

# **Course on International Arbitration and the New York Convention**

by

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## **List of Topics<sup>2</sup>**

### **Abbreviations:**

(K)	available at: <a href="http://www.kluwerarbitration.com">www.kluwerarbitration.com</a>
(W)	available at: <a href="http://www.newyorkconvention.org">www.newyorkconvention.org</a>

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<sup>2</sup> The list is based on the New York Convention 1958: Commentary Cases (2003) published in Yearbook 2003 (available at [www.newyorkconvention.org](http://www.newyorkconvention.org)).

## How to Search in Cases on [www.newyorkconvention.org](http://www.newyorkconvention.org)

**Per Contracting State:** > Court Decisions > Decisions per Country > [Contracting State]

Each court decision is numbered as in the Yearbook Commercial Arbitration (e.g., US 54). Clicking on the case number shows the option to access

Original full text (where available, e.g., “Full text decision US 54”) or

Excerpt as published in the Yearbook Commercial Arbitration (e.g., “Excerpt decision US 54”). Access to the excerpt is via [www.kluwerarbitration.com](http://www.kluwerarbitration.com).

**Per Topic:** > Court Decisions > Decisions per Topic

Topics are issues that have arisen in court decisions under the Convention as identified in the Commentaries in the Yearbook Commercial Arbitration. The Topics are briefly described in the [List of Topics](https://www.newyorkconvention.org/11165/web/files/document/1/5/15975.pdf) (<https://www.newyorkconvention.org/11165/web/files/document/1/5/15975.pdf>). They are identified by the pilcrow symbol ¶.

The Topics are grouped according to the articles of the Convention. Thus, Topics concerning Article I are ¶ 101 - ¶ 113, Article II are ¶ 201 - ¶ 226, etc.

Each reported decision contains one or more Topics that are addressed in that decision. For example, US 54 lists under “Topics in US 54”:

- ¶102 » Arbitral award not considered as domestic (paragraph 1)
- ¶109 » Arbitral award: “a-national” award
- ¶306 » Period of limitation for enforcement
- ¶404 » Authentication and certification.”

Search is facilitated by references to the relevant paragraphs in the excerpt of the court decision in the Yearbook Commercial Arbitration. For example, Topic ¶ 102 in US 54 is referenced by “¶102 (sub 2-3 and 6)” which means that the Topic is discussed by the Court in paragraphs 2-3 and 6 as numbered in the excerpt.

## **INTRODUCTION**

### **INTERNATIONAL COMMERCIAL ARBITRATION IN GENERAL**

- The four legal cornerstones of international arbitration
- The way in which international arbitration is organized

### **HISTORY OF THE NEW YORK CONVENTION**

- Time line 1923 – 1958 (W)
- *Travaux préparatoires* (W)
- Research *travaux préparatoires* for each topic below

### **GENERAL INTRODUCTION TO THE CONVENTION**

- Overview of the structure and text of the Convention (W)
- 172 Contracting States and over 2,500 court decisions (W+K)
- The most important treaty for international commercial arbitration

### **GENERAL QUESTIONS UNDER MOST OF THE TOPICS**

- What is the meaning of the provision in the Convention?
- Is the meaning to be determined on the basis of the Convention or some national law, and if the latter, which national law?
- What is the practical relevance of the provision?
- How do the courts in the Contracting States interpret and apply the provision?
- Does the provision in question need to be revised, and if so, in what manner?

- Same questions if the topic concerns an issue that is not expressly addressed by the Convention.

## **METHODS OF REVISION**

- Unification of judicial interpretation
- Guidance notes
- Amendment of existing Convention (by way of Protocol or otherwise)
- New Convention (see 2008 Preliminary Draft Convention (W))
- Other methods?

## **INTERPRETATION**

### **¶ 001 Interpretation of the Convention**

- Treaty interpretation in general – Vienna Convention on the Law of Treaties of 1969 (W)
- Authentic texts (Art. XVI)
- Static vs evolutive (aka “dynamic”) treaty interpretation
- Interpretation of the Convention by the national courts
- Guidance by UNCITRAL Model Law on International Commercial Arbitration of 1985/2006 (W)
- UNCITRAL Recommendation of 2006 for Arts. II(2) and VII(1) (W)
- A uniform judicial interpretation?

## **ARTICLE I**

### **FIELD OF APPLICATION (ARBITRAL AWARDS)**

— For the notion of “recognition,” see ¶ 301 below

#### **¶ 101 Award made in the territory of another (Contracting) State (Paragraphs 1 and 3 – First Reservation or “Reciprocity Reservation”)**

— Title of the Convention

— Notion of “foreign” award vs. “international” award

— Reciprocity vs. universality

— Reciprocity in Art. I(3) and in Art. XIV (see also ¶ 914 below)

— Reciprocity superfluous?

— Final Act § 14: no other reservations; in practice, some States do make other reservations

— Reservations (a) not notified (“gazetting”); (b) not reflected in implementing legislation; (c) Contracting State requires to be certified or on an official list

#### **¶ 102 Arbitral award not considered as domestic (Paragraph 1)**

— Non-domestic awards according to the drafters’ intent (W)

— Non-domestic awards according to certain implementing acts (e.g., 9 USC § 202 (W))

— Non-domestic awards according to the courts

— Non-domestic awards according to doctrine (W)

— Use of non-domestic award in practice

#### **¶ 103 Nationality of the parties no criterion**

— Should it be a criterion? Comp. 9 USC § 202 (W)

- Can it still play a role in interpreting the Convention?

**¶ 104 Convention’s applicability in other cases**

- Enforcement of domestic arbitral award. (W)
- Setting aside of arbitral award. Application by US courts. See also ¶ 516 (W)
- Does not apply in country of origin may have as effect that it undermines (a) limitative character of grounds for refusal of enforcement, and (b) lack of uniform application of Article II(2)

**¶ 105 “[P]ersons, whether physical or legal” (Paragraph 1)**

- Meaning of the expression
- Sovereign immunity
- See also ¶ 505 below

**¶ 106 Problems concerning the identity of a party**

- Group of companies
- State, State Agency, State Corporation
- Third party (see also ¶ 226 below)
- See also ¶ 505 below

**¶ 107 Second reservation (“Commercial Reservation”) (Paragraph 3)**

- How to determine what is commercial?
- Meaning of “whether contractual or not”

**¶ 108 Arbitral award: *arbitrato irrituale* (Italy) and other procedures akin to arbitration**

- Which are the other procedures?
- Do they fall under the Convention?

**¶ 109 Arbitral award: “a-national” award**

- Notion of “a-national” award
- Use of “a-national” award in practice
- Problems caused by the use of “a-national” award
- Does an “a-national” award fall under the Convention? (see also ¶ 513 below)

**¶ 110 Arbitral award: types**

- How to determine what is an “arbitral award”?
- Awards prior to final award: preliminary, partial, interim, interlocutory: can they be enforced separately under the Convention?
- Emergency arbitration
- In particular: interim award for interim (injunctive) relief?
- Can a Procedural Order be enforced under the Convention?

**¶ 111 “[P]ermanent arbitral bodies” (Paragraph 2)**

- Meaning and relevance?

**¶ 112 Retroactivity**

- Can this Treaty be applied retroactively? If so, as of what stage: arbitration agreement; commencement of arbitration; award?
- Lost most of its practical relevance (but may become relevant for a new Convention)
- Does Article VII(2) demonstrate an “intention” within the meaning of Article 28 VCLT?

**¶ 113 Implementing legislation**

- Self-executing vs. implementing legislation
- How to determine whether a State is Party to the Convention



- Absent implementing legislation
- Defective implementing legislation
- Diverging implementing legislation

¶ 114 **Iran-US Claims Tribunal**

- Do its awards fall under the Convention?

## **ARTICLE II**

- General overview

### **ARTICLE II(1) AND (2)**

#### **ARBITRATION AGREEMENT**

- Applicable to both referral to arbitration (Art. II(3)) and enforcement of arbitral award (Art. V(1)(a)) (see also ¶¶ 202 and 504 below)

#### **PARAGRAPH 1: AGREEMENT IN GENERAL**

##### **¶ 201          Scope of arbitration agreement**

- Terminology: “scope” and “arbitrability” (US)
- How to interpret the scope of an arbitration agreement?
- Meaning of “arise in respect of a defined legal relationship, whether contractual or not”
- Tort claims

##### **¶ 202          Contents of arbitration agreement**

- The meaning of the obligation that “Each Contracting State shall recognize...”
- The expression “which have arisen or may arise”
- The meaning of the expression “differences”
- The meaning of the expression “concerning a subject matter capable of settlement by arbitration” (see also ¶ 223 below)
- Relationship with Art. V(1)(a) (see also ¶ 504 below)

## **PARAGRAPHS 1 AND 2: AGREEMENT IN WRITING**

- Paragraph 1: requirement to recognize
- Paragraph 2: definition of written from: the two alternatives
- Probably most troublesome provision of the Convention

### **¶¶ 203-204 Formal validity, uniform rule and municipal law**

- Rationale for written from
- Internationally uniform rule?
- International maximum requirement?
- International minimum requirement? NB: Proposal re tacit acceptance was rejected at New York Conference: intent of also a minimum requirement?
- Article 7(2) of UNCITRAL Model Law of 1985 (W)
- Article 7 of UNCITRAL Model Law as amended in 2006 (W)
- Room for applicability of municipal law?
- Article VII(1) (“more-favorable-right provision”) applicable? See also UNCITRAL Recommendation of 2006 (W)
- Residual discretionary power of court to recognize and enforce? See also ¶ 500A below.
- Not applicable to enforcement of award (Art. V(1)(a))? See also ¶ 504 below.
- UNCITRAL Recommendation of 2006 (W)

### **¶ 205 Signatures**

- Does the first alternative require signature?

**¶ 206            Exchange of letters or telegrams**

- When is there an “exchange”?

**¶ 207            “[L]etters or telegrams”**

- Does it also apply to telefax?
- Does it also apply to email?
- Does it apply to e-commerce in general?

**¶ 208            Sales or purchase confirmation**

- What is special about a sales or purchase confirmation?
- Is a tacit acceptance sufficient?

**¶ 209            Arbitration clause in standard conditions**

- Incorporation by reference
- Adhesion contracts
- Consumer contracts

**¶ 210            Articles 1341 and 1342 Italian Civil Code**

- Law No. 25 of 5 January 1994

**¶ 211            Bill of lading and charter party**

- See distinct questions in reported cases

**¶ 212            Agent/Broker, etc.**

- Authorization should have the same form?
- Assignment of arbitration agreement (see also ¶ 226 below)
- See also ¶ 505 below

**¶ 213            Amendment or renewal of agreement**

- Amendment

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- Renewal
- Settlement agreement

¶ 213A      **Should International Arbitrator Apply Article II(1)-(2)?**

## **ARTICLE II(3)**

### **REFERRAL BY COURT TO ARBITRATION**

#### **A. FIELD OF APPLICATION (§§ 214-216)**

- No provision in the Convention
- Agreement providing for arbitration in another State
- Agreement providing for arbitration within forum's State
- Agreement involving foreign party
- EU law issue regarding distinction based on nationality?
- Are the tests in *Ledee* test (US No. 50) and *Bautista* (US 200): appropriate?
- First Reservation (Art. I(3)) applicable? (see also § 101 above)
- Commercial Reservation (Art. I(3)) applicable? (see also § 107 above)
- Analogous application of Art. VII(1) ("more-favorable-right provision") (see also § 701 below)
- See Commentary 2003 pp. 598-608 (W)

#### **§ 216A Analogous Applicability of Article VII(1)**

- UNCITRAL Recommendation of 2006 for Arts. II(2) and VII(1) (W)

## **B. REFERRAL TO ARBITRATION**

### **¶ 217 In general**

- Requirements
- At the request of a party
- Latest moment for making the request
- Waiver or estoppel
- Meaning and effect of “refer the parties to arbitration” in Art. II(3) vs. “stay the proceedings” (England) and “compel arbitration” (US)
- Actual submission to arbitration is not required
- Partial referral to arbitration
- Condition precedent to commencement of arbitration (see also ¶ 220 below)

### **¶ 218 Referral is mandatory**

- Internationally uniform rule?

### **¶ 219 There must be a dispute**

- How to determine?

### **¶ 220 “[N]ull and void,” etc.**

- Meaning of “null and void”
- Meaning of “inoperative”
- Meaning of “incapable of being performed”
- Problems with place of arbitration
- Financial incapacity of a party
- Anticipated problems with enforcement of the award

- Incorrect reference to arbitration institution
- Prior mediation obligation (see also ¶ 217 above)

**¶ 221 Law applicable to “null and void,” etc.**

- Law of the forum or law of the place of arbitration or some other law?

**¶ 222 Arbitrator’s competence and separability of the arbitration clause**

- Competence-competence: May an arbitral tribunal decide on its own jurisdiction, at least subject to subsequent court control?
- Separability of the arbitration clause: May an arbitral tribunal decide on the validity of the main contract in which the arbitration clause is contained?

**¶ 223 Arbitrability**

- Art. II(1): “subject matter capable of settlement by arbitration”
- See also Article V(2), sub “Arbitrability”, ¶ 519 below
- Subjective and objective arbitrability
- Public policy and enforcement of arbitration agreement
- Under which law is arbitrability to be judged?
- Bankruptcy of a party

**C. DECLARATORY JUDGMENT ON VALIDITY ARBITRATION AGREEMENT (¶ 224)**

- Is it possible under the Convention?

**D. MULTI-PARTY DISPUTES**

- Several categories

**¶ 225 Related arbitrations (consolidation, etc.)**

- Is the possibility of conflicting awards a ground for refusal to refer to arbitration?



- Class action arbitration and the Convention

**¶ 226 Third parties**

- See also Article I, “Problems concerning the identity of the respondent”, ¶ 106 above
- The issue of non-signatory parties to the arbitration agreement
- Joinder or intervention
- Piercing the corporate veil; alter ego
- Subsidiary of a party
- Assignment (see also ¶ 212 above)
- Guarantor
- Third party beneficiary
- Procedural solutions

**¶ 227 Concurrent court proceedings (“indivisibility”)**

- *Vis attractiva* (Italy); “intertwining doctrine” (US)

**E. PRE-AWARD ATTACHMENT AND OTHER PROVISIONAL MEASURES BY A COURT (¶ 228)**

- Compatible with the Convention?
- UNCITRAL Model Law amendment of 2006 (W)
- Other measures in aid of arbitration (e.g., discovery in aid of arbitration abroad)

**F. MEASURES IN AID OF ARBITRATION (¶ 229)**

- Anti-suit injunction: compatible with Convention? See ECJ in *West Tankers* (see also ¶ 704(c) below)
- Recognition of foreign judgment on the validity of the arbitration agreement: compatible with the Convention? See also ¶ 704c below

## **ARTICLE III**

### **PROCEDURE FOR ENFORCEMENT**

#### **¶ 301 In general**

- The meaning of the obligation that “Each Contracting State shall recognize...”
- Notion of recognition
- Procedure of the forum v conditions of the Convention
- *Ex parte* application
- Which procedure of the forum?
- Jurisdictional requirements of the forum?
- No “more onerous conditions or higher fees or charges” and non-discrimination vis-à-vis enforcement of domestic awards
- How is the “competent authority” in Art. V(1)-(2) determined (see also Art. VI)?
- See UNCITRAL Survey of 2008 and ICC Enforcement Guide (<https://library.iccwbo.org/dr-enforcementguide.htm>)

#### **¶ 302 Discovery of evidence**

- Compatible with request for enforcement?

#### **¶ 303 Estoppel/waiver**

- “Issue estoppel” (UK): if in setting aside proceedings in the country of origin the issue has been addressed, is a party estopped from raising that issue under a ground for refusal of enforcement under the Convention?
- Waiver: if the applicable arbitration law or the applicable arbitration rules require to timely object and a party has failed to do so, has that party waived its right to invoke a related ground for refusal of enforcement under the Convention?

**¶ 304 Set-off/counterclaim**

- Admissible in enforcement procedure under the Convention?

**¶ 305 Entry of judgment clause**

- Is the requirement of US federal law compatible with the Convention?

**¶ 306 Period of limitation for enforcement**

- How should a period of limitation be determined?

**¶ 307 Interest on award**

- Can enforcement court award interest not granted in the award?
- Can enforcement court grant post-award interest?
- Can enforcement court modify interest granted in the award?

## **ARTICLE IV**

### **CONDITIONS TO BE FULFILLED BY THE PETITIONER**

#### **¶ 401 In general**

- May other conditions be imposed on a petitioner by an implementing law or court?

#### **¶ 402 Original or copy arbitral award**

- By whom and how should it be determined whether the document supplied is an arbitral award?
- What is a “duly authenticated original award”?
- What is a “duly certified copy thereof”? Is it a copy of the original award or of the “duly authenticated original award”?
- In case of enforcement of final award, should a prior interim and/or partial award in the same arbitration be supplied as well?

#### **¶ 403 Original or copy arbitration agreement**

- What is the difference between the obligation under Art. IV(1)(a) and the ground for refusal of enforcement under Art. V(1)(a)?
- By whom and how should it be determined whether the document supplied is an arbitration agreement?
- What happens if the original arbitration agreement (contract with arbitration clause) no longer exists or is not available, but only a copy?
- What happens if the applicable law does not require an arbitration agreement in writing as is the case under Option II for Article 7 of the UNCITRAL Model Law as amended in 2006? (W)

#### **¶ 404 Authentication and certification**

- Who can validly authenticate the original of the award?
- Who can validly authenticate the original of the award and agreement?
- Who can validly certify the copy of the award and agreement?

**¶ 405 “[A]t the time of application”**

- What should happen if the petitioner does not supply the award and agreement “at the time of the application”?

**¶ 406 Translation (paragraph 2)**

- Is a translation a mandatory requirement?
- The “official or sworn translator” should come from which country?
- The “diplomatic or consular agent” should come from which country?

## **ARTICLE V**

### **GROUND FOR REFUSAL OF ENFORCEMENT IN GENERAL**

#### **¶ 500 General**

- Overall scheme
- Interpretation of ground for refusal of enforcement
- The “competent authority”, see ¶ 301 above
- Three main features (see below)
- Refusal of enforcement does not happen frequently (W)
- What is the position of a third party who has an interest in the outcome of the enforcement proceedings? (see also ¶ 106 above)

#### **¶ 500A Residual power to enforce**

- Residual power to grant enforcement notwithstanding the existence of a ground for refusal of enforcement? If so, does it apply to all grounds?
- See for issue estoppel and waiver, ¶ 303 above

#### **¶ 501 Grounds are exhaustive**

- Can the principle be circumvented by public policy (Art. V(2)) or otherwise?

#### **¶ 502 No re-examination of the merits of the arbitral award**

- Is the principle absolute?

#### **¶ 503 Burden of proof on respondent**

- Can there be a reversal of the burden of proof in certain cases?

## **ARTICLE V(1)**

### **GROUND FOR REFUSAL OF ENFORCEMENT TO BE PROVEN BY THE RESPONDENT**

- The possible relevance of “may refuse”(English text) versus “shall refuse” (see also the other authentic texts)

### **GROUND A: INVALIDITY OF THE ARBITRATION AGREEMENT**

#### **¶ 504 Agreement referred to in Article II**

- Are the requirements of Art. II(2) applicable at the stage of enforcement of the arbitral award? (see also ¶ 202 above)

#### **¶ 505 Incapacity of party**

- What is the meaning of “were, under the law applicable to them, under some incapacity”? (see also ¶¶ 105, 106, 212 and 226 above)

#### **¶ 506 Law applicable to the arbitration agreement**

- Relationship with non-domestic awards in Art. I(1) (see ¶ 102 above)
- What is to be determined under the applicable law?
- What is the meaning of “failing any indication thereon”?
- How do these conflict rules compare with the conflict rules in Art. V(1)(d) and (e)?

#### **¶ 507 Miscellaneous**

- Are there any matters in the cases indexed under this topic that merit analysis? (W)

### **GROUND B: VIOLATION OF DUE PROCESS**

#### **¶ 508 In general**

- Meaning of the ground in general
- Rule of interpretation

- Does ground b comprise the same as Art. 18 of the UNCITRAL Model Law? (W) (“The parties shall be treated with equality and each party shall be given a full opportunity to present his case.”)
- Relationship with Art. V(2)(b)

**¶ 509 “[P]roper notice”**

- What is the meaning of “proper notice”?
- How should notice be served?

**¶ 510 Time limits and notice periods**

- What would be a proper time limit?
- What would be a proper notice period?

**¶ 511 “[O]therwise unable to present his case”**

- What is the proper test?

**GROUND C: EXCESS BY ARBITRATOR OF HIS OR HER AUTHORITY (¶ 512)**

- What is the meaning of “[t]he award deals with a differences not contemplated by or not falling within the terms of submission to arbitration”?
- What is the meaning of “[t]he award . . . contains decisions on matters beyond the scope of submission to arbitration”?
- What is the difference between the two foregoing expressions?
- Does ground c correspond to the notion of the mandate (in French “*mission*”) of the arbitral tribunal?
- Does ground c apply to the case where an arbitrator has glaringly failed to apply the terms of a contract? (W)
- If the award exceeds the scope of the arbitration agreement (see ¶ 201), is there a difference between ground a and c of Art. V(1)?



- If a final award contains decisions contrary to decisions in a prior partial award in the same arbitration, is there an excess of authority within the meaning of ground c?
- Is an arbitral award that awards less than claimed (*infra petita*) covered by ground c or any other ground for refusal of enforcement in the Convention?
- What is the test for partial enforcement in case of excess of authority?
- Can a court also grant partial enforcement if the non-enforceable part of the award violates another ground for refusal of enforcement?
- Can a party request partial enforcement even if all decisions are within the scope of the arbitration agreement and the submission to arbitration (e.g., request for enforcement of the claims only, without the counterclaims)?

**GROUND D: IRREGULARITY IN THE COMPOSITION OF THE ARBITRAL TRIBUNAL OR ARBITRAL PROCEDURE (§ 513)**

- If there is an agreement on the composition of the arbitral tribunal and the arbitral procedure, what is the role (if any) of the arbitration law of the place of arbitration?
- Is there a difference between “the law of the country where the arbitration took place” (ground d), “the law of the country where the award was made” (ground a), and “the country in which, or under the law of which, that award was made” (ground e)?
- Is ground d a basis for “a-national” awards? (see § 109 above)

**GROUND E: AWARD NOT BINDING, SUSPENDED OR SET ASIDE**

**§ 514 “Binding”**

- “Binding” vs. “final”
- Abolishment of the “double exequatur”
- Is the meaning of “binding” to be determined on the basis of an autonomous interpretation or an interpretation under a national law?

- What is the meaning of “binding” on either basis?

**¶ 515 Merger of award into judgment**

- If an award has merged into a court judgment in the country of origin, can it still be enforced as an award under the Convention? (see also ¶ 702 below)
- Can a court judgment entered on the award in the country of origin be enforced as a foreign court judgment abroad? (see also ¶ 702 below)
- Can a leave for enforcement on an award in another country under the Convention be enforced as a foreign court judgment in a third country?

**¶ 516 “Set aside”**

- Distinction between setting aside and refusal of enforcement (see also ¶ 104 above).
- What is meant by “under the law of which”? (see also ¶ 102 above)
- Who is the “competent authority” and how is it determined? (see also ¶ 301 above)
- May a court in a country other than the country in which, or under the law of which, the award was made, set aside an award? Which is the effect of such setting aside?
- What happens if a setting aside action is not available in the country of origin or has been excluded by agreement (as it is possible in, e.g., Switzerland)?
- Is an application for setting aside in the country of origin a condition precedent for an application for enforcement in another country under the Convention?
- Does an application for setting aside rejected by the court in the country of origin preclude reliance on grounds for enforcement in another country under the Convention (issue preclusion or issue estoppel; res judicata; double control)? See also ¶ 303 above
- Does the application of this ground require the recognition of a foreign court judgment setting aside the award? If so, under which legal regime does such recognition take place?

- Is enforcement of an award set aside in the country of origin possible under the Convention? (W) See for enforcement of annulled awards also Art. IX of the European Convention of 1961 (see ¶ 704 below).
- What is the difference with Art. VI? (see also ¶ 601 below)

**¶ 517 “Suspended”**

- What is the meaning of “suspended”?
- If it means suspension of enforcement of the award in the country of origin, should it make a difference whether the suspension is by operation of law (e.g., France) or by court order only (e.g., The Netherlands) in the country of origin?

## **ARTICLE V(2)**

### **PUBLIC POLICY AS GROUND FOR REFUSAL OF ENFORCEMENT *EX OFFICIO***

#### **¶ 518 Distinction domestic–international public policy**

- What does the distinction mean?
- What is the justification for the distinction?

#### **GROUND A: ARBITRABILITY (¶ 519)**

- See also ¶ 223 above
- Should there be a list non-arbitrable matters?

#### **GROUND B: PUBLIC POLICY**

#### **¶ 520 Default of party**

- Is non-participation in the arbitration by a duly summoned party still an issue under the Convention?

#### **¶ 521 Lack of impartiality of arbitrator**

- Should imputed bias (or appearance of bias) also fall under Art. V(2)(b)?

#### **¶ 522 Lack of reasons in award**

- What happens if reasons are mandatory in the country of origin and no reasons are given?
- Would inadequate reasons be a ground for refusal of enforcement?

#### **¶ 523 Irregularities in the arbitral procedure**

- See also Art. V(1)(b) (¶¶ 508-511 above)

#### **¶ 524 Other cases**

- Are there any matters in the cases indexed under this topic that merit analysis?

## **ARTICLE VI**

### **ADJOURNMENT OF DECISION ON ENFORCEMENT (§ 601)**

- What is the difference with Art. V(1)(e)? (see also § 516 above)
- Until what moment can Art. VI apply? Until a court in last resort in the country of origin has decided on the setting aside or the period of time to take recourse to that court has lapsed?
- Does a court have discretionary power to adjourn enforcement?
- What is the test for adjournment?
- What is “suitable security”?
- If the application for adjournment is rejected and enforcement is granted, may the court order security from the party seeking enforcement for the event that the setting aside succeeds in the country of origin?

## **ARTICLE VII(1)**

### **MORE-FAVORABLE-RIGHT PROVISION AND COMPATIBILITY PROVISION**

#### **¶ 701 More-favourable-right provision in general**

- What is the rationale for the mfr provision?
- Are the Convention and the other legal basis for enforcement mutually exclusive?
- What is the meaning of “the law”?
- What is the meaning of “the treaties”?
- To whom does “any interested party” refer?
- May a court apply Art. VII(1) on its own motion?
- Does the mfr provision apply to the arbitration agreement as recommended by UNCITRAL in 2006? (W)

#### **¶ 702 Domestic law on enforcement of foreign award**

- Relevance of countries that have a domestic law (statutory law or case law) concerning the enforcement of foreign arbitral awards
- Relevance of countries that exclude the enforcement of foreign arbitral awards without a treaty
- Relevance of domestic laws that specifically refer to the New York Convention for the enforcement of foreign arbitral awards
- Enforcement of foreign arbitral award as foreign judgment (see also ¶ 516 above)
- Examples of specific provisions of domestic law for the enforcement of foreign awards outside a treaty (either in the context of foreign court judgments or foreign arbitral awards)
- What are the differences between enforcement under the New York Convention and Arts. 35 and 36 of the UNCITRAL Model Law? (W)

- Specific countries: France; Germany; The Netherlands, and the United States

#### ¶ 703 **Bilateral and multilateral Treaties**

- More-favorable-right and compatibility in Art. VII(1)
- If an award falls under the field of application of the New York Convention and a bilateral or multilateral treaty, how can it be determined which of them applies?
- Are there too many bilateral and/or multilateral treaties in the field of arbitration?

##### ¶ 703(a) **Multilateral Treaties**

- Cairo Convention of 1952
- Washington Convention of 1965 (W)
- Moscow Convention of 1972

#### ¶ 704 **European Convention of 1961 (W)**

- Field of application: differences with the New York Convention?
- To what extent is the European Convention complementary to the New York Convention?
- See also ¶ 516 above for limitation on setting aside in country of origin
- Should the European Convention be abolished?

##### ¶ 704(a) **Panama Convention of 1975 (W)**

- Is it an incomplete copy of the New York Convention?
- Are the Panama Convention and New York Convention compatible? (W)
- Should the Panama Convention be abolished?

##### ¶ 704(b) **Bilateral Treaties**

- In which categories can bilateral treaties be divided?

- Are there common features in respect to the New York Convention (scope, conditions for enforcement)?
- Is the New York Convention generally more favorable than bilateral treaties for the enforcement of foreign arbitral awards?

**¶ 704(c) European Union (Treaties and Legislation) See also ¶ 229 above.**

- Should a violation of EU competition law by arbitrators constitute a violation of public policy of Art. V(2) of the New York Convention as the ECJ opined in *Benetton* (W)?
- Was the ECJ correct in the *West Tankers* case? (W)
- Should the arbitration exception be deleted from Regulation 1215/2012? (W) What are the main issues?

**ARTICLE VII(2)**

**RELATIONSHIP WITH GENEVA TREATIES OF 1923 AND 1927 (¶ 705)**

- Would the experience with the ceasing of effect of the Geneva Treaties be a reason for not adopting a Protocol to the New York Convention or a new Convention?



**ARTICLE XI**

**FEDERAL STATE CLAUSE (§ 911)**

- See indexes (W)

**ARTICLE XIV<sup>3</sup>**

**GENERAL RECIPROCITY CLAUSE (§ 914)**

- What is the relationship with the First Reservation in Art. I(3)? See § 101 above.

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<sup>3</sup> Articles not mentioned in this List are typical treaty provisions of a technical nature that have not been subject to judicial interpretation and application.