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### "Arbitration as a Final Award: Challenges and Enforcement" published as Chapter 10 in International Sales Law and Arbitration: Problems, Cases, and Commentary

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# 10

## ARBITRATION AS A FINAL AWARD: CHALLENGES AND ENFORCEMENT

...  
Money, it's a gas.  
Grab that cash with both hands and make a stash.  
New car, caviar, four star daydream,  
Think I'll buy me a football team.

...  
Huhuh! I was in the right!  
Yes, absolutely in the right!  
I certainly was in the right!

- Pink Floyd<sup>1</sup>

The tribunal has now issued a final award, thus terminating the arbitration proceedings. All of the contracts regarding the arbitration have now been largely performed, though certain obligations, such as confidentiality, will obviously continue. The award will often entitle one of the parties to a sum of money, providing damages pursuant to a claim or counterclaim. Or the award may deny all of the parties' claims, but nonetheless award one of the parties a right to recover various costs associated with the arbitration. In some instances, an award may deny any recovery at all if the tribunal denies all claims and does not make any award related to costs—thus leaving each party as it found itself at the conclusion of the arbitration. However, even the latter award may be the subject of recognition for its *res judicata* effect in a subsequent legal proceeding between the parties.<sup>2</sup> The law regarding recognition and enforcement of arbitral awards applies to both enforcement of rights to money and recognition of the award, itself, in other proceedings.

### Example 10-1

A contract dispute has arisen over a contract for the sale of steel between NNM and J&G. J&G originally commenced arbitration. However, the arbitral panel ultimately determined that the steel delivered by NNM was fully conformed under

<sup>1</sup> From the song, *Money*, on the album *Dark Side of the Moon*, by Pink Floyd (1973).

<sup>2</sup> The term *res judicata* is used here in its broad sense, including, in at least some legal systems, both claim and issue preclusive effects. The nuances of issue preclusive effects of arbitral awards are, however, beyond the scope of this casebook.

Article 35, and J&G had therefore breached the parties' agreement by failing to pay for the steel as required under Article 53. The panel has, therefore, issued a final award requiring J&G to pay NNM for the steel, and further requiring J&G to pay the entire cost of the arbitral proceedings.

In many instances, a party obligated by the final award to pay money will simply do so, as its final obligation under the arbitration agreement. However, a party may also decline to pay the award. This failure to pay the award may be based on a genuine belief that the award is in some way flawed, or it may simply be a matter of obstinacy or inability to pay. In either case, court action regarding the award is likely.

If the party obligated to pay money under the award has assets in the place of arbitration, then the process of converting the award into an enforceable money judgment in court is probably a relatively simple one governed by the law of a single jurisdiction—the law of the place of arbitration, which is also law of the place of enforcement. As such, there will likely be only one forum in which any issues as to the legal viability of the award will be fully and finally determined. However, in international sales transactions, the place of arbitration (often chosen for its neutrality and/or its *lex arbitri*) will often be different from the place of enforcement (likely to be the place in which one of the parties has its business headquarters or substantial assets). Thus, a party's decision to resist the effects of an award involving an international sales transaction will typically lead to one or both of two distinct categories of court proceedings that may affect the award.

One must begin by (I) distinguishing between the basic nature of actions to set aside an award and actions to enforce an award. A party seeking to attack the award offensively will bring (II) an action to set aside the award. A party may also (III) defend against enforcement of the award in any place in which judicial enforcement is sought by the party entitled to relief under the award.

#### I. INTRODUCTION TO COURT ACTIONS TO CHALLENGE OR ENFORCE THE ARBITRATORS' FINAL AWARD

First, either party may challenge the arbitrators' decision in an appropriate court in the place of arbitration.<sup>3</sup> While challenges are most often brought by the party required by the award to pay money, either party is entitled to challenge the award if it believes it has a valid basis to do so. An action to challenge the award

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<sup>3</sup> The Model Law designates such a court in Article 6. As indicated earlier, this is the City Court of Vindobona in Danubia, our mythical place of arbitration.

in the place of arbitration is called an action to “set aside”<sup>4</sup> or “vacate” the award. If the challenge is successful, and the award is set aside, it will no longer have any legal force and effect in the place of arbitration.<sup>5</sup>

Second, a party entitled to a remedy under the final award may bring an action to enforce the award in the courts of the intended place of enforcement. Typically, the party entitled to receive money under the award will bring an enforcement action in a jurisdiction in which it believes the party obligated to pay money under the award has assets that can be seized or liquidated in payment of the award.<sup>6</sup> Such an action to enforce the award may be brought before, or after, or irrespective of whether there has been any action by the other party to set aside or vacate the award in the place of arbitration. If one party brings an action to enforce the award, the party against whom enforcement is sought may seek to defend against enforcement, irrespective of whether this party has sought to have the award set aside or vacated in the place of arbitration.

In summary, the legal viability of an arbitration award may be addressed in: (1) a court action to set aside or vacate the award in the place of arbitration; (2) a court action to enforce the award in the place of enforcement; or (3) both. In view of these two alternative, and potentially cumulative, forums in which the viability of the award might be addressed, one might reasonably ask whether the legal standards in each forum are the same or different. If they are different, then these differences could make the choice of forum for any challenge outcome determinative or could lead to inconsistent results in multiple forums. Is this a desirable effect?

One example of such differences is found in the American Federal Arbitration Act. FAA Chapter 2 formally adopts the New York Convention and its standards of enforceability with respect to international<sup>7</sup> awards. However, American courts typically apply the standards contained in Section 10<sup>8</sup> of FAA Chapter 1,

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<sup>4</sup> See Model Law Article 34.

<sup>5</sup> It may in some circumstances, however, continue to have legal force and effect in other jurisdictions outside the place of arbitration. This is addressed more fully below.

<sup>6</sup> The precise nature of enforcement—i.e., creditor’s remedies and debtor’s rights—in various jurisdictions is beyond the scope of these materials. These issues will typically be governed by national laws attempting to balance the right of creditors to be paid any monies legally owing and the rights of debtors to be free of certain unreasonable seizures of their assets. Enforcement actions may also involve insolvency proceedings, which are again primarily subject to national laws. However, UNCITRAL has made some progress in the area of uniform law proposals governing cross-border insolvency. See UNCITRAL Model Law on Cross-Border Insolvency (1997).

<sup>7</sup> The FAA actually adopts a broad definition of “non-domestic” awards, as provided for under Article 1 of the New York Convention. See 9 U.S.C. § 207 (2000).

<sup>8</sup> There are other differences between section 10 of the FAA and Article V of the New York Convention beyond the “manifest disregard” standard (which is not found in the New York Convention or other modern arbitration law). The others may or may not have a significant

including the court created “manifest disregard” standard when addressing an action to set aside an award. Thus, the standards in the United States for setting aside an award are different from the standards for enforcement. The potential for conflict and confusion should be evident. In contrast to the FAA approach, consider the following description of the drafting of the standards for actions to set aside or enforce an award included in the UNCITRAL Model Law.

### **The History of the New York Convention,**

#### **Pieter Sander**

...

#### III. Harmonizing Effect of the Convention

... I would like to draw attention to the harmonizing effect the New York Convention has had on national arbitration legislation. This development was not foreseen in 1958. It is thanks to the UNCITRAL Model Law of 1985 which virtually repeats the grounds for refusal of enforcement of the New York Convention in its model for national arbitration legislation. This was done not only for the grounds for the refusal of enforcement of an award but virtually the same grounds apply as grounds for the setting aside of an award. The Model Law has by now been adopted by [many] States of which [some] also did so for domestic arbitration. Therefore, the impact of the New York Convention on the Model Law has been considerable.

...

ICCA Congress Series No. 9 (Paris/1999), pp. 11 – 14.

\* \* \* \* \*

The following discussion focuses primarily on the Model Law and the New York Convention. As such, the emphasis in each of the two parts that follow—actions to set aside and actions to enforce—will focus on differences in the context of the two actions instead of differences in standards of legal viability. Because the standards for legal viability are essentially identical, these standards can be fully addressed in a largely interchangeable fashion in each of the two parts that follow.

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substantive effect, depending on how each is interpreted and applied. However, the significant differences in language certainly give rise to a potential for significant interpretive differences.

## II. DIRECT CHALLENGES BY THE DISAPPOINTED PARTY: OFFENSIVELY ATTACKING THE AWARD IN THE PLACE OF ARBITRATION

In earlier chapters addressing arbitration as dispute resolution, contract, and procedure, the *lex arbitri* has been paramount. Once again, in an action to set aside an arbitration award, the law of the place of arbitration, or *lex arbitri*, takes center stage. The only country in which an arbitration award may be rendered invalid is the place of arbitration.<sup>9</sup> While a party may resist enforcement in another country, any court judgment in the place of enforcement is without legal effect outside of that country. However, a decision to set aside the award may, at least, render the award invalid and unenforceable in all countries.<sup>10</sup> As such, the reviewing court in the place of arbitration has considerable power over the ultimate enforceability of the award.<sup>11</sup>

Most jurisdictions provide strict time limits for any action to set aside an award. The Model Law generally requires that such actions be brought within three months of the receipt or the award.<sup>12</sup> The (A) grounds for setting aside an award are quite limited. If, however, an award is set aside, (B) this will generally render the award without legal force and effect, subject to one rather significant exception.

### A. GROUNDS FOR SETTING ASIDE AN AWARD

The sole and exclusive grounds for setting aside an award under the Model Law are listed in subsection 2 of Article 34. The statute provides six distinct grounds upon which an award may be set aside.

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<sup>9</sup> See Model Law Article 34(1).

<sup>10</sup> This general proposition is, however, subject to exceptions addressed in section I.B. *infra*.

<sup>11</sup> Under the Model Law, this is the court (or courts) designated in Article 6.

<sup>12</sup> See Model Law Article 34(3) (providing, in the alternative, that the action be brought within three months of any decision disposing of any request to correct or clarify an award). A failure to bring a timely action to set aside an award will not prevent a party from resisting enforcement in another county, but, again, a successful enforcement defense generally has a much narrower effect than a successful action to set aside the award.

**Article 34****Application for setting aside as exclusive recourse against  
arbitral award**

...

- (2) An arbitral award may be set aside by the court specified in article 6 only if:
- (a) the party making the application furnishes proof that:
    - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
    - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
    - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
    - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
  - (b) the court finds that:
    - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
    - (ii) the award is in conflict with the public policy of this State.

Subsection (2)(a)(i) addresses the validity of the arbitration agreement. These are the same issues addressed earlier in the discussions of governing law and issues involving any decision on the tribunal's jurisdiction. In those discussions, as

well as the chart in Appendix C, it was suggested that validity issues must be addressed under the law of the place of arbitration, or *lex arbitri*, unless parties subject these issues to a different law. If another law were applied to issues of validity, then the award might be subject to being set aside. In effect, the tribunal's decision as to whether the parties validly concluded an arbitration agreement is subject to a full court review under this provision. Remember, however, the effect of separability under Model Law Article 16. An award finding the container agreement invalid (or perhaps even never concluded) will not, by itself, render the arbitration agreement invalid.

**Example 10-2**

The Peruvian buyer of wool and maker of sweaters assigned to a Paraguayan party his contract with the New Zealand seller of wool. The contract contained a provision calling for arbitration in Vindobona, Danubia. If a dispute subsequently arose between the New Zealand seller and Peruvian buyer (as assignee), the Peruvian buyer might assert that she did not validly consent to the arbitration clause as an assignee. In addressing this issue, a court hearing an action to set aside the award would likely need to look to the law of Danubia (absent any contrary party intent) in determining what effect, if any, the assignment on the contract had on the arbitration clause within it.

Subsection (2)(a)(ii) addresses basic notice and due process requirements. In essence, this provision ensures that each party was provided a full and fair opportunity to present its case, as required under Model Law Article 18. While issues could arise under this provision in a variety of contexts, one of the most common is in the case of a default proceeding, as allowed under Model Law Article 25. If an award is made in the absence of one of the parties, the reasonableness of attempts to notify the party failing to appear will often be determinative. Note that this is, essentially, the only ground related to the actual procedure on the merits of the dispute upon which an award may be vacated, other than public policy grounds. This further exemplifies the extent of discretion afforded the tribunal in determining the arbitral procedures, as long as each party is given a full and fair opportunity to present its case.<sup>13</sup>

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<sup>13</sup> A failed attempt to challenge the appointment of an arbitrator for partiality or a lack of independence might also be raised here as affecting a party's opportunity to present its case.



**Example 10-3**

At respondent's request, the tribunal appointed experts to inspect and examine the quality and production capacity of certain equipment at issue. The inspection was attended by the experts, the president of the tribunal, and the claimant. However, respondent did not receive notice of or attend the inspection. In the award, the arbitrators relied on the expert report and concluded in favor of claimant. The award likely would have been subject to being set aside because respondent was unable to present its case. However, respondent had a full and fair opportunity to read the experts' report and never objected to its content or asked for a re-inspection, thereby waiving its right to challenge the report as a basis to set aside the award.<sup>14</sup>

Subsection (2)(a)(iii) focuses on the scope of the parties' arbitration agreement or any formal submission or agreement as to the issues to be decided. In an arbitration in which the issues are formally delineated early in the proceedings, such as the Terms of Reference in an arbitration proceeding under the ICC Rules,<sup>15</sup> such formal specifications of the issues to be determined will likely be controlling under this provision. In less formal proceedings, the parties' original arbitration agreement may define the scope of issues submitted to arbitration. In either case, any decision in the award beyond the mandate of the arbitrators will be set aside. If possible, the court may set aside only an offending portion of the award. If not, the whole award may be set aside.

**Example 10-4**

A buyer of rubber failed to open a letter of credit in favor of seller, and seller commenced arbitration proceedings ultimately leading to an award in its favor. However, the award was set aside because any award based on buyer's failure to open a letter of credit was deemed outside the scope of an arbitration clause providing for arbitration of "all disputes as to quality or condition of rubber or other dispute arising under these contract regulations shall be settled by arbitration."<sup>16</sup>

<sup>14</sup> *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*, 2 HKC 205, High Court of Hong Kong, Court of Final Appeal, Hong Kong, Feb. 9, 1999, UNCITRAL CLOUT Case 599.

<sup>15</sup> ICC Rules Article 18.

<sup>16</sup> *Tiong Huat Rubber Factory (SDN) BHN v. Wah Chang International (China) Co. Ltd. & ANOR*, Supreme Court of Hong Kong, Hong Kong, Jan. 18, 1991, UNCITRAL CLOUT Case 675.

Which “contract regulations” did the court believe the parties intended in the arbitration clause above? Might the court have interpreted it differently? Should a tribunals and courts read arbitration clauses narrowly or broadly?

Subsection (2)(a)(iv) focuses on the constitution of the arbitral panel. This issue is governed by the parties’ agreement, including any rules adopted, and, in the absence of any party agreement, by the default rules of the *lex arbitri*. If the actual constitution of the tribunal was contrary to agreement or default legal rules, then the tribunal’s award may be set aside. For example, if a party is inappropriately precluded from exercising its right to choose an arbitrator, then the award might be set aside.

**Example 10-5**

The arbitration clause provided for three arbitrators—one appointed by each party and a third appointed by these two. The award was set aside because the arbitrators did not act in accordance with the parties’ agreement when the two party-appointed arbitrators appointed a third, but then fully delegated their responsibilities and requested that the third arbitrator solely decide the dispute.<sup>17</sup>

While subsection (2)(a) requires the party seeking to set aside the award to “furnish proof” of the relevant grounds, subsection (2)(b) does not. While a party will likely raise any ground for setting aside the award under subsection (2)(b), the grounds under these latter provisions typically involve matters of pure law and policy, as applied to the substance of the award itself, rather than factual allegations to be proven under the applicable law.

Subsection (2)(b)(i) addresses the arbitrability question discussed earlier in Chapter 8. Like subsection (2)(a)(i) above, this was a necessary element of any jurisdictional decision. As indicated earlier, the general trend favors increasing arbitrability of almost any international commercial financial dispute. This is particularly true in major arbitral centers. However, this issue may arise later if an award is to be enforced in a country that has not embraced this trend and still considers various disputes implicating certain public interests to be inarbitrable.

Subsection (2)(b)(ii) addresses public policy issues other than arbitrability (which is itself a particularized public policy issue). Public policy must be distinguished from simply mandatory rules of law, most of which do not rise to the sort of

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<sup>17</sup> *Fleming v. Space Homes, Ltd.*, Queens Bench, Alberta, Jan. 15, 1985, UNCITRAL CLOUT Case 628.

fundamental or essential nature of policies of sufficient public importance to justify setting aside an award. Again, this distinction is typically quite well developed in most arbitral centers, and the grounds for setting aside an award based on public policy are extremely narrow. Again, however, the issue may arise later if an award is to be enforced in a country that might not interpret “public policy” quite so narrowly.

### Notes and Questions

*Note 1:* The reader will note that in subsection (2)(b), the focus is on the law of the place of arbitration. When the context shifts from an action to set aside to an action for enforcement, these same two standards will reappear, but each will instead look to the law of the place of enforcement in determining whether the standard is satisfied.

*Note 2:* One should also note that **none** of the six above described grounds for setting aside an arbitration award provides any basis for a review of the tribunal’s decision on the merits. In fact, such a review on the merits would be inconsistent with the parties’ express agreement for final and binding arbitration.<sup>18</sup> Nonetheless, a party asking that an award be set aside (or seeking to avoid enforcement, as discussed below) may assert that the tribunal’s allegedly erroneous decision on the merits amounted to a “decision on matters beyond the scope of the submission to arbitration,” thereby falling under subsection (2)(a)(iii).<sup>19</sup> Such arguments should be rejected, except where the award has decided issues that are unequivocally beyond the scope of any submission to arbitration. An award should not be set aside simply because the tribunal decided submitted issues in a manner that has left one of the parties disappointed, as this would effectively make all awards subject to judicial review on the merits.

*Note 3:* In some circumstances in which a party has brought an action to set aside an award, and it appears likely that the award is defective in some manner that is subject to correction, it may be possible to reconvene the tribunal. If so, it may be most efficient to allow the tribunal to attempt to remedy any defect before completing the action to set aside the award. Model Law Article 34(4) provides for such a possibility. The court may, if requested by a party, suspend the setting aside proceedings for a time in order to give the arbitral tribunal an opportunity

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<sup>18</sup> The importance of this point is another reason to use the specific words “final and binding” in any arbitration agreement.

<sup>19</sup> A disappointed party may argue that the parties did not give the arbitrators the “powers” to decide the issue in a manner that is inconsistent with settled law under Article 34(2). Alternatively, a party may argue that an award inconsistent with settled law is contrary to public policy under subsection (2)(b)(ii). Fortunately, the argument has met with little success. Even the unique United States “manifest disregard of the law” standard is rarely employed to vacate an award.

to resume the arbitral proceedings or take such other action as may eliminate any grounds for setting aside the award.<sup>20</sup>

## PROBLEM

*Problem 10-1:* A and B (from Argentina and Brazil, respectively) agree to arbitration of a sale of goods dispute. The agreement provides that “the tribunal shall make an award allowing the prevailing party to recover all of its costs incurred in the arbitration, including its reasonable attorney fees.” In the final award, the tribunal grants to A the full amount of its claim, but expressly declines to make any award of costs or attorney fees. Does B have grounds to have the award set aside? What if the agreement expressly precluded the tribunal from making any award of costs or fees and it did so anyway. Would this provide grounds for setting aside the award? If so, does this mandate that the entire award be set aside?

### B. THE EFFECT OF A SUCCESSFUL ACTION TO SET ASIDE—OR IS THE AWARD STILL ENFORCEABLE?

If an award is set aside by a court of appropriate jurisdiction in the place of arbitration, then the award will no longer have any legal force and effect in that country. This primary proposition is clear and is subject to few, if any, exceptions. Under normal circumstances, the award will also be rendered unenforceable in any jurisdiction, including those outside of the place of arbitration. This second proposition is, however, subject to potential exception under certain circumstances. One might reasonably question how an award set aside in one state could possibly have any effect in another state. The answer to this question lies in the character of an international arbitration award and the language of Article VII of the New York Convention.

While an arbitration agreement and any proceedings under that agreement are subject to the law of the place of arbitration, the award nonetheless possesses an international character.<sup>21</sup> Moreover, the New York Convention provides only minimum requirements for enforcement, as Article VII.1 expressly leaves open the potential for broader enforcement under more favorable national law.<sup>22</sup>

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<sup>20</sup> Model Law Article 34(4).

<sup>21</sup> *Cf. Mitsubishi v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (emphasizing the international nature of the transaction and, thereby, taking a strong pro-arbitration view in determining that an action was arbitrable notwithstanding potential statutory anti-trust issues).

<sup>22</sup> “The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the treaties of the country where such award is sought to be relied upon.” New York Convention Article VII.

Article V also makes clear that a competent court ruling setting aside an award allows an enforcing court to decline enforcement, but does not mandate such a result.<sup>23</sup> As such, an enforcing court outside of the place of arbitration may choose not to give effect to a court decision setting aside the award to the extent that such decision is inconsistent with international norms of commercial arbitration and is enforceable under applicable national law.

In the *Chromalloy* cases, this approach was employed by both U.S. and French courts to justify enforcement of an arbitration award set aside by the courts of Egypt, the place of arbitration.<sup>24</sup> This idea of recognizing vacated awards is not, of course, without controversy. In particular, it is important to recognize the right of a court in the place of arbitration to set aside an award that is inconsistent with its own public policy,<sup>25</sup> and failing to respect such a decision is arguably contrary to general notions of comity.

In Part III.B, below, the materials explore a more recent case in which a U.S. court declines to enforce an award that had been set aside by the courts of Columbia, the place of arbitration. The court purported to distinguish *Chromalloy*, but there is also a very different tenor to the opinion. Nonetheless, where a court in the place of arbitration sets aside an international award in a manner that is clearly inconsistent with well established international norms, there remains at least a possibility that a foreign court will decide to enforce the award—notwithstanding the fact that it has been set aside.

### III. WAITING FOR ENFORCEMENT: DEFENSIVELY RESISTING ENFORCEMENT ON ONE’S OWN TURF

In 1895, the U.S. Supreme Court described and generally endorsed the idea of comity, or respect for the judicial pronouncements of other legal systems, as a basis for enforcing judgments rendered by foreign courts.<sup>26</sup> As long as the proceedings leading up to such foreign judgments respected basic commonly held notions of fairness and due process, they should generally be afforded the same sort of deference as those of one’s own jurisdiction. Unfortunately, not all

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<sup>23</sup> “Recognition and enforcement *may* be refused” under the enumerated grounds in subsections (a) through (e) (the latter addressing awards set aside in the place of arbitration). New York Convention Article V (emphasis in original).

<sup>24</sup> See *The Arab Republic of Egypt v. Chromalloy Aeroservices, Inc.*, Cour d’Appel, Paris, Jan. 14 1997 (published in 12 International Arbitration Report (1997, no. 4) pp. B-1 to B-4 (in English and French)) (enforcing the award based on French law); *Matter of Chromalloy Aeroservices v. The Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996) (enforcing the award based on the U.S. Federal Arbitration Act).

<sup>25</sup> See Model Law Article 34(2)(b).

<sup>26</sup> See *Hilton v. Guyot*, 159 U.S. 113 (1895).

national courts share these views, and even those that purport to often apply the principle of comity in ways that are inconsistent and unpredictable at best.<sup>27</sup>

If all courts followed the dictates of *Hilton v. Guyot*, the impact of the New York Convention might have been somewhat less dramatic. As it is, however, the New York Convention, almost uniformly, makes the enforcement of foreign arbitration awards simpler, quicker, and considerably more certain than the enforcement of foreign judgments. While actions to enforce foreign judgments often require state involvement and/or the preparation of “letters rogatory,” a sometimes complicated and lengthy process, an action to enforce an arbitration award is quite simple as further described below. As such, the issue of enforcement provides arbitration with one of its greatest advantages over court adjudication.<sup>28</sup>

Under the New York Convention, (A) the judicial enforcement of foreign arbitration awards is a relatively simple and straightforward process. However, even under the Convention, there remain limited (B) grounds for refusing to enforce an award. Perhaps the most important, and the most troublesome, ground for non-enforcement is (C) public policy of the country in which enforcement is sought.

#### A. ENFORCEMENT UNDER THE NEW YORK CONVENTION

The centerpiece of the New York Convention, as the primary international instrument mandating enforcement of arbitration awards, is Article III.

#### **Article III**

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

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<sup>27</sup> *Hilton* is not even necessarily followed in the United States, as the issue of enforcement of a foreign judgment may be governed by state law. While many states have adopted uniform law generally allowing for enforcement of foreign judgments, others have taken a more restrictive approach, and many only enforce judgments from jurisdictions offering reciprocity in enforcement.

<sup>28</sup> The importance (more or less) of this single particular distinction between arbitration and court adjudication may become somewhat clearer in the near future. In 2005, the Geneva Convention of Choice of Court Agreements was completed. Under this Convention, forum selection clauses choosing specific courts would generally be treated in a manner similar to arbitration agreements, and judgments issued by the selected courts would be enforceable in foreign courts in much the same manner as arbitration awards. The Convention has not yet entered into force, but, if widely adopted, it could provide parties with some interesting choices between national courts and private arbitrators.

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 or enforcement of domestic arbitral awards.

Note the specific language of Article III. International awards are enforceable, limited only to the terms of the Convention. Moreover, the Convention bars an enforcing court from imposing any greater burden on enforcement of international awards than domestic awards. Thus, an international award may be enforceable even under circumstances in which a domestic award is not. However, the mechanism for enforcement of an international award cannot be burdened to any greater extent than an enforceable domestic award.

The Convention's requirements for enforcement are relatively simple. First, Article II requires a signed writing, the requirements of which were addressed in Chapter 8 in reference to formal validity. Remember, in Chapter 8, the issue was formal validity under the *lex arbitri*, as a threshold jurisdictional issue. Here the issue is enforceability. The importance of UNCITRAL's efforts to bring about uniform standards of interpretation of the writing requirements of Model Law Article 7 and New York Convention Article II should now be much clearer.

Assuming that the formal validity requirements of Article II have been met, the enforcing party must simply comply with the procedural requirements of Article IV.

#### Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
  - (a) The duly authenticated original award or a duly certified copy thereof;
  - (b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an

official or sworn translator or by a diplomatic or consular agent.

Once the enforcing party has complied with the above procedural requirements, the enforcing court must issue a court decree making the arbitration award fully enforceable as a money judgment, unless the party opposing enforcement can prove one or more of the limited grounds for refusing enforcement.

#### B. GROUNDS FOR REFUSING ENFORCEMENT

The New York Convention provides for presumptive enforcement of arbitral awards, subject to a very limited set of grounds. You will note in the text of New York Convention Article V below, that the grounds for refusing enforcement under the New York Convention are virtually identical to the grounds for setting aside an award under the Model Law.<sup>29</sup> There are only two significant differences, each of which is quite logical in view of the differing context. Take particular note of the ground provided in subsection 1(e), as well as the applicable law in each of the provisions of subsection 2.

#### **Article 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 the recognition and enforcement is sought, proof that:
  - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - (b) 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 his case; or

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<sup>29</sup> The Model Law also addresses actions for enforcement in Article 36. While the provisions of Article 36 are functionally identical to Article V of the New York Convention, these materials will make reference to the New York Convention and Article V in view of the much wider acceptance of the New York Convention on issues governing enforcement.



- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
  - (d) 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; or
  - (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.
2. 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:
- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
  - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

The provisions of subsections 1(a) through 1(d) are obviously the same as those provided under Model Law Article 34. Both the articulation of the relevant standard and the designation of the applicable law are, essentially, identical. Thus, any of the issues addressed in these provisions ought to result in the same decision—irrespective of whether determined in an action to set aside the award or an action to enforce the award.<sup>30</sup>

Subsection 1(e) is the one additional provision of Article V, and its addition is entirely contextual. If a competent court in the place of arbitration has set aside the award, then an enforcing court may decline to enforce it. As explained above, a court is not required to refuse enforcement simply because the

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<sup>30</sup> In fact, one might even suggest that any decision of one court should have a preclusive effect on the decision of another court. However, the differing nature of the two actions may provide a court with a basis to rule otherwise.

subsection 1(e) has been satisfied. The enforcing court is, essentially, confronted with two competing values: (1) respect for international arbitration awards, and (2) respect for the judgment of a competent foreign court. In the *Chromalloy* case, the former value prevailed. In the case explored in the following example, the latter was arguably paramount.

**Example 10-6**

TermoRio contracted to sell energy to Electranta, an electrical supplier owned by the Colombian government, and the parties also agreed to arbitrate any disputes under the ICC Rules. Columbia subsequently decided to privatize Electranta and, in doing so, sold all of its assets without requiring the purchasers to assume its contractual obligations. Without any remaining assets, Electranta refused to perform its contractual obligations, and TermoRio successfully obtained a \$60 million award against Electranta in the arbitration proceedings. Electranta then sought relief in the Colombian courts, which set aside the award because Colombian law did not at that time expressly permit the use of ICC arbitration rules. TermoRio then attempted to enforce the award in U.S. courts relying on the same theory that had succeeded in the *Chromalloy* case. This court rejected the reasoning of *Chromalloy* and, instead, on notions of comity to the courts of the place of arbitration. In effect, the court stated that, unless the court decision, itself, violated international public policy, an enforcing court should refuse to enforce the award under New York Convention Article V.1.(e). Inasmuch as the Colombian court's decision was not, on its face, improper, the court declined to enforce the award.<sup>31</sup>

The reader will recall the discussion of the *Chromalloy* case in Part I.B, in which the court enforced the award in favor of Chromalloy, notwithstanding the fact that it had been set aside by the government of Egypt. The entire tenor of the *Chromalloy* and *TermoRio* decisions is different.<sup>32</sup> *Chromalloy* focuses entirely on the importance of international commercial arbitration—particularly in

<sup>31</sup> *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007).

<sup>32</sup> Compare *TermoRio S.A. E.S.P.*, 487 F.3d 928, with *Matter of Chromalloy Aeroservices*, 939 F. Supp. 907. The court attempts, in *TermoRio*, to distinguish *Chromalloy* based on a contractual promise by the award debtor not to seek to set aside the award in Egyptian courts. However, the *Chromalloy* case does not address this issue at all, and such a promise might well be ineffective as an ex-ante waiver of a right to judicial review. In short, this distinction is hardly compelling.

circumstances in which the court sets aside an award against its own government. The Court methodically walked through the discretionary provisions in New York Convention Articles V and VII and then applied the Federal Arbitration Act as a more pro-enforcement regime than the New York Convention under the circumstances of the case. Under remarkably similar circumstances, the *TermoRio* court suggested, with little specific support from the text, that the spirit of the New York Convention required substantial deference to courts in the place of enforcement.

While the *TermoRio* court did not expressly overrule the *Chromalloy* case, it certainly casts doubt upon the continuing vitality of its rationale. The two cases also provide excellent examples of two very different approaches to the question of enforcing international arbitration awards set aside in the place of arbitration. In the case of an international commercial arbitration award, to whom do foreign enforcing courts owe the greatest degree of comity—the arbitration tribunal or the courts in the place of arbitration? One might also ask if the nationality of the enforcing party is significant.<sup>33</sup>

A court seized of an enforcement action may take note of a pending action to set aside the award in the place of arbitration. The court in which the enforcement action is pending may, if it deems it proper, decide to adjourn or temporarily suspend the enforcement action, pending the outcome of the action to set aside the award. If the award is set aside in the place of arbitration, then the enforcing court may decline to enforce it under subsection 1(e), perhaps avoiding a potentially inconsistent decision of its own. Any such adjournment or suspension may, however, delay enforcement. A court may, therefore, require the party opposing enforcement to provide adequate security in view of any potential delay in enforcement.<sup>34</sup>

Subsection 1(e) also provides that a court need not enforce an award that is not yet binding in the place of arbitration.

#### Example 10-7

Claimant applied to enforce an award under Canada's adoption of Model Law Article 35(1). However, respondent has properly applied to the tribunal for correction of the award, and that request to the tribunal remained pending. As such, the award was not yet final and binding because the tribunal remained

<sup>33</sup> In *Chromalloy*, a United States corporation successfully enforced an award against the Egyptian government, even though it had been set aside by the Egyptian courts. In *TermoRio*, a foreign corporation was denied enforcement against former assets of Electranta sold by the Columbian government and then located in the United States.

<sup>34</sup> New York Convention Article VI.

seized of the matter, and the award was not yet enforceable under Article 36(1)(a)(v) (same as NYC V.1.(e)).<sup>35</sup>

The provisions of subsections 2(a) and 2(b) include the same grounds for non-enforcement as those provided by Model Law Article 34 for setting aside an award. However, the applicable law in each is different. In an action to set aside an award, these provisions focus on the place of arbitration. In an action to enforce the award, these provisions instead focus on the place of enforcement.

In view of the fact that the party is seeking aid in enforcement of the award by the courts of place of enforcement, it would seem appropriate to consider issues of arbitrability and public policy under the law of that state. However, there is also much opportunity for the mischief of protectionism here, which is precisely one of the problems that the New York Convention was intended to remedy. The courts in the place of enforcement are also addressing issues under an applicable body of law that may not have been considered by the court in any earlier action to set aside—that court having considered these issues under its own law. Thus, issues of public policy, generally, deserve special attention when it comes to questions of enforcement.

#### C. THE PUBLIC POLICY EXCEPTION: ITS USE AND ABUSE

The public policy exception to enforcement provides perhaps the most fertile grounds for court disputes. On one hand, the exception is important in recognizing that a state court should not be required to enforce an award that “would violate the forum state’s most basic notions of morality and justice.”<sup>36</sup> On the other hand, it can sometimes be quite difficult to determine whether an important mandatory rule of law may rise to the level of such fundamental notions of public policy. The following case addresses this question, as well as a question involving the validity of the arbitration clause.

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<sup>35</sup> *Relais Nordik Inc. v. Secunda Marine Services Limited and Anor*, Federal Court, Trial Division, Canada, Apr. 12, 1990, UNCITRAL CLOUT Case 625.

<sup>36</sup> *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l’Industrie du Papier RAKTA and Bank of America*, 508 F.2d 969 (2d Cir. 1974).

**Supreme Court of Korea**  
Case No. 93Da53054  
14 February 1995  
(from KluwerArbitration.com)<sup>37</sup>

**Facts**

Following a dispute between Adviso N.V. and Korea Overseas Construction Corp., an arbitral award was rendered in Zürich awarding damages to Adviso. . . . Adviso sought enforcement of the award in Korea. . . .

*[An excerpt of the decision of the Korean Supreme Court (reviewing the decision of the Seoul Court of Appeals) is presented below]*

**I. On the First Argument**

Art. IV(1) and (2) of the [1958 New York Convention] (hereinafter the ['New York Convention']) to which Korea became a party on 8 February 1973, prescribes that the party applying for recognition and enforcement of a foreign arbitral award has to meet the burden of proof by submitting (1) the duly authenticated original awards or a duly certified copy thereof and (2) the original arbitration agreement or a duly certified copy thereof and that, in the event that the said award or agreement is not made in an official language of the country in which the award is to be enforced, the party applying for recognition and enforcement of the award must produce a translation of these documents into such official language, certified by an official or sworn translator or by a diplomatic or consular agent.

The requirement [that] the translation of the arbitral award be certified by an official or sworn translator or by a diplomatic or consular agent under Art. IV(2) of the New York Convention does not go so far as to require that such translation be done personally by any of said persons. This requirement is met if anyone of them duly certifies that the translation is the translation of the arbitral awards concerned, even though the text of the arbitral awards is not translated personally by any one of said persons. Thus, an affixation of the signature of a diplomatic or consular agent is not necessarily required; nor does the

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<sup>37</sup> KluwerArbitration.com, from the *Yearbook Commercial Arbitration*, vol. XXI, 612-616 (Albert J. van den Berg ed., 1996).

meaning of the term 'certified' encompass the certification of the accuracy of the translations.

The Court below held that where the plaintiff-respondent [hereinafter 'plaintiff'] had submitted, as shown by plaintiff Evidence Numbers 1, 2, 7-1 and 7-2, the duly certified copy of the arbitration agreement and the duly certified copy of the arbitral award as well as the translations which had been duly certified by diplomatic agents concerned, the arbitral award was enforceable in Korea in the absence of the reasons for refusal as provided under Art. V(1) and (2) of the New York Convention. We are persuaded that the decision of the Court below is correct and do not agree that the Court below erred in its interpretation of said provision. We reject this argument.

...

*[The second argument is omitted]*

...

### III. On the Third Argument

The Court below noted that in this case the defendant did not argue that the arbitration agreement was void *ad initio*, but that, since the contract incorporating the arbitration agreement clause had been assigned to a third party, the assignor forfeited its right as a party to the arbitration, or the arbitration clause in the agreement was not valid between the original parties. The Court held that, in such cases, the validity of the arbitration agreement was to be judged by the arbitral tribunal, since such an issue was unavoidably tied to the merits of the arbitration.

Upon review of the award, the Court below found that the arbitration tribunal had decided in its majority opinion that, recognizing that the governing law of the alleged assignment should be the law of the Kingdom of Saudi Arabia which was most closely related to that assignment, the assignment was not valid under the law of Saudi Arabia in consideration of the views of the Committee for Settlement of Commercial Disputes of the Ministry of Justice of the Kingdom of Saudi Arabia and the Saudi Arabian National Center for Science and Technology. Then, the Court below rejected this defendant's argument because, since there were some ambiguities in the choice of the governing law and fact-findings, the arbitration award should be respected and not be reviewed by the courts of the country in

which the enforcement is sought, unless accepting the interpretations of the arbitral tribunal was contrary to the fundamental moral principles and concept of justice in Korea.

On review of the records, we conclude that the findings and holdings of the Court below were reasonable and do not agree that the Court below failed to fully try this case in violation of the rules of evidence or that the Court below incorrectly interpreted Art. V(1)(a) of the New York Convention. We reject this argument.

#### IV. On the Fourth Argument

Art. V(2)(b) of the New York Convention provides that the competent court in the country where recognition and enforcement of an arbitral award is sought may refuse such recognition and enforcement if such court finds that the recognition or enforcement of the award would be contrary to the public policy of that country. The basic tenet of this provision is to protect the fundamental moral beliefs and social order of the country where recognition and enforcement of the award is sought from being harmed by such recognition and enforcement. As due regard should be paid to the stability of international commercial order, as well as domestic concerns, this provision should be interpreted narrowly. (citation omitted). When foreign legal rules applied in an arbitral award are in violation of mandatory provisions of Korean law, such a violation does not necessarily constitute a reason for refusal. Only when the concrete outcome of recognizing such an award is contrary to the good morality and other social order of Korea, will its recognition and enforcement be refused.

The Court below held firstly, that the fact that the period of statute of limitations under the law of the Netherlands Antilles applied in this arbitral award was thirty years and this period was longer than that under the mandatory provisions of the Korean law, did not necessarily render the enforcement of this award in violation of the public order of Korea; secondly, that the determination of the arbitral tribunal that it had jurisdiction because the right of the plaintiff to the defendant on the know-how contract made on 8 November 1978 was not assigned to SECRC, was not in violation of the principle of estoppel or the public order of Korea; thirdly, that the allegation that the plaintiff blackmailed and exercised undue influence on the defendant was not supported by evidence (defendant's Evidence

Numbers 7-1 and 2, and Number 8, submitted in support of this claim, were only letters from the plaintiff or its representatives demanding royalty payments). Also the Court below added that the contract was not unfair even if the contract was biased against the defendant and that the plaintiff's delay in asserting its right did not amount to an abuse. Thereby, the Court below rejected all the arguments claiming violations of the public order.

On review of the records, we conclude that these findings and holdings of the Court below are reasonable and do not agree that the Court below erred in applying Art. V(2)(b) of the New York Convention. We reject this argument.

...

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### Notes and Questions

*Note 1:* Note the context of the case. The Korean party is the one opposing enforcement. This will often be the case, as a party is attempting to avoid enforcement in its home jurisdiction. The possible temptations for protectionism by the courts are of course obvious. This court appears to do an admirable job of avoiding such temptations.

*Note 2:* Note the court's statement that the public policy exception must be interpreted narrowly in order to achieve the stability in international commercial transactions intended under the New York Convention. The court goes on to say that a mandatory rule of law does not necessarily rise to the level of a public policy justifying non-enforcement. Instead, only harm to the fundamental moral beliefs and social order of the enforcing state will justify non-enforcement under the Convention's public policy exception. What sort of elements of an award might violate a state's fundamental moral beliefs and social order?

Private international law generally draws a distinction between mandatory legal rules and issues involving *ordre public*. "Mandatory rules" are generally considered to be those legal rules of a state whose law would unequivocally govern a given transaction in the absence of party choice, from which the parties cannot derogate, either by choosing their own terms or by choosing the rules of another legal system.<sup>38</sup> Mandatory rules of another closely connected state,

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<sup>38</sup> See e.g. Rome Convention Article 3. The choice of a given law will also likely subordinate any of the parties' own specific terms to any "mandatory rules" within the chosen body of law.



including the forum, may also be given effect depending on the circumstances.<sup>39</sup> However, a judicial forum may always give effect to its public policy (or *ordre public*) where any otherwise applicable rule is “manifestly incompatible with” that public policy.<sup>40</sup>

Even public policy may be subject to its own gradations. For example, domestic public policy is often distinguished from international public policy, the latter of which is considerably more limited than the former.<sup>41</sup> While such international public policy continues to find its source in the relevant domestic legal order, it is interpreted far more narrowly in view of its application to an international transaction. One could even further narrow the content of public policy by looking to transnational or “truly international public policy” as that having virtually universal application.<sup>42</sup> Such a public policy definition would be comparable to that of *jus cogens* in public international law. Most national courts interpret the public policy exception under the New York Convention based on the middle definition above—“international public policy” or “international *ordre public*” as a very narrow interpretation of domestic public policy concerns, as applied to international business transactions.

While the various national determinations of international public policy are often difficult to define with any precision, they are relegated to a very narrow and limited range of issues. Recognizing legitimate international public policy exceptions is perhaps a bit like recognizing pornography. While U.S. Supreme Court Justice Potter Stewart admitted he could not quite define it precisely, he stated with assurance that “I know it when I see it.”<sup>43</sup>

#### Example 10-8

Parties submitted disputes arising from a contract for the sale of steel wire to the ICC for arbitration. The arbitrators determined the seller was entitled to damages and further determined in accord with French law that the interest rate on the award should increase by 5% two months after the award was issued. Under Article V(2)(b) of the New York Convention, a United States

<sup>39</sup> See e.g. Rome Convention Article 7. Certain mandatory rules of the forum may also be given particular deference to the extent that a state is being asked to serve as a forum for resolution of the dispute in question.

<sup>40</sup> See e.g. Rome Convention Article 16.

<sup>41</sup> See e.g. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

<sup>42</sup> Audley Sheppard, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitration Awards* (2003) (available at [kluwerarbitration.com](http://kluwerarbitration.com)).

<sup>43</sup> *Jacobellis v. Ohio*, 378 U.S. 184 (1964). A similar analogy has been used by Professor Park in addressing abusive practices in arbitration, generally. See William W. Park, *Arbitration of International Business Disputes* 222 n. 1 (Oxford U. Press 2006).

court refused to enforce interest on the award—to the extent of the 5% increase. The court ruled that the increased interest was penal rather than compensatory and, therefore, violated public policy.<sup>44</sup>

Did U.S. District Court above determine “public policy” under Article V(2)(b) in the same manner as the Korean Supreme Court in the case above? If not, is there some distinction that might be drawn between the two cases in justifying the different approach by the U.S. court, or is this simply a case of protectionism?

**Example 10-9**

A party resisting enforcement of an award in Hong Kong claimed that a key witness had been kidnapped by the other party and was only released when he agreed to alter his testimony before the tribunal. The Hong Kong High Court determined that, if proven, these factual allegations would preclude enforcement of the award under Article V(2)(b). The court stated that the enforcement of an award made on basis of such fraudulently procured testimony would be a violation of public policy.<sup>45</sup>

Did the Hong Kong High Court above give an appropriately narrow construction to “public policy” in reaching its decision? Presumably, almost any state would reach a similar decision on these facts. However, could the court have grounded its decision on any other provisions of Article V?

Perhaps both the challenges and potential value of the public policy exception are best expressed by the statements of two different English judges.<sup>46</sup> On one hand, public policy is “a very unruly horse, and when you get astride it you never know where it will carry you. It may lead you from sound law [and] it is never argued at all, but when other points fail.”<sup>47</sup> On the other hand, “with a good man [or woman] in the saddle, the unruly horse can be kept in control.”<sup>48</sup> When properly and narrowly directed, the public policy exception to enforceability under the

<sup>44</sup> See *Laminoires-Trefileries-Cableries de Lens S.A. v. Southwire Co.*, 484 F. Supp. 1065 (N.D. Ga. 1980).

<sup>45</sup> *JJ. Agro Industries Ltd., v. Texuna Intl. Ltd.*, [1994] 1 HKLR 89, High Court, Hong Kong, May 29, 1992.

<sup>46</sup> This comparison is drawn from Audley Sheppard, Interim Report on Public Policy as a Bar to Enforcement of International Arbitration Awards (2003) (kluwerarbitration.com).

<sup>47</sup> *Richardson v. Mellish*, 2 Bing. 228 (1824).

<sup>48</sup> *Enderby Town Football Club Ltd v. The Football Association Ltd.*, [1971] Ch. 591 at 606.

New York Convention prevents an appropriate safety valve to avoid the use of public courts in a manner that is truly contrary to a nation's most basic and fundamental notions of morality and justice.

### PROBLEMS

*Problem 10-2:* A U.S. seller obtained an arbitration award against a U.S. consumer (pursuant to an arbitration clause in a contract of sale) and sought to enforce the award in France where the consumer had significant assets. The law of France includes a mandatory rule making such *ex ante* arbitration clauses unenforceable.<sup>49</sup> Should a French court decline enforcement of the award as a matter of “public policy”?

*Problem 10-3:* A Chinese seller of goods brought an arbitration action against a Saudi buyer in Geneva, under the Swiss Rules. The tribunal issued an award, first determining that the CISG governed the transaction, and further determining that buyer's asserted grounds for avoidance under Article 49(1)(a) did not amount to a fundamental breach under Article 25. The tribunal, therefore, granted the Chinese seller's claim for the unpaid price of the goods (buyer proved no damages) under Article 74 and also awarded interest under Article 78. Interest is considered “*riba*” under the *Shari'a*, Saudi Islamic law, and is barred by the Koran to the extent that it is based on payment of money by one person for the use of the money of another.<sup>50</sup> First, is Saudi Arabia a CISG contracting state? Why would the tribunal apply CISG Article 78 here? Is the award enforceable in Saudi Arabia (Saudi Arabia is a New York Convention contracting state). If a tribunal is uncertain as to whether an award might be enforced under such circumstance, how might any claim of interest be addressed in the award?

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<sup>49</sup> See *France*, in *International Handbook on Commercial Arbitration* 7 n. 6. (Albert J. van den Berg & Jan Paulsson eds., Kluwer L. Intl. & Intl. Council Commercial Arb., updated through Apr. 2007).

<sup>50</sup> *But see* ICC Case 7063 of 1993. In a case between two Saudi parties, the majority of a split ICC panel awarded an amount calculated only to compensate the party entitled to damages for losses caused by effects of inflation between the time of the harm and the time of the award (i.e., no compensation was awarded as a charge for the use of the money). While the majority of the panel thought that such an additional award solely intended to offset inflation did not violate the doctrine of *riba*, the dissenting panel member did not agree.