(no. 2), 100, 102, 102a and 103, and claims within the meaning of § 35 of the Act against Restraints of Competition. They are encompassed under the heading
- "Cartel Agreements and Cartel Resolutions" (§§ 1, 2, 3, 4, 5, 5(a), 5(b), 5(c), 7 and § 8), under
- "Competition Rules" (§ 29), under
- "Scope of application" (§ 99(1)(no. 2), § 100, § 102, § 102(a), § 103), and
- eventually, § 35 dealing with the rights of third parties who suffered a damage by violation of the Act. European Antitrust Laws, Art. 85 et seq. EC Treaty, are also nonarbitrable.\textsuperscript{565}

c) Securities

The Federal Supreme Court held an arbitration clause dealing with commodity futures (Warentermingeschäfte)\textsuperscript{564}

\textsuperscript{564} Bundesgerichtshof, id. at 367-368

\textsuperscript{565} MUEKO-GOTTWALD, supra note 84, at Art. V no. 58; REDFERN & HUNTER, supra note 144, at 141 (explaining that only the European Commission is competent to grant exemptions from European Antitrust Law; an arbitrator, however, has the power to rule that an agreement fits within a block exemption. If the arbitrator finds an infringement of European Law, he can adjourn the arbitration and allow the parties to apply for an exemption from the European Commission.)
generally valid.\textsuperscript{566} The court considered the action for annulment of an award (Aufhebungsklage), § 1041(2) ZPO, as a sufficient safeguard of German public policy.\textsuperscript{567} In an earlier judgment the court had, however, excluded disputes on commodity futures if they lead to an exclusion of certain German protective legislation (§§ 61, 53 Boersengesetz\textsuperscript{568}, 764, 762(1) BGB).\textsuperscript{569}

d) Labor Law

Arbitration and arbitrability of labor law disputes is governed by §§ 101 to 110 ArbGG.\textsuperscript{570} The application of the general rules for arbitration (and arbitrability) as provided by the ZPO are expressly excluded, § 101(3) ArbGG. If the parties agree upon arbitration of a labor dispute according to the ZPO this clause is void. Private law matters of labor law are arbitrable between the trade unions and employers, and employers and a very narrow group of employees (certain groups of artists and seamen), § 101(1), (2). "The bulk of

\textsuperscript{566} Bundesgerichtshof, judgment of June 6, 1991, 44 NEUE JURISTISCHE WOCHENSCHRIFT [NJW[ 2215, 2216 (1991)

\textsuperscript{567} id.

\textsuperscript{568} [German Stock Exchange Act]

\textsuperscript{569} Bundesgerichtshof, judgment of June 15, 1987, 40 NEUE JURISTISCHE WOCHENSCHRIFT 3193, 3194 (1987); ADOLF BAUMBACH ET AL., supra note 73, § 1025 no. 36 (for further non-arbitrable subject matters)

\textsuperscript{570} Arbeitsgerichtsgesetz [Code of Procedure for Labor Law Courts]
private labor disputes thus are foreclosed from private arbitration."^{571}

All in all, German law can be said to be generally open-minded to arbitrability of business disputes.^{572}

4. Comparison

Both legal systems provide for a broad arbitrability of subject matter. In the U.S., the non-arbitrability defense seems to be extremely narrowly defined.^{573} In securities law, the German Supreme Court upheld the non-arbitrability defense if arbitration included the waiver of certain protective provisions. In patent law, German law also recognizes certain exemptions; the same is true for antitrust. A striking difference is labor law. In Germany the bulk of disputes has to be brought before the Labor Courts whereas in the U.S. labor law disputes are principally arbitrable. Accordingly, it is unlikely that a party will seek enforcement of a German labor arbitration award in the U.S. Since § 1 FAA that excludes the application of the FAA on labor arbitration is superseded by the more general definition of commercial matters in § 202 FAA, enforcement of a labor arbitration award seems possible. In contrast to the United States, in Germany the majority of labor disputes is nonarbitrable;

^{571} Sandrock, supra note 12, at 41

^{572} id.

^{573} see Sever, supra note 465 (pleading for caution)
confirmation of an award on an arbitrable labor law subject matter, however, is likely. Bankruptcy claims do not seem to influence arbitration if they have started after the arbitration proceedings. Regarding to the facts in Corcoran v. Ardra this decision's precedential value is relatively small.

B. The public policy defense

1. Introduction

Art. V(2)(b) provides:

The recognition or enforcement of the award would be contrary to the public policy of that country.

2. U.S. court decisions

Parsons & Whittemore is still the leading authority and most quoted decision concerning the public policy defense. The core of the decision are the following two conclusions: first, that "the public policy defense should be construed narrowly,"\textsuperscript{574} and consequently on this basis enforcement can only be denied where it

would violate the forum state's most basic notions of morality and justice.\textsuperscript{575}

\textsuperscript{574} Parsons & Whittemore Overseas Co. v. Societe Generale de l’Industrie du Papier (RAKTA) 508 F.2d 969, 974 (2nd Cir. 1974)

\textsuperscript{575} id.
Although this standard hardly gives a clear definition\textsuperscript{576} it has been consistently applied by the courts.\textsuperscript{577} The *Parsons* court reached this conclusion by referring to the history of the Convention as a whole. In contrary to the Geneva Convention it determined for the New York Convention a general pro-enforcement bias which requires a narrow reading of the public policy defense as an exception to the rule.\textsuperscript{578} This is systematically and logically consistent because

an expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement.\textsuperscript{579}

The following discussion will deal with the particular possible elements of the public policy defense discussed in U.S. courts in a systematical, not necessarily in a chronological order:

\textsuperscript{576} Martinez, supra note 2, at 510


\textsuperscript{578} id. at 973

\textsuperscript{579} id.
a) National policy as an element of public policy

The Parsons decision dealt with national policy as a possible element of U.S. public policy. The court refused to equate national policy with public policy. It did not acknowledge international politics as a stable standard to be part of a public policy and held that a different - parochial - decision would seriously undermine the U.N. Convention's utility. The court, thereby, implicitly relies upon the underlying rationale of the Scherk decision.

Two more decisions are reported in which the defendants raised (inter)national policy considerations to invoke Art. V(2)(b): In National Oil v. Libyan Sun Oil, a case decided against a similar political background, the defendant argued that enforcement would penalize it "'for obeying and supporting the directives and foreign policy objectives of its government and would be inconsistent with U.S. antiterrorism policy.'" The court relied heavily on the

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580 During the political tensions before and during the Arab-Israeli Six Day War the majority of the Overseas crew had left Egypt, id. at 972

581 id. at 974 ("...not meant to enshrine the vagaries of international politics...")

582 id.

583 National Oil Corp. v. Libyan Sun Oil, 733 F.Supp. 800 (D.Del. 1990)

584 Embargo against Libya banning oil imports and restricting export

585 id. at 819
reasoning in Parsons and found no substantial differences in the factual background. "The policy objectives at issue in Parsons differ, at most, in degree and not in kind." 586 Although the court recognized that Sun Oil was justified in suspending performance, it refused to replace the award because Sun Oil could present all of its arguments to the arbitral panel. 587 Since Libya had special governmental permission to proceed before U.S. courts, the District Court did not find a violation of public policy. 588

Conversely in ANTCO Shipping v. Sidermar, 589 ANTCO invoked anti-restrictive trade policy of the U.S., as expressed by the Export Administration Act of 1969, 590 to justify a public policy exception. The contract between ANTCO and Sidermar excluded Israel from Mediterranean loading ports. 591 In the light of this Act Antco claimed that a

586 id. at 820 (even the (reciprocity) argument that a U.S. company probably would not be able to enforce an award in Libya did not persuade the court)

587 id.

588 id.

589 ANTCO Shipping Co. v. Sidermar 417 F.Supp. 207 (D.S.D.N.Y. 1976); see also Schlosser, Verfahrensintegrität, supra note 205, at 456 (stating that American courts tend to interpret public policy not as a defense against enforcement but an obligation to enforce a foreign arbitral award)

590 50 U.S.C. App. §§ 2401-2413; § 2402(5) in particular provides that "it is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries friendly to the United States,..."

591 id. at 211
clause "excluding Israel" was illegal and unenforceable as contravening U.S. public policy.\footnote{592}{id.} The court held applying a de minimis argument that the contract did not sufficiently involve U.S. exports as to invoke an export statute.\footnote{593}{id. at 213} It rejected to extent the statute's meaning by declaring it a general (trade) public policy against Congress' limitation on exports.\footnote{594}{id.}

The closely related question of national security was discussed in McDonell Douglas v. Kingdom of Denmark:\footnote{595}{McDonell Douglas v. Kingdom of Denmark, 607 F.Supp. 1016 (D.E.D. Miss. 1985)} national security. The District Court referred the parties to arbitration arguing that the public policy defense was premature because security concerns may be taken into consideration by limiting evidence.\footnote{596}{id. at 1020}

b) Fraud, duress, and inconsistent testimony

The following decisions may be summarized under the heading "fraud." The first reported case dealing with fraud and its implications on Art. V(2)(a) defense is Biotronik.\footnote{597}{Biotronik Mess- und Therapiegeraete v. Medford Medical Instrument Co., 415 F.Supp. 133 (D.N.J. 1976)} Biotronik had allegedly withheld evidence and engaged in a
calculated attempt to mislead arbitrators.\textsuperscript{598} Accordingly, the respondent, Medford, claimed constituted fraud and as such a violation of § 10(a) FAA or Art. V(2)(b).

The court rejected the question insofar the alleged fraud may justify the § 10(a) defense for two reasons: Medford had the opportunity to discover the alleged fraud and to invoke it during the arbitration;\textsuperscript{599} as a consequence of an "adversary system of justice"\textsuperscript{600} Medford could not expect the opposing party to present favorable evidence to Medford's position when it "failed to offer such evidence itself."\textsuperscript{601} Turning to the international aspect, the court underlined the narrow standard of the public policy defense;\textsuperscript{602} as the court did not accept Medford's fraud allegation under domestic law, it could not in an a fortiori argumentation also reject the narrower public policy defense.\textsuperscript{603}

Fraud was also discussed in Waterside v. International Navigation,\textsuperscript{604} this time under the aspect of "inconsistent

\textsuperscript{598} id. at 137
\textsuperscript{599} id. at 138
\textsuperscript{600} id. at 137
\textsuperscript{601} id. at 138
\textsuperscript{602} id. at 139
\textsuperscript{603} id. at 140
\textsuperscript{604} Waterside Ocean Navigation Co. v. International Navigation Ltd. 737 F.2d 150 (2nd Cir. 1984)
testimony."\(^{605}\) A witness had changed his testimony during the hearing upon which the arbitrators apparently based their award.\(^{606}\) Focussing on the purpose of the Convention, i. e. to remove obstacles to confirmation, the court found that recognition of an alleged inconsistent testimony as a public policy infringement bears the risk that the mere claim of such an inconsistency would force the courts to an extensive review. "This would render an allegedly simple and speedy remedy of arbitration a mockery."\(^{607}\) An allegedly inconsistent testimony, therefore, does rise to the level of a public policy infringement.

In *National Oil*\(^{608}\) the court affirmed that "intentionally giving false testimony in an arbitration proceeding would constitute fraud.\(^{609}\) A mere misunderstanding and "ample opportunity to cross-examine" the witness in order to inform the tribunal did not meet the requirements of fraud definition.\(^{610}\) Even if a statement is in fact inaccurate, intention to mislead has to be shown.\(^{611}\) The courts

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\(^{605}\) note that it was not claimed that Waterside knowingly presented perjured testimony, *id.* at 152

\(^{606}\) *id.* at 152

\(^{607}\) *id.* at 153

\(^{608}\) *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F.Supp. 800 (D. Del. 1990)

\(^{609}\) *id.* at 814

\(^{610}\) *id.* at 814-815

\(^{611}\) *id.* at 815
reaffirmed the principle that the opportunity to present an objection to the arbitral tribunal excluded consideration by a state court.\textsuperscript{612}

A similar situation arises in cases of duress. In principle the District Court in Transmarine recognized duress as a public policy violation.\textsuperscript{613} Since the defendant could not prove duress, this statement remains mere dictum.

c) Manifest disregard of the law

Originating in Wilko v. Swan,\textsuperscript{614} the doctrine of "manifest disregard of the law" has been invoked without success several times before U.S. courts to prevent enforcement of arbitral awards. Without any decision as the general validity of the theory itself, the court in Parsons & Whittemore\textsuperscript{615} turned directly to the intended purpose of the doctrine, namely a review of the arbitral proceedings for errors, but rejected the defendant's intention.\textsuperscript{616} The court was apparently concerned that an extensive judicial review would contradict the goal of arbitration: a speedy and less

\begin{flushright}
\textsuperscript{612} \textit{id}.
\textsuperscript{613} Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A.G., 480 F.Supp. 352, 358 (1979)
\textsuperscript{614} 346 U.S. 427, 436 (1953); see generally Marta B. Varela, Arbitration and the Doctrine of Manifest Disregard, 49 J. DISP. RESOL. 64 (1994)
\textsuperscript{615} Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Paper (RAKTA), 508 F.2d 969 (2nd Cir. 1974)
\textsuperscript{616} \textit{id}. at 977
\end{flushright}
expensive means of dispute of resolution. Despite this rejection manifest disregard of the law has been invoked at least twice more.

To serve as a refusal ground, however, the Convention requires that manifest disregard can be raised to the level of public policy. After reviewing precedents the court found that the courts not receptive toward the manifest disregard doctrine. The court in Brandeis v. Calabrian refused to apply it and supported its reasoning by looking at the precedents that unanimously applied a narrower definition of public policy. The court also added that in the international context the doctrine would oblige an American court to review an award based on the applicable foreign law, i. e. the judge has to apply a law he is not familiar with.

In American Construction an arbitral award was set aside by a national Pakistani court. This judgment was

617 id.


619 Brandeis, id. at 165

620 id. at 167

621 id.

characterized by "omissions and positive misstatements." Since the respondent had agreed upon arbitration, participated in the proceedings, the court regarded initiation of the Pakistani proceeding as circumvention tactics and concluded that not enforcement, but non-enforcement would be contrary to public policy. Although the rationale of the court is apparent, i. e. not to recognize an unfair judgment, its reasoning is doubtful. Mere participation in the proceedings is no reason to deprive a respondent of his defenses according to Art. V.

d) Impartiality

The problem of impartiality was issue in at least three decisions: Transmarine Seaways v. Marc Rich, Fertilizer v. IDI and Brandeis v. Calabrian Chemicals. "An appearance of bias" of one arbitrator was ground for the defendant in Transmarine to invoke the public policy defense of Art. V(2)(b). Reviewing the precedents the court found that the justices had primarily focussed on an "incoming-producing" relationship between an arbitrator and a party. In the present case the arbitrator's company represented another

623 id. at 429

624 id.; see Schlosser, supra note 205 (commenting the U.S. courts' interpretation of "public policy")


626 id. at 357
company that had pursued claims against the defendant, a relationship "far too tenuous" to require disqualification, if the Supreme Court had not set a very low standard: "even the appearance of bias" must be avoided. Consequently, such a broad bias theory is that it might lead to the exclusion of a majority of members of small, interrelated business societies. Therefore, the Supreme Court added a corrective requirement that a person has to be thought reasonably biased. On this ground the court decided that an unrelated litigation in the total absence of a financial relationship between arbitrator and party is too remote to justify replacement of an arbitrator.

In contrast to Transmarine, in Fertilizer a financial relationship existed between an arbitrator, Mr. Sen, and a party. Although the court expressed its strong belief "that full disclosure of any possible interest or bias is the better rule," the court, nevertheless, upheld the award. With regard to the unanimous vote there was no showing of

627 id. at 358
628 id. at 358; Commonwealth Coatings Corp. v. Continental Casualty Co. 393 U.S. 145, 150 (1968)
629 id.
630 Transmarine, id. at 358
632 id. at 954
actual bias that could have influenced the outcome.\textsuperscript{633} It distinguished the facts from \textit{Commonwealth Coatings} as to that Mr. Sen was not the third, the "supposedly neutral member."\textsuperscript{634} Referring to the narrow definition introduced by the \textit{Parsons} decision, the court refused the public policy defense.\textsuperscript{635}

The problem of a small business society and alleged partiality were also discussed in the \textit{Brandeis Intsel v. Calabrian}\textsuperscript{636} decision on an arbitration award of the London Metal Exchange (LME). \textit{Brandeis} was an LME member, \textit{Calabrian} had no connection with LME. The court did not accept Calabrian's argument that an "old boy network"\textsuperscript{637} has the appearance of bias; it emphasized instead the advantages of such organizations being able to produce highly skilled and experienced arbitrators out of its members.\textsuperscript{638} The mere fact that "the wakes of the members often cross"\textsuperscript{639} was not regarded sufficient for a vacation.

\begin{footnotes}
\item[633] id. at 955
\item[634] id. (referring to \textit{Commonwealth Coatings Corp. v. Continental Casualty Co.} 393 U.S. 145, 146 (1968))
\item[635] id.
\item[636] \textit{Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.}, 656 F.Supp. 160 (D.S.D.N.Y. 1987)
\item[637] id. at 168
\item[638] id. at 169
\item[639] id.
\end{footnotes}
e) Bankruptcy

The bankruptcy of one party to arbitration is an issue still relatively unclear under U.S. jurisdiction. In *Fotochrome v. Copal* the Second Circuit avoided a statement as to whether the Bankruptcy Act involves public policy. Finding no statutory answer to the relation between bankruptcy and arbitration proceedings, the court turned to § 63a(5) that requires the Bankruptcy Court to accept as a final adjudication of a claim 'probable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge...' The court did not consider an award as a judgment. However, because an award is a binding adjudication on the merits, the court equated both as to the impact on an arbitration proceeding: an arbitral award rendered after the filing of a Chapter XI petition in a United States Bankruptcy Court in an arbitration proceeding commenced prior to such filing is a valid determination on the merits and is unreviewable by the Bankruptcy Court.

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640 *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2nd Cir. 1975)

641 *id.* at 516

642 11 U.S.C. § 103(a)(5)

643 *Fotochrome, id.* at 517

644 It did not want to deprive a party of the due process right to contest an award, *id.* at 517

645 *id.*

646 *id.*
Consequently, the court enforced the award.

While the Fotochrome court preferred a more systematic national approach, the New York Supreme Court in Corcoran v. AIG\textsuperscript{647} stressed the importance of international comity prevailing domestic public policy as involved in a bankruptcy proceeding.\textsuperscript{648}

Strong policy concerns of international comity were explicitly recognized by the Court of Appeals, the highest New York state court, in Corcoran v. Ardra Insurances.\textsuperscript{649} Nevertheless, it refused to enforce an agreement to arbitrate because "the underlying concerns of the Convention are not implicated here."\textsuperscript{650} Apparently the court had the impression that New York residents incorporated a foreign company with the only purpose to circumvent mandatory New York insurance law which foreseeably did not allow arbitration. Under these circumstances the court declined to recognize the bankrupt company as a foreign company unfamiliar with the judicial proceedings.\textsuperscript{651}

\begin{itemize}
\item \textsuperscript{647} Corcoran v. AIG Multi-Line Syndicate, Inc. 143 Misc.2d 62 (Sup. Ct. N.Y. 1989)
\item \textsuperscript{648} id. at 71
\item \textsuperscript{649} Corcoran v. Ardra Ins., 566 N.Y.S.2d 575, 579 (Ct. App. 1990)
\item \textsuperscript{650} id. at 579; see § 202 FAA (lack of reasonable relationship with a foreign state)
\item \textsuperscript{651} Corcoran, id.
\end{itemize}
f) Interest rates

Another element discussed before U.S. courts under the aspect of public policy were interest rates. The Laminoirs\textsuperscript{652} decision is the only example for a successful public policy defense in the U.S. In this case the parties had agreed upon "the laws of Georgia insofar as these laws are in accordance with French laws."\textsuperscript{653} The defendant contested the French interest rates to which the award referred. The interest rate was 9.5 or 10.5% compared to the Georgia legal rate of 7%. The defendant challenged the awarded French interest rates as "usurious and against public policy" compared to the Georgia legal rate of 7%.\textsuperscript{654} Requirement for such a challenge is that the interest rate can be characterized as "odious, illegal, and immoral."\textsuperscript{655} Since the GA code (\S\S 57-101), does not set a limit to interest rates and merely requires a written agreement for higher interest rates,\textsuperscript{656} the court declined to follow the defendant's argumentation. However, it distinguished the additional 5% interest due after two months from the date of the award.\textsuperscript{657} With this distinction the

\begin{enumerate}
  \item id. at 1065
  \item id. at 1068
  \item id.
  \item id.
  \item id. at 1069
court referred to two enforcement principles that a foreign law will not be enforced
- "if it is penal only" and
- if an agreement to pay fixed sums as damages plainly is without reasonable relation to any probable damage which may follow.\(^{658}\) The court found a penal character to the statute because it punished for "omitting to do something that is required to be done" and "bears no reasonable relation to any damage resulting from delay in recovery of the sums awarded."\(^{659}\) In fact until now Laminoirs is the only case in which a U.S. court (partially!) refused to enforce an foreign arbitral award on grounds of public policy.

After the Laminoirs decision several other courts addressed the problem of interest rates. They unanimously enforced the awards, however, explicitly discussing a penal character. In International Standard,\(^ {660}\) another case dealing with post-award interest, the District Court reached the same conclusion. First, it found that a 12% interest rate was not penal.\(^ {661}\) As to the rate of interest itself the court found

\(^ {658}\) id.

\(^ {659}\) id.


that 28 U.S.C. § 1961(a), a provision providing for interest only from the date of entry to the judgment, is not applicable to awards but only to "any money judgment." Enforcing an arbitral award is of a different nature, "rather in the nature of a post-judgment enforcement proceeding."

The earlier *Brandeis Intsel v. Calabrian* decision sheds some light on pre-award interest. The court regarded as decisive the question whether the interest rate of 11.25% could be regarded as penal under the applicable (English) law. Thus, a reference to domestic law was precluded. In absence of a showing of a penal nature under foreign law enforcement was granted.

3. German court decisions

a) Introduction

As in the U.S., the public policy defense has been invoked many times before German courts, with some success. A German court is not bound by the factual or legal findings

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662 *id.*

663 *id.* (referring to *Fertilizer Corp. of India v. IDI Management Inc.*, 517 F.Supp. 948, 963 (D.S.D. Ohio 1981))


665 *id.* at 170

666 28 U.S.C. § 1961(a) providing for interest from the date of entry of the judgment.

667 *Brandeis, id.*
of the arbitration panel on public policy; it has to consider the public policy issue independently. An extensive review on the notion of public policy gave the Federal Supreme Court in its decision of May 15, 1986. The court affirmed the distinction between ordre public interne and ordre public international, the latter leaving only narrow limits for the German public policy. It reasoned that

from a viewpoint of German procedural public policy, the recognition of a foreign arbitral award can therefore only be denied if the arbitral procedure suffers from a grave defect that touches the foundation of the State and economic functions.

More specifically the Court of Appeals in Hamburg added that public policy is infringed upon when recognition leads to a result which is manifestly irreconcilable with a fundamental principle of German law, and particularly with a basic right (Grundrechte). ... Furthermore such infringements must be 'manifest', i. e. any expert on the subject, who knows the facts, must agree as to their existence.

The court included fundamental principles of political and economical life as well as German concepts of justice in its definition of public policy.

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668 Bundesgerichtshof, judgment of May 5, 1972, 25 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2180, 2181 (1972)


670 id. at 490

671 Oberlandesgericht Hamburg, judgment of Jan 26, 1989, English language summary in XVII YCA (1992) 491, 494

672 id.
b) Section 1025 (2) ZPO

The narrow definition is evidenced by the Supreme Court in 1969. Section 1025(2) ZPO provides for the voidness of an arbitration agreement in case of pressure of the dominant economic, or social position of the other party. The Supreme Court generally considered this section as part of German public policy.\(^{673}\) Without any statement as to the substance, the court refused to apply § 1025 ZPO for procedural reasons. There was no similar provision under the applicable Czechoslovak law what the German respondent could have taken into account when they agreed upon the arbitration. In addition to that the respondent already could have raised this objection during the arbitral proceedings.\(^{674}\) This argument appears doubtful because the mandatory protective provision typically should be applied when a (supposedly weaker) party did not realize the consequences of contract and a choice-of-law clause. It might be that - contrary to the court’s explicit statement - the second argument prevailed.

In a more recent decision the Hamburg Court of Appeals\(^{675}\) took a closer look at § 1025 ZPO in a case between a German and a Japanese party on an arbitration in Japan.

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\(^{673}\) id. at 236

\(^{674}\) id.

\(^{675}\) Oberlandesgericht Hamburg, judgment of Feb. 17, 1989, XV YCA (1990) 455
Like the German Federal Supreme Court it referred to the applicable Japanese law and found out that the Japanese Civil Code of Procedure does not contain a provision comparable to § 1025(2) ZPO. Then the court scrutinized a possible dominant position under the aspect of the seat of tribunal and the country where the arbitration takes place. For the German party the tribunal in Tokyo brought the disadvantages of great distance, language problems and foreign culture. On the other hand, the Japanese party had the advantage of being on his homeground. The situation would be the same if the situation were reversed. Since the seat has to be somewhere, the court found that the forum did not prove a party's superiority. As to the seat in a country of which one party is a citizen, the court enumerated the risks involved: the chairman is typically a citizen of the country where the arbitration takes place; together with the arbitrator of the Japanese party, this results in a national preponderance in the panel and the judicial control is exercised by one party's national courts. Although the Court of Appeals did not believe foreign judges to be partial, it realized a bias as to legal culture, interests and way of thinking. Arbitration regularly seeks to avoid these problems by

676 id. at 459
677 id.
678 id.
679 id. at 460
choosing a neutral third country.\textsuperscript{680} This is the prevailing practice, however no general belief such a necessity has been formed yet.\textsuperscript{681} Since the German party had put nothing forward to question its legal protection the court enforced the arbitration clause.\textsuperscript{682}

c) Due process violations

Several German court decisions dealt with alleged violations of certain procedural aspects. Due process aspects, typically dealt with in Art. V(1)(b) lead the Hamburg Court of Appeals to deny enforcement, however, under the bilateral 1954 Treaty of Friendship, Commerce and Navigation [FCN]. The court held this case violated the principle of a fair hearing.\textsuperscript{683} The broad public policy provision encompasses the due process rights protected by Art. V(1)(b).

The Court of First Instance in Munich cited "serious procedural violations" contrary to public policy.\textsuperscript{684} The arbitration panel had not engaged in a proper examination of its own competence. Signed sales confirmations presented to

\textsuperscript{680} id. at 459

\textsuperscript{681} id. at 460

\textsuperscript{682} id. at 461

\textsuperscript{683} Oberlandesgericht Hamburg, judgment of April 3, 1975, English language summary in II YCA (1977) 241

the panel were not enough evidence that in fact an arbitration agreement was concluded.\textsuperscript{685} Competence might have lacked because time limits set by the applicable arbitration rules had expired.\textsuperscript{686} Additionally, the arbitral tribunal only dealt with 200 transactions in question as a whole "without distinguishing between the legal aspects of each of the 200 cases."\textsuperscript{687}

In a case involving a bankruptcy proceeding, the Court of Appeals in Hamm held that "not every violation of the right to fair hearing represents a conflict with German public policy."\textsuperscript{688} That a short period of time during the bankruptcy proceedings due representation was doubtful, did not raise to a substantial limitation of possibilities.\textsuperscript{689} The court concluded that the respondent did not raise these objections during the arbitration and was duly represented.\textsuperscript{690} Public policy was not violated.

The Federal Supreme Court had already held that an enforcement would be contrary to public policy if a valid

\textsuperscript{685} id. at 261

\textsuperscript{686} id. at 262

\textsuperscript{687} id.


\textsuperscript{689} id. at 632

\textsuperscript{690} id. at 632-633
agreement to arbitrate is missing. The defendant is, however, no longer allowed to raise this defense if the invalidity of the award grounds on a claim of invalidity in the country of origin and the time limits for this claim have expired.\textsuperscript{691}

d) Impartiality

Impartiality or alleged bias of the arbitrators gave reason for various court decisions on Art. V(2)(b). With regard to a decision of the Court of Appeals in Cologne\textsuperscript{692} this is not surprising. The court stated - that the impartiality of a judge and of an arbitrator performing the same functions as a judge (§§ 1025(1), 1032 ZPO), is regarded as a fundamental principle of the German and international legal system.\textsuperscript{693}

The outstanding importance of independence and impartiality requires sufficient safeguards by procedural means, particularly in the area of arbitration where business contacts and economic interests bear a higher risk of a biased arbitrator.\textsuperscript{694} If the challenge of an arbitrator, the most efficient procedural safeguard is excluded, this

\textsuperscript{691} Bundesgerichtshof, judgment of March 6, 1969, II YCA (1977) 235

\textsuperscript{692} Oberlandesgericht Koeln, judgment of June 10, 1976, IV YCA (1979) 258

\textsuperscript{693} id. at 260

\textsuperscript{694} id.
represents a violation of German public order. In the case before the court only the name of the president was disclosed preventing thereby an efficient control of a panel.

In a case similar to Brandeis, on an arbitration between a member and a non-member of a trade association, the Federal Supreme Court came to a different conclusion than the U.S. court. The court did not follow the Court of Appeals' reasoning that had balanced the expertise of the panel members against the appearance of bias. The court was not convinced that any appearance of bias could be excluded.

The high requirements for establishing partiality are again evidenced by a decision of the Court of First Instance in Hamburg. The court did not regard a panel composed dominantly or exclusively of Members of a trade association as sufficiently impartial to decide a dispute between a member and a non-member. Additionally, the court held that German public policy was violated because the arbitration by the association did not give equal rights to the parties in appointing the arbitrators.

695 id.
697 id.
699 id. at 488-489
Two years later the Supreme Court rendered a judgment on a clause similar to § 7(b) of the English Arbitration Act. It provided for two arbitrators. If the arbitrators could not agree, they had to select a third person as umpire. If one party failed to appoint its arbitrator, the other party's arbitrator was allowed to serve as sole arbitrator.\(^7^{00}\) Again, the Supreme Court reasoned that such a procedure may give the impression that one party might be placed at a disadvantage.\(^7^{01}\)

This very strict standard on equal right to appoint an arbitrator to the panel has been relaxed by a more recent decision of the Federal Supreme Court on the validity of an award made pursuant § 7(b) of the English Arbitration Act (1950).\(^7^{02}\) Under express reference to the different international public policy standard, the court narrowly this standard:

only those violations of the duty of neutrality that are absolutely incompatible with the principle of judicial office, will lead to the refusal of recognition of the foreign award.\(^7^{03}\)

\(^7^{00}\) Bundesgerichtshof, judgment of Nov. 5, 1970, 54 BGHZ 392, 393

\(^7^{01}\) id. at 397

\(^7^{02}\) Bundesgerichtshof, judgment of May 15, 1986, English language summary in XII YCA (1987) 489; § 7(b) provides that in case of a reference to two arbitrators and the respondent does not appoint an arbitrator, the claimant may appoint his arbitrator as sole arbitrator.

\(^7^{03}\) id. at 490
The court required "a real impact on the proceedings,"\textsuperscript{704} i. e. a causal connection between bias and award. The § 7(b) procedure "gives both parties at the outset have equal rights of nomination, so that there does not exist an initial domination...."\textsuperscript{705} A violation of the arbitrator's duty of neutrality was not shown and, therefore, the court enforced the award.\textsuperscript{706}

With regard to "a less stringent international regime" the Supreme Court found that the participation of a legal consultant did not infringe the principle of impartiality.\textsuperscript{707} Again applying a strict standard the Supreme Court refused to stay enforcement because of the participation of a legal consultant "who allegedly took the floor."\textsuperscript{708} His participation did not rise to the level of a serious shortcoming.\textsuperscript{709}

e) Incorrect testimony

The very same decision dealt with the misjudgment of the tribunal after an incorrect testimony. The court refused to

\textsuperscript{704} id.
\textsuperscript{705} id. at 491
\textsuperscript{706} id.
\textsuperscript{707} Bundesgerichtshof, judgment of Jan. 18, 1990, XVII YCA (1992) 503, 505-506
\textsuperscript{708} id. at 505
\textsuperscript{709} id.
regard that situation as a "serious shortcoming" sufficient enough for the narrow requirements of a proceeding of revocation under § 580 ZPO.\textsuperscript{710} Since the facts underlying the ground for revocation could have been invoked before the arbitrators § 580 was not applicable in the present case.\textsuperscript{711}

f) Bankruptcy

Bankruptcy was discussed under the aspect of due process representation during the arbitral proceedings.\textsuperscript{712} At that time the Italian respondent company was under the regime of a special administration (commissario giudiziale) because of financial difficulties,\textsuperscript{713} as a special form of the bankruptcy procedure. The respondent therefore claimed that it was not duly represented during the arbitral proceedings. The court, however, pointed out that under domestic law a bankruptcy proceeding has no influence on arbitral proceedings. Arbitration is not bound by the procedural rules of the ZPO. Section 240 ZPO suspending court proceedings in

\textsuperscript{710} § 580 ZPO sets out the grounds for the revocation of a judgment, which may be summarized as (a) perjury, (b) criminal actions on the part of the opposite party or representative of one of the parties, (c) judicial misconduct, or (d) the annulment of an underlying decision or deed. (summarized in XVII YCA (1992) 506)

\textsuperscript{711} Bundesgerichtshof, id. at 507-508

\textsuperscript{712} Oberlandesgericht [Court of Appeals] Hamm, judgment of Nov. 2, 1983, English language summary in XIV YCA (1989) 629

\textsuperscript{713} id. at 629
case of the institution of a bankruptcy did, therefore, not apply.\textsuperscript{714} Additionally, § 237 KO\textsuperscript{715} states explicitly that bankruptcy proceedings in a foreign country do not hinder domestic execution proceedings.\textsuperscript{716}

g) Punitive damages

In most U.S. states an arbitrator may render a punitive damage award. The U.S. Supreme Court explicitly recognized such an arbitrator’s competence in its Mitsubishi decision. Arbitrators are competent to decide antitrust issues by applying antitrust statutes. They are also competent to render punitive damage awards because the treble damages provision is an important part of U.S. antitrust law.\textsuperscript{717} This leads to the question of whether an arbitral award, including punitive damages, would be enforceable in Germany.

In 1992 the German Federal Supreme Court rendered its first decision on the enforceability of a punitive damages judgment.\textsuperscript{718} Since the public policy concerns are the same for the enforcement of a punitive damage award and a

\footnotesize{\textsuperscript{714} id. at 632
\textsuperscript{715} Konkursordnung [German Bankruptcy Code]
\textsuperscript{716} id. at 632
\textsuperscript{717} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614, 636-637 (1985)
\textsuperscript{718} Bundesgerichtshof, judgment of June 4, 1992, 118 BGHZ 312; Wolfgang Kuehn, Rico Claims in International Arbitration and their Recognition in Germany, 11 J. INT’L ARB. 37 (1994) (discussing recognition of Rico awards in Germany)
judgment, it is very likely that the Federal Supreme Court would apply the same reasoning on the enforcement of an award. In short, the Federal Supreme Court held that the present punitive damage judgment was not enforceable:

A foreign punitive damage judgment rendering a considerable amount of money, exceeding the compensation rendered for material and immaterial damages, always cannot be declared (entirely) as enforceable in Germany. 719

The decision is characterized by a strict logic. First the court defined the term punitive damage and found the ideas behind this legal remedy; second the court attempted to integrate punitive damages into German tort law systematic and found narrow exceptions under which a judgment may be enforceable. In a third step, however, it concluded that enforceability additionally required that the punitive damage award pass a proportionality control. The court adopted the definition that a punitive damage is an amount of money added to purely compensatory damages; 720 it recognized mainly three ideas behind the legal remedy of a punitive damage: a penal and a (private and public) social character.

An offender shall be punished for his misconduct. Punitive damages are the means whereby the deterrent effect of a punishment can be safeguarded in cases where the mere

719 id. at 334

720 id. at 335
compensatory damage does not sufficiently guarantee this effect.\textsuperscript{721}

Apart from this penal character, the court distinguished a social element: a victim is rewarded for his private law enforcement in the public’s interest and the punitive damage guarantees a fair compensation that might not be obtained by compensatory damages.\textsuperscript{722}

The court found that punitive damages are a specific form of damages, and as such are a matter of private law and enforceable.\textsuperscript{723} The German ordre public, however, prevents enforcement\textsuperscript{724} because the German tort law (§§ 249 BGB) only provides for compensation but not for an enrichment,\textsuperscript{725} or a penal or deterrent function.\textsuperscript{726} Herefrom the court distinguished punitive damages serving a different function, to compensate with a lump sum residual disadvantages not already specifically settled or difficult to prove or to skim off the profits made by the offender through the tort.\textsuperscript{727}

\textsuperscript{721} id.
\textsuperscript{722} id.
\textsuperscript{723} id. at 337
\textsuperscript{724} id. at 338
\textsuperscript{725} id.
\textsuperscript{726} id. at 339
\textsuperscript{727} id. at 340
These "nonpunitive"\textsuperscript{728} parts have to be clearly indicated by the U.S. court.\textsuperscript{729} "Due to the prohibited revision au fond principle, the German court may not second guess the implicit motives of the U.S. court;"\textsuperscript{730} it is however, competent to determine the prior function (Schwerpunkt) of a punitive damage.\textsuperscript{731} Enforceability of this nonpunitive part requires additionally that the award passes the test of proportionality (Verhältnismaessigkeit), a constitutional standard.\textsuperscript{732} The only accepted legitimate end is the compensation of the victim,\textsuperscript{733} any form of punishment can only be exercised by the State.\textsuperscript{734}

All in all, German decisions reflect the very narrow standard of the public policy defense and also the willingness of the German courts to refuse enforcement if this narrow standard is infringed.

\begin{itemize}
\item \textsuperscript{728} Hartwin Bungert, Enforcing U.S. excessive and punitive damages awards in Germany, 27 INT'L LAW. 1075, 1082 (1993)
\item \textsuperscript{729} Bundesgerichtshof, \textit{id.} at 341
\item \textsuperscript{730} \textit{id.} at 342 (summarized by Bungert, \textit{id.} at 1082)
\item \textsuperscript{731} Bundesgerichtshof, \textit{id.} at 342
\item \textsuperscript{732} Bungert, supra note 728, at 1084 ("The principle of proportionality has three principles: a means must be (1) appropriate (geeignet), (2) have the least restrictive effect (erforderlich) to achieve the legitimate end, and (3) bear a reasonable relationship to the ends (verhältnismaessig im engeren Sinne)")
\item \textsuperscript{733} \textit{id.} at 344
\item \textsuperscript{734} \textit{id.}.
\end{itemize}
4. Comparison

National policy was not substantially discussed by a German court, a case involving an embargo was decided not on public policy grounds but missing evidence.\textsuperscript{735} Similarly in both jurisdictions a number of cases discussed the issue of impartiality: the German cases deal mainly with an alleged bias of one arbitrator as a member of a trade association, the U.S. cases with alleged business contacts between an arbitrator and a party.\textsuperscript{736} The most striking difference results from the U.S. Brandeis (and also the Fertilizer) decision and the decision of the Hamburg Court of Appeals. Both decisions deal with an award rendered by a tribunal of a trade association. The U.S. court did not find the appearance of bias, the German court did.

The rather broad appearance of bias doctrine of the Hamburg Court has been relaxed in the international context by more recent Supreme Court decisions. In the opinion of the Supreme Court the mere possibility of bias is not sufficient to stay enforcement. In the international context the Supreme Court required a real impact of the impartiality on the result of proceedings. The court explicitly stated that "the finding that a party had a predominant weight in constituting

\textsuperscript{735} Oberlandesgericht [Court of Appeals] Hamburg, judgment of Jan. 26, 1989, XVII YCA (1992) 491, 495

\textsuperscript{736} Schlosser, Verfahrensintegrität, supra note 205, at 458
the tribunal is therefore not sufficient" and hereby implicitly limited the Court of Appeals' reasoning. Both jurisdictions seem to adhere to a "rule of reason" standard.

Bankruptcy proceedings initiated after the arbitration proceedings follow a similar line. They do not hinder the enforcement of the arbitral award. The decision in Corcoran v. Ardra is a rare exception.

In both jurisdictions the influence of false testimony has been discussed with the same result: if the defendant (could have) invoked this objection during the proceedings, this will exclude any further consideration by state courts. It is very likely that despite any explicit statement by the U.S. or German courts, they will refuse enforcement if duress influenced the agreement under the consistently applied narrow standard.

As to the enforcement of awards with a penal effect (interest rates or punitive damages), U.S. and German jurisdictions surprisingly agree in their statements and logical reasoning not to enforce any such award.

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737 Bundesgerichtshof, judgment of May 15, 1986, XII YCA (1987) 489, 490

738 Corcoran v. Ardra Ins. 77 N.Y.2d 225 (Ct. App. 1990)
Chapter 4: Conclusion

"[There is] a strong presumption in favor of freely negotiated choice-of-forum provisions."\(^{739}\) This statement that could serve as a conclusion has been provided by the U.S. Supreme Court in *Mitsubishi v. Soler Chrysler-Plymouth*. The application of the New York Convention is left to the good faith of the contracting states due to the inevitable public policy defense. The U.S. and German courts did not create a loophole to circumvent the Convention by a broad interpretation of the public policy. They refer instead to the pro-enforcement bias of the Convention and its purpose to promote and facilitate enforcement. This pro-enforcement purpose logically requires a narrow interpretation of the defenses to safeguard the mentioned purpose.\(^{740}\) The U.S. and German courts adopt this purpose by extending the number of arbitrable subject matters\(^{741}\) and limiting the public policy

\(^{739}\) *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, Inc. 473 U.S. 614, 631 (1985)

\(^{740}\) Parsons & Whittemore Overseas Co. v. Societe Generale de l’Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2nd Cir. 1974)

\(^{741}\) see supra Art. V(2)(a)
defense to the "most basic notions of morality and justice" \textsuperscript{742} or "a grave defect that touches the foundation of the State and the economic functions."\textsuperscript{743}

The courts are evidently concerned about dilatory tactics of losing parties that invoke an Art. V defense by merely asserting inconsistencies in the proceedings. To distinguish dilatory tactics from an enforcement barring violation, the courts developed several criteria:

At first a party claiming a violation of its rights must bring some evidence, some semblance of substance.\textsuperscript{744} If the defendant is not able to support his assertion with some evidence, a court is likely to assume lack of good faith.\textsuperscript{745}

However, an evident infringement of the defendant's procedural rights will not necessarily lead to a stay of enforcement. Courts of both countries emphasized several times that not every infringement fulfills the standard for a stay of enforcement.\textsuperscript{746} Additionally, a causal connection has been required: the mere violation is not enough, it must

\textsuperscript{742} Parsons, id. at 974

\textsuperscript{743} Bundesgerichtshof, judgment of May, 15, 1986, English language summary in XII YCA (1987) 489

\textsuperscript{744} Imperial Ethiopian Gov't v. Baruch-Foster Corp. 535 F.2d 334, 337 (5th Cir. 1976)

\textsuperscript{745} Imperial, id.

have had some impact, material consequences on the award.\textsuperscript{747} There must be at least some probability that the award would have been different.\textsuperscript{748}

For two reasons a defendant may be estopped to invoke an infringement: if he could have raised his objections already before the arbitral panel, courts assume that he has impliedly waived his right.\textsuperscript{749} Accordingly, it has been held that an unexcusable delay to oppose the award may have the same effect.\textsuperscript{750} The underlying rationale is to force full participation of the parties in the arbitration proceedings to guarantee the effectiveness of arbitration: "[he] cannot remain silent, raising no objection during the arbitration proceedings, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first."\textsuperscript{751} A party is, therefore, badly advised not to attend the arbitration proceedings and pursuing a state court action instead. U.S. and German courts did not recognize a

\begin{itemize}
\item[748] Oberlandesgericht Hamburg, judgment of April 3, 1975, English language summary in II YCA (1977) 241
\item[751] Cook Indus. v. C. Itoh & Co., 449 F.2d 106, 107-108 (2nd Cir. 1971)
\end{itemize}
parallel state court action for an alleged invalidity of the agreement as a sufficient justification of a non-participation.\textsuperscript{752} Parallel court proceedings may, however, be promising and bar the enforcement when they concern the vacation of an award in the country of its origin. Here, U.S. courts are less reluctant to stay enforcement to avoid inconsistencies between the two parallel proceedings.\textsuperscript{753} As Art. VI allows the court to require suitable security such a tactics is only advisable if the court proceedings are likely to be successful.

Eventually, courts draw a distinction between a national and international standard.\textsuperscript{754} An infringement that on a domestic level would hinder enforceability, may not have the same effect in the international cast because comity concerns require a less stringent standard.\textsuperscript{755}


\textsuperscript{753} Fertilizer Corp. of India v. IDI Management, Inc., 517 F.Supp. 948, 962 (D.S.D. Ohio 1981); Spier v. Calzaturificio Tecnica, S.p.A., 663 F.Supp. 871,875 (D.S.D.N.Y. 1987); see also DOMKE ON COMMERCIAL ARBITRATION, supra note 13, at § 45:03 (concurring with these decisions)

\textsuperscript{754} e. g. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 629 (1985); Bundesgerichtshof, judgment of Jan. 18, 1990, English language summary in XVII (1992) 503, 505

\textsuperscript{755} Pietrowski, supra note 8, at 92
The U.S. courts decline to review the merits by second-guessing the arbitrators' decision. They recognize a broad discretion of the panel generally presuming that the panel acted within its competence, in particular if there is a broad arbitration clause. Only a clear abuse of its powers or a completely irrational award may cause a refusal of confirmation.

Against this background it can be concluded that the courts in fact interpret the refusal grounds narrowly and, thereby, safeguard the application of the Convention by a uniform method for the enforcement of a foreign award. The Convention can, therefore, be regarded as an efficient means to enforce an award in another contracting state.

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756 Parson & Whittemore Overseas v. Societe Generale de l'Industrie du Papier (RAKTA) 508 F.2d 969, 976; but see Bundesgerichtshof, judgment of May 31, 1972, 25 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2180, 2181 (denying such a binding effect on the jurisdiction for public policy)

757 Bundesgerichtshof, judgment of Feb. 27, 1970, 53 BGHZ 315, 320 (interpreting the clause "...any dispute arising out of this contract..." broadly in favor of the arbitrators' competence)

Chapter 5: Further means of enforcement

I. Introduction

Apart from the enforcement under the Convention, the undoubtedly most important procedure, other enforcement mechanisms need to be mentioned: The 1961 European Convention on International Arbitration does not offer an alternative structure for the enforcement of foreign awards; according to its Art. I(1)(a) its application is limited to "persons having ... their habitual place of residence or their seat in different Contracting States." The United States did not accede this treaty. The 1965 multilateral Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), however, is applicable. ICSID will not be discussed here because has not given rise to practice in the U.S.-German relation. This is evidenced by the fact that there is no U.S.-German ICSID proceeding reported. Another procedure for the enforcement of foreign arbitral awards is the 1954 Treaty of Friendship, Commerce and Navigation between the United States and Germany.

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759 1964 BGBl. II 425
760 Sandrock, supra note 12, at 30
761 7 U.S.T. 1839, T.I.A.S. No. 3593
Of course, a prevailing party might think of a double exequatur strategy; i.e. seek a confirming court decision in the country of issuance, and then enforcement of this judgment. In general such a strategy is not advisable because there is still no treaty on the reciprocal recognition of foreign judgments; the enforcement is usually based on comity only. Normally the double-exequatur will be more time and money consuming, not very surprising with regard to an additional court proceeding. It may, however, be preferable if the prevailing party has already obtained a confirming judgment, e.g. because it had sought enforcement already in another country.

II. The Treaty of Friendship, Navigation and Commerce

The Treaty of Friendship, Navigation and Commerce [FCN] between the United States and Germany is another possible basis for the enforcement of an arbitral award, albeit,

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762 Westin, supra note 17, at 327 (mentioning that the enforcement of a foreign money judgment is a matter of the individual states. There is, however, the Uniform Money Judgment Recognition Act, §§ 1-11, 13, U.L.A. 261 (1986) which has been enacted only by several states.); for Germany there are two procedures: the procedures according to § 1044 ZPO or §§ 328, 723 ZPO

763 Hilton v. Guyot, 159 U.S. 113, 202-203 (1895)

764 Sandrock & Hentzen, supra note 45, at 85 and 87 (giving an extensive comparison between the enforcement procedures)

765 7 U.S.T. 1839, T.I.A.S. No 3593
"modest in scope and limited in their usefulness." It follows the concept of "national treatment" to avoid discrimination of a foreign award.

1. General Applicability

It is unclear in how far the later U.N. Convention and the implementing legislation supersedes the earlier FCN as a lex posterior. Two arguments speak for a continuous applicability of the Treaty: Art. VII(1) of the U.N. Convention expressly provides that 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...." Additionally, the purpose of the Convention (and the implementing legislation) is to facilitate the enforcement of foreign arbitral awards. More lenient requirements of the Friendship Treaty, therefore, would meet the Convention's purpose.

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766 DOMKE ON COMMERCIAL ARBITRATION, supra note 13, at § 45:02

767 Quigley, supra note 1, at 1053

768 Aksen, supra note 387, at 6

769 Aksen, id. at 14; Schlosser, Verfahrensintegrität, supra note 205, at 457; Swisher, supra note 11, at 488; Westin, supra note 17, at 355
2. The particular requirements

Contrary to the multinational U.N. Convention the bilateral Friendship Treaty is only applicable to agreements/awards between the nationals of the two countries. The language of the Treaty, however, does not suggest a limitation to the awards rendered on the territory or by nationals of one of the contracting parties.

The FCN does not make any reference to any law for the determination of the validity of the arbitration agreement, only for finality and enforceability with regard to the "laws of the place where rendered." Logically finality and enforceability in this place require validity of the agreement under the same (domestic) law. That means that for the determination of the validity of the agreement the law of the country of issuance should be applied. Since this

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770 The Treaty provides in its relevant part (Art. VI(2)): "Contract entered into between nationals or companies of either Party and nationals or companies of the other Party, that provide for the settlement by arbitration of controversies shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy.

771 Sandrock & Hentzen, supra note 45, at 68
parallels the U.N. Convention it can be referred to the relevant chapter above.\textsuperscript{772}

3. Finality and enforceability of the award

The procedure of enforcement under the FCN has only two requirements:

- the award has to be "final and enforceable under the laws at the place where award rendered," and
- it should not be "contrary to public policy."

The two reported New York cases on the enforcement of a German award evidence that the courts enforce awards under the FCN like foreign judgments.\textsuperscript{773}

In Engelbrechten \textit{v.} Galvoni \& Bros. a German party sought enforcement of a final, but not certified, award. Certification by a German court is a requirement for the execution in Germany, § 1042 ZPO. The court did not read the Treaty provision prohibiting the enforcement of an unenforceable award. In the light of the mandate of the Treaty the court recognized its discretion to give effect to German awards to extend "broader recognition to foreign adjudications required by the treaty...."\textsuperscript{774} In Landegger \textit{v.} Bayerische Hypotheken und Wechsel Bank the District Court

\textsuperscript{772} id.

\textsuperscript{773} McClendon, supra note 16, at 70

held that simultaneous court proceedings in Germany to vacate the award do not hinder enforceability in the U.S. In case of a vacation of an award, reopening might be possible.775

Similarly in Germany an arbitral award is "'final and enforceable' once it has been rendered in the form required by the law of the country in which the proceedings took place and, from that moment on, when any ordinary means of recourse are no longer available against it."776 It is submitted that there is a tendency in Anglo-American Treaties to duplicate certain elements to prevent a disregard by the courts.777 Accordingly, a"double-exequatur" may be deemed superfluous.

The second requirement is that the award should not be "found contrary to public policy." Public policy "includes (most matters of) due process as well as arbitrability of the subject matter."778


776 Sandrock & Hentzen, id. at 69 (referring to Bundesgerichtshof, judgment of Oct. 21, 1971, 57 BGHZ 153, 157)

777 Sandrock & Hentzen, id. at 70

778 Sandrock & Hentzen, id. at 70; Oberlandesgericht Hamburg, April 3, 1975, II YCA (1977) 241 (for an example of a public policy decision under the FCN)
Conclusion

Arbitration offers a number of advantages over litigation. Those advantages gain even more weight in international business than in domestic disputes. The review of court decisions is evidence that arbitration in the international cast is a reliable method of dispute resolution. This is a result in particular of the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and its application by U.S. and German courts. If a party to arbitration tries to enforce an award under the Convention or the FCN the issue of enforcement abroad no longer seems to be critical. In the majority of cases courts grant enforcement.

The Convention provides for broader applicability than the bilateral FCN. The procedure of the Convention cannot only be used for awards rendered in bilateral U.S. German relations but also for an award rendered in favor of a U.S. or German party before a panel in another (for the U.S.: contracting) country.

The refusal of arbitration as an alternative method of dispute resolution might be described once again by using the words of the Supreme Court in Scherk v. Alberto-Culver:
"... the dicey atmosphere of such a legal no-man's-land [if arbitration as a choice of forum were not recognized] would surely damage the fabric of international commerce and trade, and imperil the willingness and the ability of businessmen to enter into international commercial agreements." The possibility of a fast and predictable dispute resolution in a neutral forum and the enforceability of an award rendered by an arbitration tribunal help overcome businesspeople's reluctance to trade internationally.

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