INTERNATIONAL COMMERCIAL ARBITRATION

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Validity of Agreement to Arbitrate

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, approved in New York in 1958, with approximately 90 member states,[1] notwithstanding its title, does not refer only to the efficacy of international arbitral awards, but also provides for the enforcement of the actual agreement to arbitrate, as stated in Article II.[2]

The enforcement of the agreement to arbitrate can be set in the following hypothetical case referred to by a prominent American specialist:[3] [A] an American company and [B] a British company, enter into a contract that contains an agreement to arbitrate in Switzerland. If a dispute arises and A seeks to bring an action against B in the court of New York or London, the courts of either country will dismiss the action (or grant a stay), and will refer the parties to arbitration. If the arbitration goes forward in Zurich and if it results in an award in favor of either party, that award can be enforced directly in the United States, the United Kingdom and some ninety countries, as well as in Switzerland.

The same is true for the Inter-American Convention on International Commercial Arbitration, (CIDIP, Panama, 1975) as provided in its first Article[4] and also for the European Convention on International Commercial Arbitration (Geneva, 1961) as contained in its articles V and VI.[5]

Courts are inclined to judge in favor of the arbitration agreement's validity — *favor validatis*— as seen in various decisions of different national judiciaries.

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1 Brazil is not a member state of the Convention.

2 Article II - "Each Contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration...".

3 Andreas. F. Lowenfeld, *International Litigation and Arbitration*, 345 (1993).

4. Article I - "An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid".

5 The Geneva Convention does not carry the same, clear rule on the validity of the arbitration agreement, but articles V and VI contain clear indications as to the possibility that parties should discuss the validity of this agreement and on the competence of the arbitrator to decide upon this question. Article V, alinea 3 states: "*Sous réserve des contrôles judiciaires ultérieurs prévus par la loi du for, l'arbitre dont la compétence est contestée, ne doit pas se dessaisir de l'affaire; il a le pouvoir de statuer sur sa propre compétence et sur l'existence ou la validité de la convention d'arbitrage ou du contrat dont cette convention fait partie.* And article VI, para. 2 rules: "*Quand ils auront à se prononcer sur l'existence ou la validité d'une convention d'arbitrage, les tribunaux des États contractant statueront....*".

Mangistaumunaigaz Oil Prod. (state-owned enterprise of the Republic of Kazakhstan) v. *United World Trading of Colorado* — The Queen's Bench Division held that a clause in a contract for the sale of crude oil which stated "Arbitration, if any by ICC rules in London" was a valid and binding agreement to arbitrate. The Colorado company challenged the jurisdiction of the ICC, arguing that the clause ("arbitration, if any ...) did not contain an actual binding agreement to arbitrate and that a further and specific agreement was necessary, in which case the arbitration would be an ICC arbitration in London. Justice Porter of the Queen's Bench held that the clause did reflect the parties intention "to settle any dispute which might arise between them by arbitration according to ICC rules in London" and that any other construction would strain common sense.[6]

The Court of Appeal of Dresden, Germany also decided in favor of the validity of an arbitration clause although it was drafted in ambiguous terms, by saying that "all disputes arising in connection with the present contract shall be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce of Vienna". The German court decided that the ICC was competent to administer the dispute and that reference to a city other than Paris did not render the arbitration agreement ineffective, the reference to Vienna to be read as an indication that the place of arbitration would be Vienna, but the arbitration would be conducted in accordance with the Rules of the International Chamber of Commerce of Paris.[7]

An interesting case was judged by a court in Rotterdam, *Chemicals & Phosphates Ltd. v. N.V. Algemeene Oliehandel.* Plaintiff, an Israeli company requested the defendant, a Dutch company, to deliver a certain product. The Dutch company's contract which was sent to the Israeli party contained an arbitration clause. It so happened that the Israeli company received the contract but did not sign and return a copy thereof as requested by the seller.

After the arrival of the goods in Israel, the buyer, as a result of an analysis done on the merchandise, protested as to the quality of part of the goods delivered, and proceeded to sue the Dutch company in the court of Rotterdam, claiming that it had not signed the special conditions containing the arbitration agreement, to which Oliehandel replied that the claim should be dismissed in view of the agreement to arbitrate. Chemicals argued, among other reasons, that it cannot be bound by the arbitration clause by means of silent acceptance, since the contract is governed not only by Dutch law, but also by article II (2) of the New York Convention of 1958, as both the Netherlands and Israel have ratified it.

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[6] See Charles N. Brower and Abby Cohen Smutny, *Recent Decisions Involving Arbitral Proceedings*, 30 The International Lawyer, 271, 279 (1996).

[7] Id, at 279-280.

Court did not accept the Israeli company's arguments, and specifically on the Convention argument, stated that its reference to an agreement in writing for the validity of arbitration clauses means either an agreement signed by the parties or an exchange of letters or telegrams. The Court considered that this paragraph means that each party to a contract must be informed in a sufficient manner, on the basis of written documents, that the other party knows that possible disputes arising from the contract are to be referred to arbitration and that each party must consent thereto. This requirement was fulfilled in the case since the parties agreed that Chemicals sent a written purchase order to Oliehandel, that Oliehandel responded by sending a contract of sale containing an arbitration clause printed clearly on the contract form and that this form was received by Chemicals before delivery of the goods and was retained,without protest, for the following two months.[8]

These are clear indications of Courts' *favor validatis* approach to the arbitration agreement.

Independence of the Arbitration Agreement

An important aspect of the validity of arbitration agreement is that it does not depend of the validity of the general contract between the parties, meaning that it is possible the contract should be null and void and yet the arbitration agreement contained therein should be considered apart and decided upon as valid.

This is clearly stated in the Rules of the International Chamber of Commerce and in the Uncitral Rules. Article 8.4 of the ICC Rules states that "Unless otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas".

Article 21.2 of the Uncitral Rules provides that "The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21 an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause".

And the Model Law of Uncitral followed the same orientation by including in article 6.1 a provision that "The arbitral tribunal may rule on its own jurisdiction,

[8] See Loewenfeld, supra note 3, at 347-9.

including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause". This is also the rule of the Swiss law on Private International Law in its article 178.3.[9]

Among the various decisions which have upheld the validity of arbitration agreements independently of the validity of the wider contract, notice should be given to the decision of the civil chamber of the French Cassation in *Comité populaire de la municipalité de Khoms El Mergeb v. Sté Dalico Contractors*, regarding a contract which established the Libian law as applicable to the contract where the Libian municipality claimed that according to Libian law the arbitration agreement was not valid.[10]

The highest French court judged that the existence and the efficacy of an arbitration agreement is decided in accordance with the common wish of the parties, there being no need to submit it to a national law.

The U.S. Supreme Court decided *Prima Paint Corp. v. Flood and Conclin Mfg. Co.* where one party had hidden its financial situation and declared bankruptcy one week after signing the contract, that even though the other party claimed there had been fraud vitiating its consent, the arbitral tribunal was to decide the dispute, stating that,

> "Except when the parties otherwise intend, arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded ... where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud".[11]

As Judge S. Schwebel of the International Court of Justice explained it, "when the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement".[12]

Therefore the law that is applicable to the contract does not necessarily apply to the arbitration clause. An arbitral tribunal decided in 1982 that the law chosen

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9 The rule of the Swiss law provides that "*La validité d'une convention d'arbitrage ne peut pas être contestée pour le motif que le contrat principal ne serait pas valable*".

10 121 Journal du Droit International, 432 (1994).

11 *Prima Paint Corp. v. Flood and Conclin Mfg. Co.*, 388 U.S. 395 (1967).

12 S. Schwebel, *The Severability of the Arbitration Agreement*, in International Arbitration: Three Salient Problems, 5 (1987) as reproduced in Craig, Park and Paulsson, International Commercial Litigation, 67 (1990).

by the parties as applicable to the merits of the dispute would not apply to the scope and effect of the arbitration clause, to which they would rely on the common intent of the parties as revealed by the circumstances of the negotiation and performance of the contract and usages conforming to the needs of international commerce.[13]

The Law Applicable to the Merits of the Dispute

The basic rule, accepted universally is that the parties may choose the law to be applied by arbitrators to the dispute resolution. But if the parties have not chosen that law, what the arbitrators have to do has been dealt with by the Rules of the different organizations that supervise national and international arbitrations.

"The law designated as the proper law by the rule of conflict which [the arbitrator] deems appropriate"; "the law determined by the conflict of laws rules which [the arbitral tribunal] considers applicable"; "the law designated by the conflict rule that the arbitrators will consider appropriate in the specific case"; these are the rules concerning the applicable law in the absence of indication by the parties, as provided respectively by the Rules of the International Chamber of Commerce, the Uncitral Rules (and its Model Law) and by the Geneva Convention of 1961 on Arbitration. These formulas indicate a two step search by the arbitrators: first they have to find the appropriate conflict of law rules, and then search which substantive law these conflict rules indicate as applicable.

The International Arbitration Rules of the American Arbitration Association provide a simpler formula, namely that in case the parties did not designate a law for the dispute resolution, "the tribunal shall apply such law or laws as it determines to be appropriate", meaning that the arbitrators choose the applicable law with no need to recur to any system of conflict rules.

Different doctrines regarding the choice of applicable law by the arbitrators have been advocated. One proposes the cumulative application of conflict systems which are interested in the dispute, another one prefers to rely on the general principles of private international law, and still another one advocates the "direct way" without interference by any system of conflicts.[14]

Case 4132 of the International Chamber of Commerce decided in 1983 is an example of the "direct way". The arbitrators considered that the larger part of the contract had to be performed in Korea, and for this reason the private law of

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[13] *Isover ST. Gobain v. Dow Chemical France et al,* as referred by Craig, Park and Paulsson, op. cit., at 12.

[14] See "YVES DERAINS, *Cour d'Arbitrage de la Chambre de Commerce Internationale - Chronique des sentences arbitrales,* 105 JOURNAL DU DROIT INTERNATIONAL, 976, 997 (1978).

Korea should be taken as ruling the contract. There was no reference to any rule of conflict of laws of any interested State.[15]

Another doctrine advocates not to apply any national legal system, by reasoning that "arbitrators, as opposed to the State judiciaries, are not the guardians of the enforcement of a national legal system, so they have the option, which they effectively use, to combine different legislations in order to pick from each one its best rules. This system which stems from a typical comparative approach is the only practical way for the formation of the *lex mercatoria* and represents the future of the law of international trade".[16]

Concerning the applicable law to the merits of the dispute, all conventions and domestic laws that deal with international arbitration allow the parties to indicate the application of *ex aequo e bono*, the principles of equity. So parties may insert in the arbitration agreement that "arbitrators will decide based on the contract and on justice, without considering any national legislation". Conventions and the domestic laws equally provide that the arbitrators should take in consideration the rules contained in the contract as well as those commercial usages which are applicable to the contract.

When parties choose which law the arbitrators will apply to the dispute, there is no need that the chosen law should have any connection to the subject matter. Those who generally advocate the need of some connection, are referring to matters submitted to national Courts, but in arbitration, which is beyond any legal system, because it lies in the neutral domain of transnational commercial law, parties are entirely free in their choice of law clause.

In case number 7154 rendered by an arbitral tribunal in Geneva the dispute involved an Argelian shipowner against a French shipyard,[17] and the choice of law was based on the Swiss Private International Law statute, which contains a special chapter for international arbitration, article 187, para. 1 providing that "the arbitral tribunal shall apply the rules of law chosen by the parties, or failing such choice, the rules of law most closely connected to the dispute". The arbitrators referred to Swiss doctrine that stresses the distinction between the rule of article 187 and the basic private international law rule of article 117 regarding contracts which provides for the application of the law of the State with the closest connection, which is deemed to exist with the State in which the party performing

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[15] Award in case nº 4.132, 1983, 110 JOURNAL DU DROIT INTERNATIONAL, 891 (1983). Yves Derains comments that *"l'arbitre ne se soucie pas de déterminer le système de conflit de lois auquel il devrait se référer tant pour qualifier le contrat que pour déterminer le droit applicable"*.

[16] See YVON LOUSSOUARN, *Le rôle de la méthode comparative en droit international privé français*, 68 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ, 307, 338 (1979).

[17] Case 7154, 121 JOURNAL DU DROIT INTERNATIONAL, 1059 (1994).

the characteristic obligation has his habitual residence or his place of business, with various illustrations as to what "characteristic performance" is supposed to mean. The choice of law by the arbitral tribunal does not have to follow such intricate ways, it simply should follow the law which is most closely connected to the dispute, which does not necessarily imply territorial liens, but rather much more what anglo-saxon doctrine has called the "proper law".

In this particular case the two potentially applicable legal systems for the dispute were the French and the Algerian law. But according to French law serious problems would arise regarding statute of limitations, which could be harmful to plaintiff and also to defendant, who was counter suing the plaintiff, whereas according to Algerian law there was no problem with statute of limitation, meaning that both actions could proceed. The decision was based on the reasoning that a case is more closely connected to that law which saves its existence than to the one that denies it.[18]

In *Companhia Valenciana de Cementos Portland v. Primary Coal*,[19] we have a good illustration of arbitration judged in accordance with *lex mercatoria*. The dispute was between a Spanish company and a New York company and the sole arbitrator delivered a partial award regarding the law to be applied to the dispute, which he established as being "the usages of commerce, also known as *lex mercatoria*". The Spanish company moved an annulment action before the Paris judiciary, claiming that the arbitrator did not follow rule 13.3 of the ICC rules which provides for the application of the "law designated as the proper law by the rule of conflict which he deems appropriate", since the arbitrator did not search for the appropriate conflict rule to indicate which substantive law to apply. The Court of Appeals of Paris stood entirely behind the arbitrator, saying that he initially examined both possibly applicable laws, the Spanish and the New York laws and found them both lacking appropriate connections to justify their jurisdiction to prescribe on the dispute between the parties,[20] so interpreting the tacit wish of the parties, he decided that they aimed to exclude the application of

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18 Id, at 1061.

19. *Companhia Valenciana de Cementos Portland S.A. v. Primary Coal Inc.*, 79 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ, 305 (1990)

20 The Paris Court of Appeals said, id, at 307: "*l'arbitre a tout d'abord examiné, pour les juger insuffisants, les divers éléments objectifs de rattachement proposés par les deux lois nationales dont la compétence pouvait être envisagée (loi espagnole et loi de l'Etat de New York), puis, interprétant la volonté tacite des parties, il a estimé souverainement qu'elles avaient entendu exclure l'application tant du droit espagnol que du droit de l'Etat de New York ...*". In BRUNO OPPETIT's comment on the court's decision, the arbitrator's reasoning comes out a little clearer: "*.. c'est en faisant application de ces principes que l'arbitre a souverainement estimé, après avoir envisagé tour à tour les éléments susceptibles de conduire au rattachement à l'une des deux lois nationales possibles, ces liens insuffisants pour justifier une compétence législative précise et qu'au demeurant les parties avaient entendu exclure l'application des diverses lois nationales intéressées; dès lors, conclut la Cour de Paris, l'arbitre avait pu, à bon droit, choisir d'appliquer la* lex mercatoria".

both Spanish and New York laws, or even the application of English law.[21] Considering the lack of jurisdiction of any national law, the arbitrator was right in applying the usages of international trade, known as *lex mercatoria*.

The recently approved Principles of International Commercial Contracts of the Unidroit —result of many years' endeavors of scholars of different countries in an effort to create uniform norms for international trade— may sometimes serve arbitrators as a source for a good solution to disputes regarding which the parties did not choose an applicable law.[22]

Sometimes parties' choice of law will not be clearly expressed in the contract, but will be revealed in an indirect way. Some decisions have affirmed that the choice of the place where the arbitration proceedings should take place indicates that the parties wished the law of that forum to be applied.[23]

The Arbitration Procedure

Choice of Rules

In matters of procedure considerable freedom is extended to parties and to arbitrators in the choice of rules to be followed.

Article 11 of the ICC Rules provides that "the rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration".

The Uncitral Rules are more liberal about the arbitrators' freedom to proceed as they understand appropriate, and at the same time, very careful regarding equality of the disputing parties, stating in Article 15 that "subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers

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[21] Bruno Oppetit, id at 312 finds this affirmation of Court rather strange, as from the reading of the arbitral award it comes out clear that each party asked that its national law should be applied.

[22] ALEXANDRE GARRO in his article on the Unidroit Principles, in Tulane Journal of International and Comparative Law, 1995, expresses the view that arbitrators have in these Principles a better source than *lex mercatoria* and will find there more precise solutions than following *ex aequo e bono*.

[23] See *Tzortzis and Sykias v. Monark Line A/B,* Court of Appeal (U.K.), 1 W.L.R. 406 (1968), apud Andreas F. Lowenfeld, supra note 3, at 273. The Inter-American Convention on the Law Applicable to Contractual Obligations, article 7, para. 2 provides that "selection of a certain forum by the parties does not necessarily entail selection of the applicable law". This convention does not concern arbitration and also does not exclude the presumption that forum carries along applicable law; it only says that this is not a necessary deduction.

appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case".[24]

The Uncitral Model Law's article 19 provides that "1. Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. 2. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence".

All these rules indicate the welcome approach to free arbitration from the strict, formalistic rules of procedure to which parties and courts are forced to submit themselves, with results that so often border on the inequitable and the unjust.

Courts have usually interpreted that by choosing the *locus* of the arbitration proceedings, there is an implied choice by the parties to submit themselves to the procedural rules of that forum. Among many others, so was decided by the Court of Appeals of Paris in 1992.[25]

Interim or Conservatory Measures

There is no denying that arbitration does not have the same force as judicial proceedings, which are supported by a vast array of measures of coercion which are not in the reach of arbitrators. Therefore in certain cases, a party that is obligated to submit itself to arbitration, or that has already done it, will be allowed to recur to a judicial authority for an interim or a conservatory measure. This has been established in all official Rules of Arbitration.

The ICC Rules provides in article 8.5 that "before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory

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[24] The same article proceeds with the following rules: "2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials. 3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party".

[25] See 83 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ, 777 (1994). Court said: "*...la clause se bornant à stipuler que les procédures ... se dérouleraient à Londres, cette clause signifiant bien que les parties ont entendu soumettre à la procédure d'arbitrage selon la loi anglaise, l'ensemble des litiges nés de l'exécution du contrat*".

measures and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat of the Court of Arbitration. The Secretariat shall inform the arbitrator thereof".

The Uncitral Rules, article 26.3, provide in the same vein that "a request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement".

And also the Rules of the American Arbitration Association, Article 22.1: "At the request of any party, the tribunal may take whatever interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods which are the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods". Same article, para. 3: "A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate".

The jurisprudential illustration of this aspect of arbitration is the Italian Cassation decision in *Scherk v. Société des Grandes Marques*, where Scherk had initiated arbitration in Zurich under the ICC Rules against its Italian licensee, SGM, alleging that this company was using its trade marks without paying royalties. Scherk requested a judicial order of attachment of SGM's assets and the court of first instance in Rome granted the order. SGM contended before the Italian courts that it was entitled to use the marks and that the arbitration clause was invalid. The Supreme Court of Italy upheld the attachment, and held that it lacked jurisdiction over disputes concerning the license agreement, which were subject to arbitration.[26]

Recognition and Enforcement of Foreign Arbitral Awards

The main source for recognition and enforcement of foreign arbitral awards is the 1958 United Nations Convention which deals precisely with this matter as its title shows and it can apply even to awards made in non-contracting states, unless the recognizing state declares when signing, ratifying or acceding to the Convention, that it would only implement it regarding awards coming from

[26] As reported by Lowenfeld, supra note 3, at 364, note 11. See id at 365 that courts in the United States, for most part, have declined to permit pre-award attachment in connection with international arbitrations, except in maritime claims, whereas in England it appears possible to secure a Mareva injunction in aid of an arbitration pending, or about to be initiated in the United Kingdom; in Switzerland *forum arresti* is available to secure an arbitral award regardless of where the arbitration is pending.

Contracting states.[27] The basic principle of the Convention is that each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.[28]

The novelty and importance of this principle is that it abolished the need to have the award judicially recognized in the country where it was rendered and then have it again recognized in the country where it has to be enforced, a practice which became known as "double exequatur". In those countries that ratified the Convention, any award coming from another contracting state (if the ratifying state signed the caveat of Article I, para. 3, otherwise even if coming from a non-contracting state) will be enforced on the same basis it recognizes and enforces domestic awards.[29]

The Swiss law on Private International Law provides in article 194 that recognition and enforcement of foreign arbitral awards are ruled by the 1958 Convention for recognition and enforcement of foreign arbitral awards.

In England a foreign arbitration award will be enforced whether or not the law governing the arbitration proceedings requires a judgment or order of a court to make the award enforceable,[30] for as Dicey & Morris say "if the English court insisted on a foreign judgment in order to make the award enforceable in England, it would not be enforcing the award but the judgment". In the English system a foreign arbitration award must be valid and final in accordance with the law that governs the arbitration proceedings, but does not have to be enforceable in the country of origin. This was clearly established in *Union Nationale des Coopératives Agricoles v. Caterrall*, where an English company signed a contract for the sale of wheat seed to French buyers, which contained a clause that any dispute would be decided by the Arbitration Chamber of Copenhagen. A dispute having arisen, *Union* obtains an award from the committee of the Copenhagen Arbitration Chamber ordering *Caterrall* to pay 183.000 sterling pounds. Under the Rules of the Chamber, awards made by the committee are final, but by Danish law, the award is not enforceable in Denmark until a judgment of a Danish court has been obtained. The Queen's Bench ruled that despite the fact that no judgment was obtained from the Danish judiciary, the award could be enforced in England, since it was final and binding by Danish law as seen from the English point of view.[31]

The Inter-American Convention on International Commercial Arbitration, signed in Panama in 1975 and the Inter-American Convention on Extraterritorial

27 As foreseen in Article I.3.
28 Article III of the Convention.
29 See Lowenfeld, supra note 3, at 344.
30 DICEY & MORRIS, THE CONFLICT OF LAWS, 610 (1993).
31 Id, at 612.

Validity of Foreign Judgments and Arbitral Awards approved in Montevideo in 1979 both conduce to the same result, namely that if the awards are *res judicata* in the country where they were rendered, they are enforceable in another jurisdiction.

Confidentiality

Some Courts dealt with the question concerning to what degree arbitration procedures have to be kept confidential. A brief review of the cases will help to understand the nature of the problem.

In *Esso Australia Resources v. Plowman*, the Australian Supreme Court decided in 1995 that the Minister for Energy and Minerals, who was not a party to the arbitration, could acquire arbitration documents and information through discovery. The editors of *Arbitration International* wrote on this case that,

"The recent decision of the High Court of Australia in *Esso/BHP v. Plowman* casts severe doubts on the question whether, as a general legal principle, international commercial arbitration is 'confidential'. It is a dramatic decision, with significance far beyond the shores of Australia. The High Court declares that, contrary to widespread understanding elsewhere (including England), there is no firm basis in contract to support the confidentiality of a commercial arbitration, as distinct from privacy of the arbitral hearings".[32]

The High Court stated that complete confidentiality of an arbitration is impossible for a variety of reasons, that include: a) no obligation of confidentiality attaches to witnesses involved in arbitral proceedings; b) an arbitral award might come into the public domain through a variety of court proceedings relating to the arbitration and, c) the parties must be entitled to disclose the existence and details of the proceedings and the award in the event that, for example, either party must keep shareholders[33] informed or collect on an insurance policy.

There is a similar precedent in the United States, from the U.S. District Court for the District of Delaware in *United States v. Panhandle E. Corp*., where the United States Government, acting to protect a security interest as guarantor of ship financing bonds, sought documents relating to an ICC arbitration in Geneva between a *Panhandle* subsidiary and *Sonatrach*, the Algerian national oil and gas company. *Panhandle* argued against production on the ground that ICC Rules consider arbitration documents confidential and cited Article 2 of the Internal Rules of the ICC Court, which provides that the confidential character of the work of the ICC Court of Arbitration "must be respected by anyone who participates in

[32] As reproduced in 30 The International Lawyer, 280 (1996).
[33] Id at 281.

that work in any capacity". The court held, however, that such rule is meant to apply internally to the ICC to govern members of its Court of Arbitration, and not to "parties to arbitration proceedings or the independent arbitration tribunal which conducts those proceedings".[34]

On the other side there are English and French decisions in favor of strict confidentiality.

In *Hassneh Ins. of Israel v. Mew*, Justice Colman's findings presented the English view of strict confidentiality as derived from the concept of implied privacy, stating that,

> "If it be correct that there is an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing. The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party. Similarly, witness statements, being so closely related to the hearings, must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitrator. If outline submissions, then so must pleadings be included".[35]

This English principle limits disclosure of the award to those situations when disclosure is necessary to enforce or protect the legal rights of a party to the arbitration agreement, and only then if the right in question cannot be enforced or protected in any other manner.

In the French case of *Aïta v. Ojjeh*, the Court of Appeal of Paris rendered a judgment against a party who incorrectly sought annulment in France of an award rendered in London. The Court not only dismissed the challenge, but ruled that the very bringing of the proceedings violated the principle of confidentiality. The Court ordered the challenging party to pay a significant penalty to the party that won the arbitration, noting that the action "caused a public debate of facts which should remain confidential" and that "the very nature of arbitral proceedings requires that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed.[36]

Competence to Interpret Arbitration Award

ICC case Nº 6233 of 1992, published in 1995, contains a novel subject —can an arbitral tribunal interpret the award of another tribunal? The defendant

[34] Id at 282.
[35] Id, ibidem.
[36] Id at 283.

challenged the jurisdiction of a new tribunal to interpret an award rendered by the previous tribunal, arguing that the ICC Rules do not contain any provision concerning the interpretation of arbitral awards. He argued that only the tribunal that renders an award can interpret it, and if the rendering tribunal cannot interpret the award, then a state court should do it.

The tribunal disagreed and held that an arbitral tribunal, not state courts, has jurisdiction to interpret arbitral awards, and that this is based upon the arbitral agreement itself, the purpose of which is to bar the jurisdiction of state courts. Arbitral jurisdiction, said the tribunal, is by definition ephemeral and occasional and many difficulties may impede the recomposition of the same arbitral tribunal; by making an award, a tribunal is discharged of the case, so that nothing stands in the way of the composition of a new tribunal to deal with a request for interpretation.[37]

Some Major U.S. Arbitration Cases

U.S. case law has a series of very interesting and important court opinions regarding arbitration awards. One U.S. Court of Appeals and three U.S.Supreme Court decisions will demonstrate the prestige that arbitration has won in that country and how courts endeavor their best efforts to eliminate different kinds of arguments which are being raised from time to time to neutralize the practice of arbitration.

Parsons Whitemore Overseas v. Societé Generale de Industrie de Papier (Rakta) - U.S.Court of Appeals 2d. Circuit (1974)[38]

In 1962 Parsons, a U.S. corporation, signed an agreement with Rakta, an Egyptian company to construct, start up, manage and supervise for one year, a paperboard mill in Alexandria, Egypt. In May 1967 the six day war between Egypt and Israel paralysed the construction work and on June 6 Egypt broke diplomatic ties with the United States, expelled all American citizens with the exception of those who would apply and qualify for a special visa.

Rakta's complaint regarding Parsons having abandoned the project was submitted to a three arbitrator board governed by the ICC Rules. A preliminary award recognized Parsons' force majeure defense as good only regarding the period from May 28 to June 30, 1967, emphasizing that Parsons had made no more than a perfunctory effort to secure special visas and that the Agency for International Development's notification that it was withdrawing financial backing

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[37] Id at 284.

[38] *Parsons v. Rakta*, 508 F.2d 969. See Lowenfeld, supra note 3, at 350.

did not justify Parsons' unilateral decision to abandon the project. The final verdict held Parsons liable to Rakta for damages for breach of contract, costs and for three-fourth's of arbitrator's fees.

Parsons sought a Court declaratory judgment to prevent Rakta from collecting the award out of a letter of credit issued in Rakta's favor by Bank of America, drawn to satisfy any penalties that would be assessed against Parsons for breach of contract. Rakta counterclaimed to confirm and enter judgment upon the foreign arbitration award. Parsons' defenses were all based on different rules of the New York Convention and all of them were rejected by the U. S. Court of Appeals, following its interpretation of the Convention.

Public policy - Article V (2) (b) states that recognition and enforcement of an arbitral award may be refused if it is found by the competent authority of the country where recognition and enforcement is sought that this would be contrary to the public policy of that country.

Parsons argued that the political events that led to and derived from Egypt's breaking of its diplomatic relations with the United States, required that Parsons, as a loyal American citizen, abandon the project. Court did not agree with that, did not accept the equation of "national" policy with "public policy". And Court said that "to read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of public policy. Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention meant to subscribe to this supranational emphasis. To deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanisms for enforcement. We have little hesitation, therefore, in disallowing Overseas' (Parsons') proposed public policy defense".[39]

Non arbitrability - Same article V of the New York Convention, (2) (a) provides that recognition and enforcement may be refused if the subject matter of the difference is not capable of settlement by arbitration under the law of the country where the recognition and enforcement is being sought.

Parsons argued that United States foreign policy issues can hardly be placed at the mercy of foreign arbitrators who are charged with the execution of no public trust and whose loyalties are to foreign interests. Court understood that the mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute not arbitrable. There is no special national interest in judicial, rather than arbitral, resolution of the

[39] Id, at 353.

breach of contract claim underlying the award in this case, concluded the Court of Appeals.

Inadequate Opportunity to Present Defense - The New York Convention provides in Article V, (1) (b) that recognition and enforcement of the award may be refused at the request of the party against whom it is invoked if it proves that it was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case.

Parsons sought relief under this provision of the Convention due to the arbitration court's refusal to delay proceedings in order to accommodate the speaking schedule of one of Parsons' witnesses, David Nes, the U.S. Chargé d'Affaires in Egypt at the time of the six day war.

This aspect was also denied by Court because, among other reasons, it found that the arbitration tribunal had before it an affidavit by Mr. Nes in which he furnished, by his own account, "a good deal of the information to which I would have testified". Moreover, had Mr. Nes wished to furnish *all* the information to which he would have testified, there is every reason to believe that the arbitration tribunal would have considered that as well.[40]

Arbitration in Excess of Jurisdiction - The Convention states in article V, (1) (c) that recognition and enforcement may be refused if the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or if it contains decisions on matters beyond the scope of the submission to arbitration. Parsons claimed that liability for loss of production was excluded from arbitration but Court decided that the arbitration tribunal has a wide competence to construct the contract and Court should not usurp the arbitrator's role[41]

Award in "Manifest Disregard" of Law - Court rejected this defense of Parsons based on the Federal Arbitration Law, which has been read to include an implied defense to enforcement where the award is in "manifest disregard" of the law and the American corporation asked Court to read this defense as a license to review the record of arbitral proceedings for errors of fact or law. Court said that it emphatically declined to assume such a role because extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings.[42]

Professor Lowenfeld notes that Article V, in both paragraphs (1) and (2) begins with the words "recognition and enforcement ... may be refused". If a

[40] Id, at 355.
[41] Id, at 356.
[42] Id, at 357.

court chooses to recognize or enforce an award notwithstanding establishment of one of the defenses set out in Article V, there is no violation of the Convention. He adds that if Court refuses to grant enforcement for another reason —for instance because it disagrees with the arbitral tribunal in its definition of force majeure— that would be a violation of the Convention.

Scherk v. Alberto Culver Co. - U. S. Supreme Court (1974)[43]

Scherk, a German national sold his enterprises to Alberto Culver, an American company, along with rights to trademarks in cosmetic goods. Scherk guaranteed sole and unencumbered ownership of these trademarks. The sales agreement contained a clause that any dispute would be settled by ICC arbitration, in Paris, and that Illinois law would be applicable. The trademarks were found to be subject to encumbrances and A. Culver commenced action in a federal court, Scherk motioned to dismiss or stay action, pending arbitration in Paris.

The district court denied the motion and ordered Scherk to enjoin from proceeding with arbitration, relying on *Wilko v. Swan*, that agreement to arbitrate could not preclude a buyer of a security from seeking judicial remedy under Securities Act, which bar any waiver of compliance with "*any provision of this subchapter*". This decision was affirmed by the 7th. Circuit.

The Supreme Court reversed and held that the U.S. Arbitration Act reversing centuries of judicial hostility to arbitration agreements was designed to allow parties to avoid the costliness and delays of litigation. The Act provides for stay of proceedings in a case where a court is satisfied that the issue before it is arbitrable under the agreement. A parochial refusal by the courts of one country to enforce an international arbitration agreement would ... frustrate these purposes.

In *Bremen v. Zapata* the doctrine that a forum-selection clause of a contract, voluntarily adopted by the parties, will not be respected in a suit brought in the U.S. was rejected. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and
contracting.

An agreement to arbitrate before a specified tribunal is a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.

"The invalidation of such an agreement ... would reflect a parochial concept that all disputes must be resolved under our laws and in our courts. We cannot have trade and commerce in world markets and international waters exclusively

[43] 417 U.S. 506 and XIII International Legal Materials, 974 (1974).

on our terms, governed by our laws and resolved in our courts".

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. - U.S. Supreme Court (1985)[44]

Automobile distributorship agreement between the two parties contained a clause which called for arbitration in Japan under the rules of the Japan Commercial Arbitration Association.

Soler contended that its claims under the Sherman Antitrust Act and other antitrust laws were nonarbitrable. By five votes against three the Supreme Court held that agreement to arbitrate contained in an international contract should be given effect even where claim or defense arise under the US antitrust laws.

The strong presumption in favor of freely negotiated contractual choice-of-law provisions is reinforced here by the federal policy in favor of arbitral dispute resolution, a policy that applies with special force in the field of international commerce. The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum ... the potential complexity of antitrust matters does not suffice to ward off arbitration.

The Supreme Court also said that "if they are to take a central place in the international legal order, national courts will need to 'shake off the old judicial hostility to arbitration' and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal".

Justice Blackmun who wrote the opinion for the majority said that U.S. adherence to the Convention shows that "it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration".

Mastroubuono v. Shearson Lehman Hutton Inc. - U.S. Supreme Court (1995)[45]

An arbitration panel sitting in Chicago issued a 400.000 dollar punitive damages award (in addition to compensatory damages) in a securities fraud case under a brokerage agreement that included an applicable law clause specifying that New York law would govern the relationship of the parties. But it so happens that New York law prohibits arbitrators from awarding punitive damages, and

44 473 U.S. 614 and XXIV International Legal Materials, 1964 (1985).
45 115 S.Ct. 1212.

therefore the District Court and the Court of Appeals of New York decided that parties intended by selecting the law of a state to embrace not only the substantive laws that govern their rights and duties under the contract, but also the arbitration law of that state.

The Supreme Court reversed this decision. "We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators'. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration: neither sentence intrudes upon the other".