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Enforcing Foreign Arbitral Awards in the Federal Republic of Germany: The Example of a United States Award

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Disputes in international trade often are settled by arbitration. Fortunately, most arbitral awards do not have to be enforced because the parties fulfill their obligations without recourse to state authority.[1] Nevertheless, cases remain where enforcement in national courts must be sought. Specifically, business deals between United States, Canadian, and other non-European companies, on the one hand, and West German companies, on the other hand, are booming. Parties engaged in these arrangements often agree upon a place in the United States, notably New York City, as the situs for any eventual arbitration between them.[2] Parties entering into arbitration agreements with West German parties should be aware of the difficulties and risks that arise when enforcing an award rendered in the United States (*i.e.*, New York), since the award would have to be recognized and

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1. M. DOME, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION 320 (1968). *See also* GLOSSNER, *Der Einfluß der Internationalen Handelskammer (International Court of Claims) auf die moderne Schiedsgerichtsbarkeit*, 30 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 15, 16 (1984). Ninety out of a hundred arbitral awards rendered under the auspices of the ICC in Paris are fulfilled without recourse to state authority.

2. *See* Hoellering, *The Law of Arbitration in the United States and its Relevance for German-American Business Relations*, in ARBITRATION IN US-GERMAN BUSINESS RELATIONS 11 (Boeckstiegel ed. 1985).

enforced in the Federal Republic of Germany (West Germany). No matter how remote this necessity might seem when an arbitration agreement is consummated, non-West German parties should be fully informed of the relevant risks.

The question therefore arises: What pitfalls should be avoided from the outset to guarantee the enforcability of such an award? Are there any vagaries to be taken into consideration? Nearly a dozen judgments rendered by West German courts on the recognition and enforcement of United States arbitral awards clearly demonstrate that these questions remain much more than a matter of academic interest. Additionally, West German judgments pertaining to the enforcement of foreign arbitral awards rendered in countries other than the United States strongly support this assessment.[3]

The success of an international arbitration depends upon whether its overall strategy has been planned carefully. One of the primary goals of that strategy is to ensure that an eventual award could be enforced successfully against the contractual partner. This article will investigate the options available to a party of a New York arbitration to enforce in West Germany, an arbitral award obtained against a West German company. Four legal options upon which the enforcement could be based should be distinguished: (1) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958;[4] (2) the Treaty of Friendship, Commerce, and Navigation between the Federal Republic of Germany and the United States of 1954;[5] (3) the West German common law rules on the enforcement of arbitral awards; and (4) the so-called "double exequatur" (obtained by applying first for confirmation of the arbitral award before the competent U.S. court, and then seeking recognition and enforcement of that court's decision under the West German common law rules on foreign judgments).

This article will focus on the enforceability of arbitral awards rendered in New York. Its reasoning and results, however, also may be in point where an arbitral award has been rendered by an arbitral

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3. The most pertinent decisions relating to foreign arbitral awards shall be discussed *infra* throughout the text.

4. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, *acceded to with reservations* by the United States, Sept. 30, 1970, *ratified with reservations* by the Federal Republic of Germany, June 30, 1961, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *reprinted in* A. JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, 397-416 (1981) [hereinafter New York Convention].

5. Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-West Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593 [hereinafter Friendship Treaty].

tribunal sitting in any other U.S. state. Regardless of where the award was issued, the matters in dispute would relate to foreign "commerce," within the meaning of Chapter 1, Section 1 of the United States Arbitration Act (Arbitration Act).[6] Consequently, the tribunal would have to follow generally the procedural rules of the Arbitration Act, rather than the arbitration statutes of the U.S. state in which it would be sitting.[7] It appears that the place of the arbitration (whether New York or any other state) would be immaterial. The enforceability of the award within West Germany would be the same no matter where in the United States the award was rendered, since the procedural rules leading to it would have been the same.

Part I of this article analyzes separately the different enforcement options available in West Germany, discussing the different requirements to be met for obtaining an enforcement order under each option.[8] Part II compares these different options, and draws conclusions as to which option is the most advantageous for a petitioner seeking to have a United States award recognized and enforced in West Germany. Additionally, guidelines for an overall strategy are provided.[9]

I. The Different Means of Recognition and Enforcement

Aside from the aforementioned four means available to a petitioner in possession of an United States arbitral award, a number of other multilateral conventions at first glance might appear to provide a basis for obtaining an enforcement order in West Germany. These multilateral conventions include: the Geneva Protocol on Arbitral Agreements in Commerce,[10] the Geneva Convention on the Recognition of Foreign Arbitral Awards,[11] and the European Convention on Venue and Enforcement of Judgments in Civil and Commercial Matters.[12] Nevertheless, petitioners would find none of these other bases at their disposal.

The Geneva Protocol covers only arbitral agreements between persons subject to the jurisdiction of the contracting states. Since the

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6. 9 U.S.C. §§ 1-14, §§ 201-208 (1982) [hereinafter Arbitration Act].
7. *See* Southland Corp. v. Keating, 104 S.Ct. 852 (1984); International Commercial Arbitration in New York 19 (McClendon & Goodman ed. 1986).
8. *See infra* notes 10-142 and accompanying text.
9. *See infra* notes 143-155 and accompanying text.
10. Reichsgesetzblatt [RGBl] 1925 II 47.
11. Reichsgesetzblatt [RGBl] 1930 II 1068.
12. Bundesgesetzblatt [BGBl] 1972 II 774 [hereinafter European Convention].

United States does not adhere to that Convention, its provisions remain outside the scope of the present analysis. Similarly, the Geneva Convention exclusively deals with arbitral awards that have been rendered in the territory of a contracting state. Again, since the United States has not acceded to that Convention, its provisions also will not be taken into consideration in this article. Even if the petitioners were nationals of a member state of the Geneva Protocol, or if their arbitral awards were rendered in the territory of a member state to the Geneva Convention, this analysis would not change. The Geneva Conventions have been superseded by the New York Convention of 1958.[13]

Finally, the European Convention is not applicable to arbitrations.[14] One could therefore only think of using it as a basis for the enforcement of a United States arbitral award in the case of the double exequatur (*i.e.*, if a U.S. state court has recognized the award, the award is embodied in the judgment, and the petitioner seeks enforcement of judgment in West Germany). Even in this case, however, the European Convention would not be applicable. Article 25 of the European Convention provides that only decisions rendered by courts of contracting states are covered.[15] The United States has not joined as a member to that Convention.

Petitioners thus will have at their disposal only the four means of enforcement enumerated at the outset of this article. The following discussion examines more fully those four alternative avenues of arbitral award enforcement.

A. *The New York United Nations Convention*

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 remains the most well known device for the recognition and enforcement of arbitral awards. West Germany ratified the Convention in 1961.[16] Rather late, the United States acceded to this Convention in 1970.[17]

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13. New York Convention, *supra* note 4, Art. VII, para. 2, at 399.
14. European Convention, *supra* note 12, Art. I, para. 2(4). *See* Bundesgerichtshof (German Federal Supreme Court), Judgment of Apr. 14, 1988 (case no. III ZR 12/87) at 6, to be published in ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ]; ZOELLER, ZIVILPROZESSORDNUNG (15th ed. 1987), app. II, Art. 1, annot. 20; Geimer in GEIMER & SCHUETZE, INTERNATIONALE URTEILSANERKENNUNG, 1983, vol. I, § 27.
15. European Convention, *supra* note 12, Art. 25.
16. *See* BUNDESGESETZBLATT [BGBL] 1961 part II, 121.
17. *Id.*

1. *Applicability of the New York Convention*

The New York Convention applies to the recognition and enforcement of arbitral awards, where (1) the award has been rendered in the territory of a state other than the state where the recognition and enforcement is sought (*i.e.*, in a foreign state);[18] or (2) the award, although rendered within the state where recognition and enforcement is sought, is not considered as a domestic award because it has been rendered under foreign procedural rules.[19] Among most signatories to the Convention, the recognition and enforcement of foreign awards may be achieved on the basis of the first alternative which is said to enshrine the principle of territoriality.[20] This is, however, not so in West Germany. Its law on arbitration proves unique. The qualification of an arbitral award as foreign or as domestic does not depend upon the question of whether it has been rendered in the territory of West Germany or abroad (as most other laws provide). Rather, the designation depends upon whether the procedure leading to the arbitral award was by way of West German arbitration rules (then the award is considered domestic); or, whether it was subject to the arbitration rules of a foreign state (then the award is considered foreign).[21] An award rendered by an arbitral tribunal sitting in New York City thus would be, under West German arbitration law, a domestic award if the procedure followed by the tribunal was West German, and *vice versa*. Section 2 of the West German statute implementing the New York Convention provides that even though an arbitral award is rendered in a foreign country, it may be set aside according to the rules pertaining to the enforcement of domestic awards (*i.e.*, according to Sections 1041, 1043, 1045 paragraph (1) and 1046 of the West German Code of Civil Procedure [ZPO] where

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18. *Id.* Art. I, para. 1, sent. 1.

19. *Id.* Art. I, para. 1, sent. 2. A. JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, 29 (1981). *See* Schlosser in STEIN AND JONAS, ZIVILPROZESSORDNUNG, (20th ed. 1987) vor. § 1044, annot. 11.

20. A. JAN VAN DEN BERG, *supra* note 19, at 29-31. The second alternative is mostly neglected. However, an exception may be the decision in Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983), which considered a New York award as foreign where both parties were foreign and thus held that the New York Convention applied. *See* MC CLENDON & GOODMAN, *supra* note 7, at 152-153; BORRIS, DIE INTERNATIONAL HANDELSSCHIEDSGERICHTSBARKEIT IN DEN USA 18-19, annot. 34 *et seq.* (1987); MEZGER, *Anmerkung*, 30 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 647, 649-50 (1984).

21. Bundesgerichtshof (German Federal Supreme Court), Judgment of Oct. 3, 1956, in 21 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 365, 367; SANDROCK, *Zuegigkeit und Leichtigkeit versus Gruendlichkeit*, JURISTENZEINTUNG [JZ] 370, 372 (1986).

the procedural rules followed by the tribunal were West German). This "procedural theory" on the nationality of an award[22] caused the incorporation of the second alternative of Article I, paragraph (1) into the Convention. Since it is improbable that an arbitral tribunal sitting and rendering its award in the United States would apply West German procedural law, most likely this alternative would not apply in the present context.

Both the United States and West Germany, when signing the New York Convention, made reservations pursuant to Article I, paragraph (3). One of these reservations provides that the signatories will apply the Convention only to arbitral awards rendered within contracting states.[23] The other reservation restricts the applicability of the New York Convention by requiring that the arbitral award must have been rendered in a commercial matter.[24] The first restriction is without importance in the present context, because both the United States and West Germany have acceded to the New York Convention. Additionally, the latter reservation could be of almost no practical relevance in this context. The interpretation of commercial matters in the United States as well as in West Germany is so broad that it will rarely encroach upon the application of the New York Convention. Any contract between merchants with respect to their business is considered to be commercial.[25]

2. *Substantive Requirements for Enforcement Under the New York Convention*

The New York Convention enumerates a catalogue of grounds upon which the recognition and enforcement of foreign arbitral awards may be rejected. The general scope, relevance, and interpretation of those grounds has been discussed in much detail elsewhere.[26] This article explores, on the one hand, some problems which relate

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22. A. JAN VAN DEN BERG, *supra* note 19, at 27-28; SCHWAB, SCHIEDSGERICHTSBARKEIT 320 (3d ed. 1979); Schlosser in STEIN & JONAS, *supra* note 19, Vor. § 1044, annot. 12.

23. New York Convention, *supra* note 4, art. 1, at 397. SANDROCK, HANDBUCH DER INTERNATIONALEN VERTRAGSGESTALTUNG, appendix C.II, 1070-72 (1980).

24. New York Convention, *supra* note 4, art. 1, at 397. SANDROCK, HANDBUCH DER INTERNATIONALEN VERTRAGSGESTALTUNG, APPENDIX C.II, 1070-72 (1980).

25. SANDROCK, *Arbitration Between U.S. and West-German Companies: An Example of Effective Dispute Resolution in International Business Transactions*, 9 U. PA. J. INT'L BUS. L. 27, 39-40 (1987). *See also* § 344, para. 1 of the German Commercial Code [HGB].

26. SANDERS, *A Twenty Years' Review of the Convention in Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269 (1979). *See also* the annual updates within the commentary by Van den Berg in the Y.B. COM. ARB. For cases in which the criteria are governed by West German law *see* SANDROCK, *supra* note 25.

to the New York Convention itself without necessitating the reference to domestic (*e.g.*, West German) law. On the other hand, this article focuses on those restrictions where the West German judge who would have to decide upon the recognition and enforcement of a New York award would not only have to apply one or more provisions of the New York Convention itself, but where the New York Convention would refer him or her to West German municipal law. Interesting problems emerge where, in this way, the New York Convention has to be implemented by the municipal law of a signatory state.

a. *The Validity of the Arbitration Agreement*

The New York Convention provides that, under certain circumstances, recognition and enforcement of the award may be refused if the arbitration agreement is not valid under either the law to which the parties have subjected it, or, failing any indication, under the law of the country where the award was made.[27]

Firstly, the invalidity of the arbitration agreement may result from its failure to meet the applicable form requirement.[28] With regard to arbitration agreements, Article II, paragraph (2), of the New York Convention contains a uniform rule (*loi uniforme*) which makes any reference to municipal law superfluous.[29] The agreement has to be in writing, but telegrams are sufficient.[30] One would assume that telexes and the more and more popular telefaxes meet this requirement as well. The provision is construed liberally, both in the United States and in West Germany. A written instrument is needed, of course, for an offer to arbitrate.[31] The offeree's answer must also be in writing.[32]

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27. New York Convention, *supra* note 4, Art. V, para. 1(a), at 398.

28. It must be emphasized, however, that the form of the arbitration agreement is not within the purview of Article V, paragraph 1(2), of the New York Convention, because Article II, paragraph 2, addresses this subject matter.

29. A. JAN VAN DEN BERG, *supra* note 19, at 226-227.

30. New York Convention, *supra* note 4, Art. II, 1-2, at 397.

31. A. JAN VAN DEN BERG, *supra* note 19, at 227.

32. *Id.* at 225-227. *See* Bundesgerichtshof (German Federal Supreme Court), Judgment of May 10, 1984, 30 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 644 (1984), also published in 37 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2763 (1984); Landgericht (Court of First Instance of Hamburg), Judgments of Dec. 10, 1985 and Dec. 30, 1985, unpublished, *English language summary in* 12 Y.B. COM. ARB. 487, 488 (1987) (New York Convention not applicable where written form requirement of Article II not satisfied in "apparent authority" liability theory of intermediary to arbitration agreement); Landgericht (Court of First Instance Bremen), Judgment of Dec. 16, 1965, unpublished, *English language summary in* 2 Y.B. COM. ARB. 233 (1977). *See also* SANDROCK, *supra* note 25, at 35.

Secondly, the invalidity of the arbitration agreement may stem from an insufficient authorization granted to an agent who signed the arbitration agreement for his or her principal. Under the New York Convention, the question commonly arises whether an agent needs an authorization in writing to bind the principal. This question has been litigated in West German courts. Neither Article II nor Article V explicitly offers a solution. In one case where express authority was lacking, the Court of First Instance (Landgericht) Hamburg held that mere apparent authority is insufficient (*i.e.*, the authorization may not be implied—in fact, or in law. Thus, the court seemed to find that under Article II of the New York Convention, a written authorization is required.[33] This accords with the purposes commonly assigned to form requirements under West German law. The form requirements are designed to warn the principal for whom the agent acts, as well as to protect the other party to the contract relying upon the binding nature of the agreement.[34] Since form requirements legally are held to serve primarily different purposes in other countries, the decision has been criticized harshly for its disregard of the international context in which the respective authority was given.[35] Lastly, it must be noted that West German courts will respect any time limits for raising the defense of invalidity set by the applicable law pursuant to Article V, paragraph (1)(a) of the New York Convention.[36]

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33. Judgment of December 10, 1985, unpublished, *English language summary in* 12 Y.B. COM. ARB. 487-88 (1987); *see also* Landgericht (Court of First Instance), Hamburg, Judgment of Mar. 16, 1977, 24 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 124 (1978) (comment by Klinke at 642).

34. *See* Heinrichs in Palandt, BÜRGERLICHES GESETZBUCH, § 125, annot. 1a (47th ed. 1988). For an international comparison see SANDROCK, HANDBUCH DER INTERNATIONALEN VERTRAGSGESTALTUNG part D (1980), and Schmitthoff, *Agency in International Law*, RECUEIL DES COURS, vol. 1, at 115 (1970).

35. A. JAN VAN DEN BERG, *supra* note 19, at 224.

36. Bundesgerichtshof (German Federal Supreme Court), Judgment of Jun. 26, 1969, 52 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 184, 189; Judgment of Jan 7, 1971, 55 BGHZ 162, 169; Judgment of Oct, 21, 1971, 57 BGHZ 153, 157; and Judgment of May 10, 1984, 37 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2763, 2764 (1984).
As to the time limits set under United States see KOLKEY, *Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, 22 INT'L LAW 693, 695 (1988).
Article I, paragraph 1(a) of the New York Convention provides:

> 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;. . .

New York Convention, *supra* note 4, Art. V, para. 1(a), at 398.

b. *Scope of the Arbitration Agreement*

The New York Convention mandates that the arbitral tribunal not exceed its authority.[37] The dispute subject to arbitration must be covered by the arbitration agreement.[38] Since the New York Convention does not directly address the details of this question, the solution to eventual problems arising from the excessive exercise of tribunal power must be sought under either the law governing the arbitration agreement, or the law applicable to the arbitral award[39]—neither of which will be West German law in the case of a United States award. Nevertheless, West German courts have always broadly construed arbitration agreements. Furthermore, some West German courts and commentators adhere to the theory of the *Kompetenz-Kompetenz*, by which an arbitrator is empowered to rule on the existence, validity, enforceability, or annulment of an arbitration agreement if these issues are in dispute.[40] Thereby, the arbitrator is held to be empowered to decide according to the domestic jurisdiction. Since many decisions and commentators advocate against the theory of the *Kompetenz-Kompetenz* and for denying the arbitral tribunal the right to rule on its own jurisdiction,[41] the parties to an arbitration agreement would be well advised to confer, in express terms, such power upon their arbitral tribunal. If this express authorization is lacking, West German courts appear much more likely to enforce an arbitral award under Article V, paragraph (1)(c) than the courts of other countries,[42] (*e.g.*, the United States, where the power of *Kompetenz-Kompetenz* is firmly denied to an arbitral tribunal).[43]

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37. New York Covention, *supra* note 4, Art. V, para. 1(c), at 398.

38. *Id.*

39. A. JAN VAN DEN BERG, *supra* note 19, at 312.

40. Oberlandesgericht (Court of Appeals), Celle, Judgment of Nov. 1, 1957, 1958 MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR]; MANN, *Schiedsrichter und Recht Festschrift*, 1 FÜR WERNER FLUME ZUM 70. GEBURTSTAG 593, 608 (H. Jakobs ed. 1978). *See* SANDROCK, *supra* note 25, at 48.

41. Bundesgerichtshof (German Federal Supreme Court), Judgment of May 5, 1977, 68 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 356, 358, 365-366. SCHWAB, *supra* note 22, at 39-40.

42. In cases of doubt the agreement is interpreted to cover the dispute. *See* Bundesgerichtshof (German Federal Supreme Court), Judgment of Dec. 10, 1970, 26 BETRIEBSBERATER [BB] 369, 370 (1971) and Judgment of Feb. 27, 1970, 53 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ] 315, 320-323.

43. *See* Interocean Shipping Co. v. National Shipping and Trading Corp., 462 F.2d 673 (2d Cir. 1972), *aff'd on other grounds*, 523 F.2d 527 (2d Cir. 1975); Pollux Marine Agencies, Inc. v. Louis Dreyfus Corp., 455 F.Supp. 211 (S.D.N.Y. 1978).

c. *Due Process*

Pursuant to Article V, paragraph (1)(b) of the New York Convention, a court may refuse the recognition and enforcement of an arbitral award if the arbitral proceedings leading to that award have not met due process requirements, particularly the denial of a fair hearing.[44] Due process has been an issue in a number of court decisions concerning the recognition and enforcement of arbitral awards in West Germany. West German courts have not considered the provision as embodying a *loi uniforme* (*i.e.*, a uniform standard of due process which would be defined in the New York Convention itself), but have interpreted it as a reference to the applicable municipal law. A West German enforcement court considering a defense based upon due process violations would have to examine whether any provision of West German municipal law guaranteeing due process has been violated. The standards for determining whether the principle of due process has been violated, however, would not be the same as in purely municipal cases. On an international level, the standards of due process are construed less stringently than on a municipal level. Quite in line with this reasoning, the Court of Appeals (*Oberlandesgericht*) of Hamburg has stated in two decisions that only in rather extreme cases could the principle of due process be considered infringed upon under West German law.[45] These rulings indicate that a distinction well known in private international law, between *ordre public international* and *ordre public interne*, also governs this issue.

Furthermore, the principle of due process is not fettered by other provisions embodied in Article V, paragraph (1). Certainly, Article V, paragraph (1)(d), grants the parties autonomy with respect to the composition of the arbitral tribunal, and to the organization of the arbitration procedure. The principle of due process, however, does not suffer any limitation.[46] The autonomy conferred to the parties does not empower them to contract out of due process. On the contrary, the imperatives deriving from the principle of due process

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44. A. JAN VAN DEN BERG, *supra* note 19, at 297.

45. Judgment of Apr. 3, 1975, 21 RECHT DER INTERNATIONALEN WIRTSCHAFT 432 (1975) (comment by Gruendisch at 577); Judgment of Jul. 27, 1978, unpublished, *English language summary in* 4 Y.B. COM. ARB. 266 (1979).

46. In anticipation of future possible arguments: New York Convention, *supra* note 4 at 301.

are not subject to the parties' autonomy. Due process also may be invoked pursuant to Article V, paragraph (2)(b), which authorizes the court of exequatur to refuse the recognition and enforcement of arbitral awards, if such recognition and enforcement would result in a violation of the public policy of the state of exequatur. The specific problems which result are addressed in a later section.[47]

The two issues explicitly mentioned in the due process clause of Article V, paragraph (1)(b) of the New York Convention have been debated before West German courts. The issue of proper notice has been raised successfully in one case where the respondent alleged not to have been informed about the names of the arbitrators.[48] The arbitral tribunal which had rendered the award was composed of several broker members of the Copenhagen Arbitration Committee for Grain and Feed Stuff Trade. According to the rules of that Committee, only the name of the president of that tribunal was to be communicated to the parties; the names of the two co-arbitrators were excluded from disclosure because of the small number of traders qualifying for the office of arbitrator and because all of the traders knew one another. The rules intended to prevent undue influence on the few arbitrators. The Court of Appeals (*Oberlandesgericht*) of Cologne held that the right to challenge an arbitrator and to control his exclusion from further proceedings was so fundamental as to make the names of the arbitrators part of the "proper notice" clause.[49]

With regard to the parties' ability to present their case (Article V, paragraph (1)(b)), the Court of Appeals (*Oberlandesgericht*) of Hamburg has applied less stringent standards. In a case in which the respondent had received documents on the evening before the oral hearing—and therefore had claimed not to have been able to take notice of them in time—the court found Article V, paragraph (1)(b) of the New York Convention was not violated, arguing that the respondent had had ample opportunity to unpack and study them. The court held the respondent was obligated to participate actively in the arbitral proceedings; a violation of due process could be maintained only where the party alleging a violation of due process

47. *See infra* notes 73-82 and accompanying text.

48. Judgment of Jun. 10, 1976, 91 ZEITSCHRIFT FÜR ZIVILPROZESS [ZZP] 318 (1978) (comment by Kornblum at 332).

49. *Id.*; *see also* A. JAN VAN DEN BERG, *supra* note 19, at 306.

had shown a bona fide cooperation in the proceedings.[50] This liberal approach, however, is not unlimited. The same court found a violation of due process in a case where the arbitral tribunal handed down its award without any oral hearing and a document had not been forwarded to the respondent.[51] The court argued the proceedings violated even the relaxed standards of due process as they apply in the international setting if respondent had no knowledge whatsoever of the documents upon which the arbitral tribunal based its decision. The court added that a violation of due process could be found without requiring that the award would have been rendered differently had respondent been granted a fair hearing.

The decision also illustrates the general reluctance of West German courts to deny recognition and enforcement of international arbitral awards on the basis of due process.[52] In the case, one of the parties moved to postpone the hearing of a witness who had to go on a business trip. The arbitrator rejected that motion in ruling to accept an affidavit of the witness instead of his oral testimony. The court did not regard this as a violation of due process.[53]

d. *Composition of the Arbitral Tribunal and Arbitral Procedure*

The New York Convention primarily subjects the composition of the arbitral tribunal and the arbitral procedure to the law chosen by the parties, and secondarily to the law in effect at the place where the arbitration took place.[54] Neither of those two laws will too often be West German in the cases here under consideration. Therefore,

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50. Judgment of Jul. 27, 1978, unpublished, *English language summary in* 4 Y.B. COM. ARB. 266-267 (1979). Each party's obligation to participate actively in order to be able to raise defenses has again been stressed by the same court in its Judgment of Sep. 23, 1982, KONKURS TREUHAND SCHIEDSGERICHTSWESEN 499, 501 (1983). In this decision, the court refused to set aside an award of an appellate arbitral tribunal that had rejected the appeal because the time limits to submit the appeal had elapsed. Respondent in the arbitral proceedings had raised the appeal on the day he received the award. On the other hand, he knew that the award had been rendered earlier, and that he could have obtained it at an earlier stage of the proceedings. According to the rules of the institutional tribunal, time limits for appeal began to run on the day the award was passed down.

51. Judgment of Apr. 3, 1975, 21 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 432 (1975). This case was not based on the New York Convention, because the court rejected a retroactive implementation. As to the applicability of the holding under the New York Convention, *compare* GRUENDISCH, *Anmerkung*, 21 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 577, 578 (1975). The proceedings in question had been conducted by an AAA arbitral tribunal.

52. Oberlandesgericht (Court of Appeals), Hamburg, Judgment of July 27, 1978, *unpublished, English language summary in* 4 Y.B. COM. ARB. 266 (1979).

53. *Id.* at 267.

54. New York Convention, *supra* note 4, Art. V, para. 1(d), at 398.

this ground for rejecting the recognition and enforcement of a foreign award, thus, has been rarely debated before a West German court. It seems to be of no great practical relevance.[55]

e. *Binding Nature of the Award*

The New York Convention requires awards to be "binding;" otherwise they remain unenforceable.[56] The binding nature of an award has to be determined by the law of the country in which or under the law of which the award was rendered.[57] Since we assume in the factual context under consideration that the award was rendered in New York (or in another location within United States jurisdiction) whether the award has become "binding" in the meaning of the New York Convention will depend upon an interpretation of the U.S. Arbitration Act.

The meaning of "binding" in Article V, paragraph (1)(e) has been the subject of considerable discussion. No consensus has yet been reached as to its meaning.[58] The doctrinal disputes which have been waged, however, need not be examined in the context of this article. For the purposes of this article, one must discern at what point in time West German courts would consider a New York award to have become "binding." According to a very recent decision of the West German Federal Supreme Court,[59] a distinction has to be made between ordinary means of recourse (enabling a second arbitral tribunal or court to rejudge the merits of the case, thereby preventing the award from becoming res judicata) and extraordinary means of recourse (by which only very grave, fundamental irregularities of the award or of the procedure leading to it, may be pleaded. The possibility of instituting or the actual institution of an ordinary means of recourse would prevent a United States award from becoming "binding." The possibility of instituting an extraordinary means of

55. *See* A. JAN VAN DEN BERG, *supra* note 19, at 323.

56. New York Convention, *supra* note 4, Art. V, para. 1(e), at 399.

57. *See* Bundesgerichtshof (German Federal Supreme Court), [BGHZ] Judgment of Sep. 26, 1969, 52 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN 184, 188.

58. As to the details, *see* A. JAN VAN DEN BERG, *supra* note 19, at 333-46. A seemingly different approach by which an award is considered to be "binding" as soon as it becomes enforceable under the law applicable usually leads to the same results. *See* Schlosser in STEIN & JONAS, *supra* note 19, app. to § 1044, annot. 78-79.

59. *See* Bundesgerichtshof (German Federal Supreme Court), Judgment of Apr. 14, 1988 (case no. III ZR 12/87) at 7, to be published in ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ]. This judgment accords with a prior decision by the same court of June 26, 1969, 52 BGHZ 184, 188 (rendered, however, under section 1044 of the Zivilprozeßordnung [ZPO] (German Code of Civil Procedure)).

recourse or actually instituting it, however, would not achieve this.[60] We will have to examine, therefore, whether an arbitral award granted in New York (or in another United States jurisdiction) would be subject to an ordinary appeal opening up the possibility of its full-scale re-examination by the respective *iudex ad quem*; or, whether it would be open only to an extraordinary means of recourse entitling the respective appellant to complain of grave, fundamental irregularities.

The U.S. Arbitration Act itself does not provide for an award to be subject to a normal appeal.[61] The only remedy lying against an award would be an application to vacate it pursuant to Section 10. Vacation, however, can be based only on grounds of a grave fundamental nature, and does not lead to a full-scale re-examination of the matter.[62] An application for a vacation, therefore, would have to be qualified as an extraordinary means of recourse not preventing the award from becoming "binding" under Article V, paragraph (1)(e) of the New York Convention. On this basis, a United States award, once rendered, would be susceptible of being recognized and enforced in West Germany.

An award's "binding" nature must be distinguished from the determination of whether respondent is precluded from forwarding arguments against the validity of the award within the West German exequatur proceedings. West German courts have held that respondents may raise such issues only to the extent which they could have availed themselves of the issues before the competent court, under the proper law of the arbitration proceedings.[63] This implies two limitations. First, respondents may forward only the kind of issues provided for under that law. Second, respondents can do so successfully only if time limits for raising the issues (such as in § 12 of the U.S. Arbitration Act) have not elapsed.

While the respondents must raise and prove these defenses in proceedings for the recognition and enforcement of an arbitral award,

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60. It should be noted, however, that the exequatur court may stay the proceedings if an extraordinary means of recourse has been launched with the competent court. *See* New York Convention, *supra* note 4, Art. VI, at 399.

61. Arbitration Act, *supra* note 6.

62. In cases of doubt, United States courts also tend to confirm the award as rendered. *See* McCLENDON & GOODMAN, *supra* note 7, at 134.

63. Bundesgerichtshof (German Federal Supreme Court), Judgment of Jun. 26, 1969, 52 ENTSCHEIDUGEN DES BUNDESGERICHTSCHOFES IN ZIVILSACHEN [BGHZ] 1984, 1989; Judgment of Jan. 7, 1971, 55 [BGHZ] 162, 169; Judgment of Oct. 21, 1971, 57 BGHZ 153, 157; and Judgment of May 10, 1984, 37 NEUE JURISTICHCHE WOCHENSCHRIFT [NJW] 2763, 2764 (1984).

the court may reject *ex officio* the claimant's request, if: either the subject matter of the arbitral award is not arbitrable under the *lex fori*; or, the award is contrary to the *ordre public* of the *lex fori*.[64]

f. *Arbitrability of the Subject Matter*

The New York Convention provides that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of that country.[65] The arbitrability of the subject matter (an issue considered to pertain to the public policy), however, does not pose serious problems. Section 1025, paragraph (2) of the West German Code of Civil Procedure [ZPO] equates arbitrability with the power to enter into an amicable settlement; insofar as the parties to a dispute are authorized to dispose of their dispute by way of an amicable settlement, they also have the power to submit it to arbitration.[66] Commercial matters—including certain types of antitrust, industrial property, and labor law—are arbitrable.[67]

Agreements to arbitrate future disputes arising out of restrictive trade practices, however, will be binding only if the agreement reserves to each party the option to bring the dispute before an ordinary court.[68] Disputes on industrial property rights are generally susceptible of being settled amicably, and hence are arbitrable. As labor disputes may be settled only under particular circumstances, usually they can not be considered as arbitrable in the international setting.[69] Transactions on commodity futures also are non-arbitrable.[70]

It thus turns out that West German municipal law to which Article V, paragraph (2)(a) refers is extremely liberal with regard to the arbitrability of the subject matter.[71] Danger, however, lies just around

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64. New York Convention, *supra* note 4, Art. V, para. 2 (a), (b), at 399.
65. *Id.*, Art. V, para. 2(a), at 399.
66. BAUMBACH-LAUTERBACH, ZIVILPROZEßORDNUNG § 1025, para. 2 (1970).
67. *Id.*
68. GESETZ GEGEN WETTBEWERBSBESCHRAENKUNGEN [GWB] (West German Antitrust Statute) § 91 (1980), *reprinted in* BUSINESS TRANSACTIONS IN GERMANY (FRG) (edited and translated by B. Ruster) app. 3-67. *See also* SANDROCK, *supra* note 25, 40-41.
69. For more details, *see* SANDROCK, *supra* note 25, at 41.
70. Bundesgerichtshof (German Federal Supreme Court), Judgment of Jun. 15, 1987, in 40 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3193-94 (1987).
71. This liberal approach to arbitrability is enhanced by a widely recognized scholarly doctrine pursuant to which Art. V, para. 2(a) of the New York Convention does not itself introduce any substantive rule on arbitrability, but only authorizes the national legislature to introduce such tests of arbitrability. According to this doctrine, arbitrability will be an issue

the corner. Again, pursuant to Article V, paragraph (1)(a) of the New York Convention, recognition and enforcement of the award may be refused if the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication, under the law of the country where the award was made. Thus, within West Germany, respondents may prevent the enforcement of a United States award when the respondent is able to prove that the subject matter of the award was not arbitrable under the proper law of the arbitration agreement (*e.g.*, under New York law), and that such lack of arbitrability has caused the arbitration agreement to be null and void under that law. In sum, then, arbitrability is two-fold: the subject matter must be arbitrable not only under West German law, but also under the proper law of the arbitration agreement which often is the law of the place of arbitration.[72]

g. *Public Policy (Ordre Public)*

West German courts widely acknowledge that the reservation of public policy must be narrowly construed pursuant to the New York Convention. Matters which, under domestic circumstances, would pertain to public policy may lack this necessity in an international setting. This rather restrictive approach matches the worldwide tendency to distinguish between *ordre public national* and *ordre public international*, the latter embracing only some extreme features of the former.[73]

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only if the national legislature has made use of this authorization. As Section 1044 para. 2(1) of the German Code of Civil Procedure [ZPO] (which deals with the recognition and enforcement of foreign arbitral awards) refers to the validity of the arbitral award rather than to the validity of the arbitral agreement, the issue of arbitrability (pursuant to this doctrine) could no longer be raised in exequatur proceedings. If the award was valid under the proper law, even though the agreement was invalid, the German court would have to recognize the award. SCHLOSSER, DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT 714, annot. 753 (1975); SCHWAB, *supra* note 22, at 427; GOTTWALD, *Die sachliche Kontrolle internationaler Schiedssprüche durch staatliche Gerichte*, in FESTSCHRIFT FÜR HEINRICH NAGEL ZUM 75. GEBURTSTAG 54, 60 (W. Habscheid & K.H. Schwab ed. 1987). Since arbitrability is also a matter of public policy, the issue of arbitrability could still be raised under Art. V, para. (2)(b) instead of Art. V, para. (2)(a). For the relationship between arbitrability and *ordre public*, *see* THIEFFRY, *The Finality of Awards in International Arbitration*, 2 J. INT'L ARB. 3, at 27, 36 *et seq.* (1985).

72. *See* SCHLOSSER, *supra* note 71, at 308, annot. 313; KORNMEIER & SANDROCK, HANDBUCH DER INTERNATIONALEN VERTRAGSGESTALTUNG, vol. II, annot. F 53. *See also* A. JAN VAN DEN BERG, *supra* note 19, at 288-89 and 369 (author interprets Art. V, para. (1)(a) as the exclusive measure of arbitrability, and rejects the defense of lacking arbitrability under the proper law of the arbitration agreement).

73. *See* Bundesgerichtshof (German Federal Supreme Court), Judgment of May 15, 1986, 98 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 70, 74, *English*

It has to be kept in mind, however, that the impartiality of the arbitrators is considered to pertain to such *ordre public international.* The aforementioned decision of the Court of Appeals (*Oberlandesgericht*) of Cologne[74] which dealt with a case where the names of two co-arbitrators were not disclosed to the parties could as well have been rendered under Article V, paragraph (2)(b) of the New York Convention.

In another case, the Federal Supreme Court (*Bundesgerichtshof*) held invalid an agreement which provided: "Disputes should be resolved by two arbitrators, one of them appointed by each party. If one party would not appoint its arbitrator in time, the other arbitrator should decide on the matter all by himself."[75] The possibility that an award could be rendered by one of the party-appointed arbitrators alone, was regarded as being in violation of public policy. In another more recent case, however, the West German Federal Supreme Court took a more restrictive position.[76] In both cases, the arbitral tribunal was supposed to be composed of two arbitrators, one appointed by each party. In the latter case, one of the parties was in default; the arbitrator appointed by the other party was therefore entitled, pursuant to Section 7(b) of the English Arbitration Act of 1950,[77] to act as sole arbitrator, which he did. The arbitrator handed down his award without the assistance of any co-arbitrator. Since any indication of a violation of the arbitrator's duty of neutrality was lacking, the court held such procedure to be compatible with West German public policy.

Impartiality, in this context, is a basic tenet of public policy. Its importance may be inferred from cases in which the recognition of an arbitral award was refused on the basis that an institutional arbitral tribunal established by an association had rendered an award,

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language summary in 12 Y.B. COM. ARB. 489, 490 (1987); Oberlandesgericht (Court of Appeals, Hamburg, Judgment of Mar. 27, 1975, 21 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 645 (1975), *English language summary in* 2 Y.B. COM. ARB. 240 (1977); SANDROCK, *supra* note 25, at 65. In the United States a similar approach may be found. Parson & Whittemore Overseas, Inc. v. Société Generale (RATKA), 508 F.2d 969 (2d Cir. 1974).

74. *See supra* note 49 and accompanying text. As to the different understandings in the United States and in Germany *see* Boeckstiegel, *American Business-Arbitration from a German Point of View*, in BOECKSTIEGEL, *supra* note 2, at 59, 62.

75. Judgment of Nov. 5, 1970, 24 NEUE JURISTISCHE WOCHENSCHRIFT 139 (1971). This judgment was rendered under the national provisions on arbitration, however. *See also* SANDROCK, *supra* note 25, at 63.

76. Judgment of May 15, 1986, 98 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 70, 75-76, *English language summary in* 12 Y.B. COM. ARB. 489-491 (1987).

77. 1950 Law Reports, Statutes, 441, 444.

notwithstanding the fact that only one of the parties to the dispute was a member of that association while the other party was not. Under these circumstances, the impartiality of the arbitral tribunal was considered questionable, and the award was held to violate public policy.[78]

Careful attention should be paid also to the relationship between due process, on the one hand, and public policy, on the other. For it is doubtful whether all requirements of due process, such as they have been described,[79] also form part of West German public policy.[80] One should assume that the values grouped under the heading of due process are so basic as to constitute, as a matter of course, an inherent feature of public policy. This conclusion, though justified under most circumstances, is not always correct. In the view of West German courts, there may be violations of due process which leave public policy unaffected, as illustrated by a judgment of the Court of Appeals (Oberlandesgericht) of Hamburg.[81] In that case, the court had to decide whether an unreasoned award which had been rendered in England, where the giving of reasons is not mandatory, violated West German public policy. Although legal doctrine maintains that unreasoned awards violate due process, the court granted recognition and enforcement by merely referring to Article V, paragraph (1)(d) (defense of irregular composition of the arbitral tribunal), and holding that the proceedings complied with the English rules.[82]

B. *Treaty of Friendship, Commerce and Navigation*

The Treaty of Friendship, Commerce and Navigation between the United States and West Germany (Friendship Treaty)[83] is much less comprehensive than the New York Convention. Nevertheless, the Friendship Treaty has been the basis for enforcement judgments in West Germany several times, particularly before the New York Convention was ratified by the United States and thereby made

78. *See* Bundesgerichtshof (German Federal Supreme Court), Judgment of Dec. 19, 1968, 51 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN (BGHZ) 255, 259; Landgericht Hamburg (Court of First Instance) Hamburg, Judgment of Dec. 30, 1985, unpublished, *English language summary in* 12 Y.B. COM. ARB. 487, 488 (1987).

79. *See supra* notes 44-53 and accompanying text.

80. *See* Schlosser in STEIN & JONAS, *supra* note 19, § 1044, annot. 39.

81. Judgment of July 27, 1978, unpublished, *English language summary in* 4 Y.B. COM. ARB. 266 (1979).

82. *Id.* at 267.

83. Friendship Treaty, *supra* note 5.

binding between the two nations. Pursuant to Article VII, paragraph (1) of the New York Convention (which is called the "more favorable right provision"), the Friendship Treaty remains applicable, notwithstanding the accession to the New York Convention by the United States. Similar to the New York Convention, the Friendship Treaty seeks to limit the grounds upon which the enforcement of arbitral awards may be rejected.[84]

1. *Applicability of the Friendship Treaty*

Because of the bilateral nature of the Friendship Treaty, its scope of applicability remains small in comparison to the New York Convention. Article VI, paragraph (2) of the Friendship Treaty seeks to guarantee the mutual recognition and enforcement of arbitral awards, but only of those awards which have been rendered according to agreements entered into between nationals or corporations of the contracting states. Awards leading back to arbitration agreements to which nationals and companies from other states than the United States and West Germany are a party are not susceptible of being enforced under the Friendship Treaty. Therefore, enforcement may be sought in West Germany under the Friendship Treaty only for a fraction of arbitral awards delivered in New York or elsewhere in the United States.

As to the nationality of corporations, court rulings and the majority of West German legal scholars follow the so-called "seat theory" in linking the nationality of a company to the law in effect at its principal place of business.[85] As this approach poses problems because it does not align with the provisions of the European Economic Community (EEC) Treaty,[86] the future might well favor what is still the minority view—that the place of incorporation remains the controlling factor.[87] The theory of incorporation, of course, would have

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84. *See* Bundesgerichtshof (German Federal Supreme Court), Judgment of Feb. 16, 1961, 34 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 274; 277 Bundesgenchtshof (German Federal Supreme Court) Judgment of Oct. 21, 1971; 57 BGHZ 153, 155.

85. Bundesgerichtshof (German Federal Supreme Court), Judgments of Jan. 30, 1970, Nov. 5, 1980, Mar. 21, 1986; 53 BGHZ 181, 183; 78 BGHZ 318, 334; 97 BGHZ 269, 271.

86. As to this point, *see* Bayrisches Oberstes Landesgericht (Bavarian Supreme Court), Judgment of Mar. 21, 1986, 1986 ENTSCHEIDUNGEN DES BAYRISCHEN OBERSTEN LANDESGERICHTS IN ZIVILSACHEN [BayObLGZ] 61, 67-68; GROSSFELD, *Die ausläendische juristische Person & Co. KG*, 6 PRAXIS DES INTERNATIONALEN PRIVATUND VERFAHRENSRECHTS [IPRax] 351 (1986); EBKE, *Die "ausläendische Kapitalgesellschaft & Co. KG" und das europaeische Gemeinschaftsrecht*, 1987 ZEITSCHRIFT FÜR UNTERNEHMENS UND GESELLSCHAFTSRECHT [ZGR] 245, 248 *et seq.*

87. BEITZKE, *Anerkennung und Sitzverlegung von Gesellschaften und juristischen Personen im EWG-Bereich*, 127 ZEITSCHRIFT FÜR DAS GESAMTE HANDELS- UND WIRTSCHAFTSRECHT [ZHR] 1 (1965); NEUMAYER, *Betrachtungen zum internationalen Konzernrecht*, 83 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFTEN 129, 139 (1984).

to be subject to certain restrictions resulting from the necessity to prevent the circumvention by enterprises of rules in effect at corporations' principal places of business.[88]

2. *Substantive Conditions for Enforcement Under the Friendship Treaty*

The Friendship Treaty requires the national courts of the two contracting parties to regard arbitral awards as enforceable, provided the awards are based on a valid arbitration agreement, and they have become final and enforceable under the laws of the place where rendered.[89]

a. *The Arbitration Agreement*

The Friendship Treaty does not contain any provision pertaining to the law applicable to the validity of the arbitration agreement. Hence, the general rules of municipal law have to be consulted on this question. According to Article 1044, paragraph (2), of the West German Code of Civil Procedure [ZPO], the arbitration agreement is reviewed under the law governing the arbitral proceedings. The parties may choose this law, or it may be inferred from the place where the arbitration has taken place. Since in the case of a New York arbitral award this would be Chapter 2 of the United States Arbitration Act, the answers to all questions arising in this respect will be the same as those given above, pursuant to the New York Convention.[90]

One West German scholar considers the validity of the arbitration agreement to be the only test upon which the enforcement of the award could be made contingent.[91] This opinion has been rejected, however, by the West German Federal Supreme Court (*Bundesgerichtshof*). The Court ruled that not only the arbitration agreement, but also the award itself, in order to be enforceable, had to comply

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88. SANDROCK, *Ein amerikanisches Lehrstueck für das Kollisionsrecht der Kapitalgesellschaften*, 42 RABELS ZEITSCHRIFT 227, 258 (1978). For the time being, natural persons' capacity is governed by the law of their nationality and juristic persons' capacity by the law of the principal place of business. Both references to foreign law include the foreign conflict-of-laws rules. Therefore, a renvoi to a third law or back to German law may occur.

89. Friendship Treaty, *supra* note 5, at Art. VI, para. (2).

90. As to the time limits that the foreign law might impose (such as § 12 United States Arbitration Act), they are considered applicable under the Friendship Treaty. *See* SCHLOSSER, *Anmerkung*, 86 ZEITSCHRIFT FÜR ZIVILPROZESS [ZZP] 49, 56 (1973).

91. BUELOW & ARNOLD, INTERNATIONALER RECHTSVERKEHR (Looseleaf 1957) E 991, 107.

with certain requirements introduced under the Friendship Treaty.[92]

b. *The Arbitral Award*

Under the Friendship Treaty, the arbitral award must be "final and enforceable under the laws at the place where rendered." This language strongly indicates that the Friendship Treaty has discarded the above-mentioned peculiarity of West German arbitration law enshrined in the so-called "procedural theory" and referred to in Article I, paragraph (1)(2) of the New York Convention. According to the procedural theory, qualification of an arbitral award as foreign or as domestic depends upon the procedural rules followed by the arbitral tribunal. Instead of acknowledging that theory, the Friendship Treaty embodies the doctrine of territoriality in embracing only awards rendered either on the territory of the other contracting state or on the territory of a third state "designated" in the sense of Article VI, paragraph (2)(1) of the Friendship Treaty "for the arbitration proceedings."

Awards by arbitral tribunals sitting in the United States will be enforceable under the Friendship Treaty, no matter whether the tribunals have followed the procedural rules embodied in the United States Arbitration Act, in the arbitration acts of one of the different federal states or in a statute in effect outside the United States.

The arbitral award is "final and enforceable" once it has been rendered in the form required by the law of the country in which the proceedings took place and, from that moment on, when any ordinary means of recourse are no longer available against it.[93] Further, the question has been raised whether the "final and enforceable" nature of the award requires some kind of prior pronouncement of the competent state court (*e.g.*, a New York court) on the enforceability of the award. Such a pronouncement, while permissible under Sections 9 and 207 of the United States Arbitration Act, would lead to a so-called "double-exequatur." Section 9 of the United States Arbitration Act provides that an order confirming the award may be obtained from the competent state court when "the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration." Section

92. Judgment of Oct. 21, 1971, 57 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 153; SCHWAB, *supra* note 22, at 436.

93. Friendship Treaty, *supra* note 5, at Art. VI, para. (2)(1). *See supra* notes 57-63 and accompanying text (discussion of Art. V, para. (1)(e) of the New York Convention).

207 of the United States Arbitration Act authorizes petitioner "to apply" within three years after an arbitral award falling under the Convention is made "to any court having jurisdiction . . . for an order confirming the award as against any other party to the arbitration."[94]

The advocates of the theory, pleading for the need of such prior confirmation, point out that otherwise, the requirement of the "final and enforceable" nature would be superfluous. Despite this argument, these scholars remain the minority view with regard to West German arbitration doctrine. The vast majority[95]—including West German courts[96]—holds that the issuance of a United States confirming order is not indispensable for West German consideration of a United States award as "final and enforceable." Scholars espousing the majority view put forth primarily two arguments. First, they contend that the Friendship Treaty was based on an Anglo-American draft. Anglo-American statutes usually tend to duplicate certain features in order to make sure that their provisions are not disregarded by courts. Furthermore, the notion of enforceability has an especially broad meaning under the Friendship Treaty, because it encompasses all objections against the validity of the arbitral award admissible under the laws of the country where the award was rendered.[97] Accordingly, its narrow interpretation in Article VI, paragraph (2)(1), would not be warranted. In sum, then, "double exequatur" is not held necessary under the Friendship Treaty.

c. *Public Policy*

When the aforementioned conditions have been met, enforcement of the arbitral award may be refused only if it violates public policy. As previously pointed out with respect to Article V, paragraph (2)(b) of the New York Convention, this notion includes (most matters of) due process as well as the arbitrability of the subject matter. Since West German courts always have been reluctant to apply the *ordre*

94. Arbitration Act, *supra* note 6.

95. DROBNIG, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW (1972) (further references).

96. Landgericht (Court of First Instance), Judgment of Dec. 4, 1964, KONKURS TREUHAND SCHIEDSGERICHTSWESEN [KTS] 182, 183 (1966). The German Federal Supreme Court in its decision on the Treaty of Oct. 21, 1971, 86 ZEITSCHRIFT FÜR ZIVILPROZESS [ZZP] 46 (1973) did not have to rule on this issue as a confirmation order by a New York court existed already.

97. DROBNIG, *supra* note 95, at 369, 370; Bundesgerichtshof (German Federal Supreme Court), Judgment of Oct. 21, 1971, 57 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 153, 156-57.

public in an international setting, the purview of the *ordre public* also has been narrowed under the Friendship Treaty.[98] The Friendship Treaty explicitly prohibits the denial of recognition on the ground that the arbitration has taken place outside the territory of one of the contracting states or that the arbitrators have a nationality differing from that of the states. Generally, the Friendship Treaty requires national courts to treat a foreign arbitral award in the same manner as a domestic one.

C. *Section 1044 of the West German Code of Civil Procedure [ZPO]*

Although the West German legislature, in its Code of Civil Procedure [ZPO], has left scholars and practitioners with rather awkward, outmoded rules on arbitral proceedings, it has recognized the importance of international arbitration adopting a rather liberal approach to the recognition and enforcement of foreign arbitral awards. Section 1044 enumerates the grounds upon which West German courts may refuse to recognize and enforce foreign awards.[99]

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98. *See supra* notes 73-77 and accompanying text. *See also* Bundesgerichtshof (German Federal Supreme Court), Judgment of Oct. 21, 1971, 57 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 153, 158.

99. BAUMBACH-LAUTERBACH, ZIVILPROZEßORDNUNG, *supra* note 66, § 1044. § 1044 provides:

Foreign Arbitrations

1044

I. A foreign arbitration decision (judgment) which has become binding under the authoritative law, will, so far as government treaties do not require otherwise, be declared to be executable under the proscribed provisions for domestic aribtrations. Section 1039 is not applicable.

II. The motion for the declaration of executability should be rejected:

1. when the arbitration decision (judgment) is legally ineffective (void);* since the legal effectiveness of the arbitration decision is, so far as treaties do not provide or declare otherwise, dependent on the law which was authoratative in the arbitration proceeding;

2. when the recognition of the arbitration decision would be against good morals or would be an offense to public order, in particular when the verdict sentences one party to do an act the commission of which is prohibited under German laws;

3. when the party was not legally represented, as long as the conduct of the case was not (strictly) or silently conducted;

4. when the party in the proceedings was not permitted a legal hearing.

III. In substitution of the annulment of the arbitration decision is the determination that it is not acknowledged domestically.

IV. If the arbitration decision, after it has been declared to be executable, is reversed in the foreign nation, one can apply by way of a lawsuit (complaint) for reversal of the declaration of execution. The appropriate authoritative provisions of section 1043 Abs. 2, 3, are to be applied to the complaint so that the statutute of limiations begins running with the knowledge by the party of the lawful reversal of the

1. *Applicability of Section 1044 Code of Civil Procedure*

Section 1044 covers the recognition and enforcement of any *foreign* arbitral award that has become final under the applicable law. Again, an award is considered foreign under West German municipal law if it has been rendered under foreign procedural law.[100] The notion of "finality" requires that the award no longer be subject to an ordinary means of recourse.[101] Whether there is an extraordinary means of recourse available in the competent foreign court remains irrelevant. Thus, the final nature of a United States award lies unaffected when it still may be vacated pursuant to Section 10 of the United States Arbitration Act. A United States arbitral award, therefore, is generally susceptible of being recognized and enforced under Section 1044.

2. *Substantive Requirements*

Similar to the New York Convention, Section 1044 provides a general obligation to recognize and enforce foreign arbitral awards if none of the negative conditions mentioned therein prevail. Within its catalog, Section 1044 enumerates four concerns: (1) validity; (2) public policy; (3) valid representation; and (4) the right to be heard.

a. *Validity (Rechtswirksamkeit) of the Arbitral Award*

The validity of the arbitral award[102] may be considered the broadest of the conditions to be met. It encompasses all reasons which, under the law applicable to the award, may cause it to be invalid (*e.g.*, an

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arbitration decision.

* This is determined according to the law of the land where the arbitration decision was rendered; it is sufficient that according to applicabale law a ground for reversal exists, but these grounds have to be proven. [Eds. note: The original text of § 1044, in German, is followed by official comments interpreting these provisions. *See* BAUMBACH-LAUTERBACH, ZIVILPROZEßORDNUNG, *supra* note 66, at 1789-92.]
Id. [The editors wish to express their gratitude to Ms. C. Hoffmann, McGeorge School of Law, J.D. 1989, for her valuable assistance in translating this section from the original German source].

100. Schlosser in STEIN & JONAS, *supra* note 19, § 1044, annot. 10.

101. Bundesgerichtshof (German Federal Supreme Court), Judgment of May 10, 1984, 37 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2763, 2764 (1984); Judgment of Jun. 26, 1969, 52 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 184, 188; Judgment of Mar. 9, 1978, 31 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1744 (1978).

102. BAUMBACH-LAUTERBACH, ZIVILPROZEßORDNUNG, *supra* note 66, § 1044 (z)(1).

invalid arbitration agreement, an excess of the scope of the arbitration agreement, or formal defects of the award).[103]

Conversely, the West German Federal Supreme Court (*Bundesgerichtshof*) has limited substantially the scope of this requirement, by ruling that the issue of invalidity of the arbitral award may be raised before a West German court only if it could still be pleaded before a court under the foreign law applicable to the award[104] (*i.e.*, before the competent foreign court; here, the New York court). Section 12 of the United States Arbitration Act provides that a motion to vacate the award must be served upon the adverse party or attorney within three months after the filing or deliverance of the award. The ruling of the West German court thus means that, after this three months period has elapsed, the award definitely has become "valid" under Section 1044, paragraph (2)(1), of the West German Code of Civil Procedure [ZPO]. It may have become valid before that time if no defenses under the law applicable would lie against it—a question which would have to be answered by the West German exequatur court according to Sections 10-12 of the United States Arbitration Act.[105]

A number of scholars in West Germany have challenged this particular decision, by arguing the approach of the West German Federal Supreme Court favors too much the recognition and enforcement of awards rendered in states which have imposed short time limits.[106] This argument, however, remains unconvincing. As the parties themselves usually decide on the law applicable to their arbitration, either explicitly or by choice of the location where their

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103. HENN, SCHIEDSVERFAHRENSRECHT 233, (1986).

104. Bundesgerichtshof (German Federal Supreme Court), Judgment of Jun. 26, 1969, 52 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 184, 189; Judgment of Jan 7, 1971, 55 BGHZ 162, 169; Judgment of Oct, 21, 1971, 57 BGHZ 153, 157; and Judgment of May 10, 1984, 37 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2763, 2764 (1984); in support of this position: SCHLOSSER in STEIN & JONAS, *supra* note 19, § 1044, annot. 14; SCHLOSSER, *supra* note 71, at 647, annot. 683; SANDROCK, *supra* note 25; MEZGER, *Die Anerkennung jugoslawischer und anderer osteuropäischer Schiedssprüche in der Bundesrepublik*, 15 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 278, 279 (1962); BAUMBACH, LAUTERBACH, ALBERS & HARTMANN, ZIVILPROZESSORDNUNG, § 1044, annot. 3A.

105. *See* Bundesgerichtshof (German Federal Supreme Court), Judgment of Jun. 26, 1969, 52 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ] 184, 188; *see also supra* note 36.

106. BÜELOW, *Der Schiedsvertrag in dem Verfahren der Vollstreckbarerklärung eines ausländischen Schiedsspruchs*, 24 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 486, 487 (1971); HENN, *supra* note 103, at 233; Schuetze in SCHUETZE, TTSCHERNING & WAIS, HANDBUCH DES SCHIEDSVERFAHRENS 351-352 annot. 638 (1985); SCHWAB, *supra* note 22, at 225 and citations therein.

arbitration is to take place,[107] they have had ample opportunity to inquire about the law. Thus, there is no reason for a West German court to impose different legal standards after the fact. Major deficiencies of the award often also will concern due process or public policy, and thus still can be brought forward.

b. *Public Policy*

Section 1044, paragraph (2)(2), of the West German Code of Civil Procedure [ZPO] mandates that the recognition of an arbitral award is excluded where its enforcement would be incompatible with fundamental principles of West German law, and in particular where its enforcement might lead to a violation of the bill of rights catalog of the West German Constitution. The standards of public policy as they have been defined in Section 1044, paragraph (2)(2), however, do not differ from those outlined above under Article V, paragraph (2)(e), of the New York Convention, and under Article VI, paragraph (2)(2) of the Friendship Treaty.[108]

c. *Valid Representation*

If a party was not represented properly during the arbitral proceedings, and has not subsequently approved of them (either explicitly or by conduct), there will be no recognition and no enforcement of the foreign arbitral award under Section 1044, paragraph (2)(3), of the West German Code of Civil Procedure [ZPO]. The fact that a separate provision addresses the problem of valid representation is puzzling for the following reason. As mentioned above, Section 1044, paragraph (2)(1) of the West German Code of Civil Procedure [ZOP] already relates to the general validity of the award by providing that all questions pertaining to validity are subject to the law governing the arbitration procedure. The question whether a valid power of attorney has been granted with respect to the arbitral proceedings, the confines of such power, and all other problems connected with it are, by virtue of a common rule of conflict of laws,[109] subject to

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107. Bundesgerichtshof (German Federal Supreme Court), Judgment of Feb. 12, 1976, 1976 WERTPAPIERMITTEILUNGEN [WM] 435, 436; SCHLOSSER, *supra* note 71, at 214, annot. 222. SCHLOSSER in STEIN & JONAS, *supra* note 19, § 1044, annot. 11 *et seq.*

108. *See supra* notes 73-77 & 98 and accompanying text.

109. SCHLOSSER in STEIN & JONAS, *supra* note 19, § 1044 note 43, SCHLOSSER, *supra* note 71, at 660, annot 700 *et seq.*; SCHLOSSER, *Anmerkung*, 86 ZEITSCHRIFT FÜR ZIVILPROZESS [ZZP] 49, 53-54 (1973). The Courts and the leading opinion among scholars subject power of attorney

the law applicable to the arbitral proceedings. It therefore would seem that any deficiency in the power of attorney would affect the validity of the arbitral award, and thus would be appealable already under Section 1044, paragraph (2)(1).

This conclusion, however, is only partly justified. Of course, the aggrieved party may already plead a deficiency in its representation, on the basis of Section 1044, paragraph (2)(1). But in doing so, it would be bound by the time limits prescribed by the law applicable to the arbitral proceedings, (*i.e.*, under the provisions of the United States Arbitration Act). These time limits may have elapsed. Notwithstanding the law governing the arbitral procedure introduced by the United States Arbitration Act, Section 1044, paragraph (2)(3), empowers the aggrieved party to raise the issue of representation separately, even after such time limits may have elapsed.[110] The defense of lack of a valid power of attorney thus has been privileged by the West German statute. This privilege can be explained only by the fact that the issue of representation affects the right to be properly heard, and that such right to be heard is, in turn, an integral part of due process.[111]

d. *The Right to be Heard*

The West German Code of Civil Procedure [ZPO] grants a defense to those respondents to whom the right to be properly heard was denied during the arbitral proceedings.[112] The requirements to be met under this provision generally parallel the due process elements of Article V, paragraph (1)(6) of the New York Convention. The parties must have been informed about the initiation of the proceedings, and must have had ample opportunity to present their case. West German courts have been fairly reluctant, however, to deny recog-

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to the law of the country in which the power of attorney is to be used. Bundesgerichtshof (German Federal Supreme Court), Judgment of Apr. 16, 1975, 64 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ] 183, 192; Judgment of May 13, 1982, in 35 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2733; Mueller in SANDROCK, *supra* n. 23, Part D, annot. 11 *et seq.*

110. Schlosser in STEIN & JONAS, *supra* note 19, § 1044 note 45.

111. It must be be stressed, however, that § 1044, para.(2)(3) of the ZPO applies, in the very narrow sense of the term, only to powers of attorney granted, by a separate declaration of the principal, with respect to the arbitral proceedings; it does not apply to powers of authority deriving from statutory provisions (*e.g.* to powers of authority conferred by a corporation law to the directors of a company, etc.).

112. BAUMBACH-LAUTERBACH, ZIVILPROZEßORDNUNG, *supra* note 66, § 1044, para. (2)(4).

nition on the ground of a violation of the right to be heard, not unlike its tendency to so treat due process.[113]

Upon a review of the different grounds under which recognition and enforcement of a foreign arbitral award may be denied according to Section 1044, it turns out that the only peculiarity vis-à-vis the New York Convention and the Friendship Treaty lies in the handling of the problem of representation.

D. *Section 328 of the West German Code of Civil Procedure [ZPO]* (Double Exequatur)

Lastly, the winning party in the arbitration proceedings may seek confirmation and execution of the award in New York. Mention already has been made of Sections 9 and 207 of the United States Arbitration Act pursuant to which the competent state court may confirm the award. After having obtained a judgment or order, a petitioner may then file (in West Germany) for the recognition and enforcement of this New York judgment, based on Sections 328 and 722 of the West German Code of Civil Procedure [ZPO]. Two decisions of the West German Federal Supreme Court, both rendered in 1984, definitely have confirmed this additional means of enforcement of an arbitral award.[114] These two judgments have held that, even if the award has already been recognized in the United States, and even if such award thereby has been merged into the judgment of the court, the parties still may seek recognition and enforcement of the arbitral award itself.[115] The decisions have found support as well as criticism, as will be discussed after having first outlined the conditions for double exequatur set out in Sections 328 and 732 of the West German Code of Civil Procedure [ZPO].

1. *Sections 328 and 723 of the West German Code of Civil Procedure [ZPO]*

Section 328 of the West German Code of Civil Procedure [ZPO] governs the recognition of judgments rendered by foreign state

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113. *See supra* notes 44-52 and accompanying text.

114. Judgment of Mar. 27, 1984, in 30 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] (1984) 557, also 37 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2765 (1984), *English language summary in* 10 Y.B. COM. ARB. 426 (1985); and Judgment of May 10, 1984, in 30 RIW 644 (1984); also 37 NJW 2763 (1984), *English language summary in* 10 Y.B. COM. ARB. 427 (1985). A decision of the Oberlandesgericht (Court of Appeals), Hamburg had stated such interpretation with respect to England already in 1978, Judgment of July 27, 1978, unpublished, *English language summary in* 4 Y.B. COM. ARB. 266, 268 (1979).

115. Judgment of May 10, 1984, in 37 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2763 (1984) (comment by Mezger), 30 RECHT DER INTERNATIONALEN WIRTSCHAFT 647 (1984); *See also* HENN, *supra* note 103, at 233.

courts.[116] It enumerates a catalog of conditions which would prevent such recognition. As long as none of them is given, the foreign judgment is recognized *ex lege*.[117]

a. *Venue*

Section 328 first requires that the court of the foreign state which has rendered the judgment have jurisdiction under West German law.[118] Thereby, a mirror-image application of the West German rules of jurisdiction is required.[119] The West German exequatur court must assume that its own domestic rules on jurisdiction would be applicable to the respective United States (*i.e.*, New York) court, and it could grant recognition and enforcement to the New York judgment only if those jurisdictional requirements were met by the New York court. The moment at which the New York judgment was rendered proves to be the relevent time. Since West Germany and the United States are not members to any multilateral or bilateral convention on the recognition and enforcement of foreign court judgments, such mirror-image jurisdiction would have to be established by the petitioner in West Germany, according to Section 12 of the West German Code of Civil Procedure [ZPO].[120]

The most important West German rules on jurisdiction which might be in point for the cases under consideration are those authorizing parties to agree upon a venue, either in writing or by a letter of confirmation.[121] According to Section (9)(1) of the United States Arbitration Act, a petitioner can only seek confirmation of an arbitral award by a court where the parties "in their [arbitration] agreement have agreed" upon such judgment upon the award. Often, an agreement of that kind will also include an understanding upon the specific court which is to enter the judgment upon the award. That this assumption is justified also results from Section (9)(2) of the United States Arbitration Act, which specifies venue: "[i]f no court is specified in the agreement. . . ." Thus, where the parties had agreed in their arbitration clause on the jurisdiction of a specific United States court, the requirement enunciated in Section 328 (1)(1)

116. BAUMBACH-LAUTERBACH, ZIVILPROZEßORDNUNG, *supra* note 66, at 328.
117. *Id.*
118. *Id.* at 328(1).
119. *See, e.g.*, THOMAS & PUTZO, [ZPO], § 328, note 2.
120. As to the problems of this restrictive approach, *see* SCHLOSSER, *Doppelexequatur zu Schiedsspruechen und ausläendischen Gerichtsentscheidungen*, 5 PRAXIS DES INTERNATIONALEN PRIVAT UND VERFAHRENSRECHTS (IPRax) 141, 142 (1985).
121. BAUMBACH-LAUTERBACH, ZIVILPROZEßORDNUNG, *supra* note 66, § 38.

of the West German Code of Civil Procedure [ZPO] would be met already by a mirror-image application of Section 328.

Yet, cases remain where the parties did not stipulate in their arbitration agreements which court should have jurisdiction for entering a judgment upon the award. In these cases, other provisions of the West German Code of Civil Procedure [ZPO] might be in point. A court which, at the time of the introduction of a claim, did not have jurisdiction will acquire it where the parties argue before it without previously having raised objections against its lack of jurisdiction. Thereby, the presentation of arguments on the merits operates as a cure of the defective jurisdiction.[122] Venue also exists at the domicile of the defendant,[123] at the principal place of business of the defendant,[124] at the place of business of a branch of an enterprise as long as the suit refers to that branch,[125] and at the place where the defendant has assets.[126] For in rem litigation, there is an exclusive venue with the court of the situs.[127] In sum then, absent any agreement of the parties whereby jurisdiction for the confirmation order has been conferred upon a specific United States court, ample statutory options lie at the disposal of a petitioner to prove the existence of a mirror-image jurisdiction, under West German jurisdictional standards, of the United States court which has issued the confirmation order. Nonetheless, it must be stressed here that a judgment issued in New York under some kind of transient jurisdiction, or under a long arm statute, is unlikely to be judically recognized in West Germany.[128]

b. *Opportunity of the Defendant to Present His or Her Case*

According to West German Code of Civil Procedure [ZPO] Section 328(1)(2), the party who is the defendant in the recognition and enforcement proceedings must have had an opportunity to present his or her case before the foreign court whose judgment is sought

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122. *Id.* at § 39. As to this aspect *see* SCHLOSSER, *supra* note 120, at 142; Geimer in GEIMER & SCHUETZE, *supra* note 14, Vol. I 2, § 197 XVIII, at 1569-1570. The Oberlandesgericht (Court of Appeals) of Frankfurt, however, has once held to the contrary. Judgment of Dec. 13, 1978, 32 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1787 (1979).

123. BAUMBACH-LAUTERBACH, ZIVILPROZEßORDNUNG, *supra* note 66, § 12.

124. *Id.* § 17.

125. *Id.* § 21.

126. *Id.* § 23.

127. *Id.* § 24.

128. *See* Schuetze, *Probleme der Anerkennung US-amerikanischer Zivilurteile in der Bundesrepublik Deutschland*, in 1979 WERTPAPIERMITTEILUNGEN [WM] 1174.

to be recognized. This defense may become relevant, however, only after a number of conditions have been fulfilled. First, the defendant, or anyone else whom the defendant duly authorizes, must actually not have taken part at all in the foreign proceedings. Second, the defendant has to raise this objection before the West German exequatur court. Finally, the writ initiating the proceedings before the foreign court must not have been served on the defendant—or at least not in a timely manner (*i.e.*, there must have been too little time for the respondent under the conditions given—difficulty of the case, foreign language, distance to the foreign court, etc.—to provide a proper defense).

c. *No Conflicting Prior Judgment*

The foreign court's decision also must not collide with an earlier West German decision, or with an earlier foreign decision on the same matter (recognizable and enforceable in West Germany) regardless of whether the foreign decision has been sought to be actually recognized and enforced in West Germany.[129]

d. *Public Policy*

The recognition and enforcement of the foreign judgment must not be incompatible with fundamental principles of West German law; in particular, it must not infringe upon the basic human rights enshrined in the West German Coode of Civil Procedure [ZPO] at Section 328, paragraph (1)(4). This public policy reservation is interpreted, by and large, the same way as under the other rules mentioned above.[130] The facts as they have been stated in the judgment by the foreign court will be acknowledged by the West German exequatur court unless they have been ascertained under a procedure in violation of the West German *ordre public*[131]—an assumption which is unlikely with respect to a judgment rendered under the United States Arbitration Act, or under other rules of United States civil procedure.

e. *Reciprocity*

Section 328, paragraph (1)(5) of the West German Code of Civil Procedure [ZPO] requires reciprocity to be guaranteed. This means

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129. BAUMBACH-LAUTERBACH, ZIVILPROZEßORDNUNG, *supra* note 66, Art. 328, para. (1)(3).
130. *See supra* notes 73-77, 98, 108 and accompanying text.
131. Bundesgerichtshof (German Federal Supreme Court), Judgment of Apr. 11, 1979, 33 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 529 (1980).

that the foreign court whose judgment is examined for recognition and enforcement in West Germany must be prepared to recognize and enforce, in the country where the court is sitting, a hypothetical judgment of the kind rendered by a West German court. The existence of reciprocity between the United States and West Germany has been acknowledged in a number of cases by West German courts.[132] Nevertheless, some doubts remain where the type of judgment for which recognition is asked is unknown in West Germany—and thus no actual reciprocity can be determined—or where enforcement proceedings in the United States are never initiated because of exhorbitant costs, making them worthless or at least unattractive for the West German petitioner.[133] In many instances, the threat of high attorneys' fees deters West German parties from introducing proceedings in the United States. West German procedural rules oblige a losing party to bear not only his own attorneys' fees, but also the attorneys' fees of the winning party plus the court's fees (such fee shifting being widely unknown in Anglo-American law), thereby reimbursing the winning party for all its expenses in connection with the proceedings. The fact that United States law does not provide such reimbursement further dissuades West German parties from initiating any kind of proceedings in the United States.

f. *Res Judicata*

Another substantive requirement for the enforcement of a United States confirmation judgment in West Germany results from Section 723, paragraph (2)(1) of the West German Code of Civil Procedure [ZPO], whereby the West German exequatur court must not issue an enforcement order unless the foreign judgment for which the enforcement order is sought has become res judicata.

Again, a foreign judgment will not obtain the effect of res judicata as long as it may be appealed by way of a normal means of recourse which would enable a second arbitral tribunal or a court to reconsider the merits of the case; or, as long as an appeal is pending. Entry of

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132. Bundesgerichtshof (German Federal Supreme Court), Judgment of Mar. 27, 1984, 30 RECHT DER INTERTERNATIONALEN WIRTSCHAFT [RIW] 557, 558 (1984). *See also* SCHLOSSER, *supra* note 71, at 740, annot. 786.

133. BAUMBACH-LAUTERBACH, ZIVILPROZEßORDNUNG, *supra* note 66, Art. 91, para. 1(1). *See also* SCHUETZE, *Anmerkung*, 30 RECHT DER INTERNATIONAL WIRTSCHAFT [RIW] 734, 736 (1984); Schuetze in GEIMER & SCHUETZE, *supra* note 14, § 245, I 5, at 1777. For the different approach in the U.S., *see, e.g.*, Aleyska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

res judicata is not prevented, however, as long as only an extraordinary means of recourse can be filed against the judgment for which only grave, fundamental irregularities (either of the award itself or of the arbitral proceedings leading to it, including the confirmation order and its procedure) may be pleaded. Thus, as long as the confirmation order rendered by the United States court pursuant to Sections 9 or 207 of the United States Arbitration Act would be subject to a normal appeal as set out above, it would not become res judicata and the West German exequatur court would not be authorized to issue an enforcement order.

g. *No Scrutiny of Award and Confirmation Order*

West German Code of Civil Procedure [ZPO] Section 723 provides that the West German exequatur court, once all requirements have been fulfilled, has to issue the enforcement order without scrutinizing the prior proceedings.[134] The West German court will neither review the arbitral award nor the arbitral proceedings which led to it. Moreover, the West German court will examine neither the foreign confirmation order, nor the proceedings upon which the order was pronounced. The West German exequatur court thus has to determine only whether the specific requirements set out in Sections 328 and 723 are met. Once this has been established, an exequatur order must be issued.[135]

3. *Criticism of the Parallelism Between the Enforcement of the Award and the Confirmation Judgment by Double Exequatur*

The two aforementioned 1984 rulings of the West German Federal Supreme Court (*Bundesgerichtshof*) which opened up the possibility of a double exequatur,[136] have been criticized for proclaiming too liberal an approach to international arbitration. Several scholars have argued the court's rulings would expose the respondent to the danger of having the arbitral award enforced twice; once by way of proceedings under the New York Convention, the Friendship Treaty, or Section 1044 of the Code of Civil Procedure [ZPO] upon the arbitral

134. BAUMBACH-LAUTERBACH, ZIVILPROZEßORDNUNG, *supra* note 66, Art. 723.

135. *See* THOMAS-PUTZO, *supra* note 119, § 723, annot. 1, 2. GEIMER, INTERNATIONALES ZIVILPROZESSRECHT 474, annot. 2319 (1987); MEZGER, *Anmerkung*, 30 RECHT DER INTERNATIONALEN WIRTSCHAFT 647 n. 1a, 648 (1984).

136. *See supra* note 114 and accompanying text.

award itself; and another time by way of a double exequatur on the basis of the United States confirmation order according to Sections 9 or 11 of the United States Arbitration Act, and a West German enforcement order issued pursuant to Sections 328 and 723.[137] These scholars correctly point out that considerable doubt centers around whether the arbitral award, after having been subject to a United States confirmation order, still exists as such. According to the doctrine of merger, the award merges into the confirmation order, which negates (or extinguishes) its existence as an independant legal title.[138] Hence, it may be argued that, after a United States confirmation order has been issued, there is no longer an arbitral award which could be the subject of West German exequatur proceedings, and that the proceedings be initiated only with respect to the United States confirmation order.

One must not neglect, however, the legitimate interests of the winning party. If the losing party does not voluntarily abide by the dictates of the award, the winning party is interested in the easiest way of enforcing the award. This interest has been acknowledged by the New York Convention, the Friendship Treaty, and Section 1044 of the West German Code of Civl Procedure [ZPO]. The fact that the petitioner has filed for a United States confirmation order before seeking the recognition and enforcement of the arbitral award in another state should not cause harm to the petitioner.[139] It may well be easier to have an arbitral award enforced abroad under the New York Convention than to have a state court's judgment enforced in the same place. The criticisms against the rulings of the West German Federal Supreme Court, therefore, remain unpersuasive. On the contrary, the Court's rulings deserve support.[140]

This scenario by no means leaves the losing party without protection. Once the winning party attempts to enforce the claim a second time, the petition must be dismissed for want of a legitimate legal interest. Furthermore, the party which has lost the arbitration may

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137. BAUMBACH-LAUTERBACH, ZIVILPROZEßORDNUNG, *supra* note 66, art. 328, 723.

138. SCHUETZE, *supra* note 133, at 735; Schuetze in SCHUETZE, TSCHERNING & WAIS, *supra* note 106, at 349-350, annot. 633.

139. *See* Oberlandesgericht (Court of Appeals) Hamburg, Judgment of July 27, 1978, unpublished, *English language summary in* 4 Y.B. COM. ARB. 266, 268 (1979) (with respect to an English award).

140. Judgment of May 10, 1984, 37 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2763 (1984), 30 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 644 (1984). The court follows the arguments of SCHLOSSER, *supra* note 71, at 737, 740, annot. 782 and 786. *See also* Schlosser in STEIN & JONAS, *supra* note 19, app. to § 1044, annot. 80.

file a protective suit pursuant to Section 767 of the West German Code of Civil Procedure [ZPO] in order to have the second enforcement proceeding declared illegal.[141]

II. Comparison of the Different Means: Conclusions for an Effective Enforcement Strategy

As presented in Part I of this article, the four major means of recognition and enforcement of a United States arbitral award in West Germany may appear to be rather similar. In fact, similar standards of scrutinization prevail under all four options. Nonetheless, upon closer examination, one discovers that a petitioner would be ill-advised to utilize either of these options indiscriminately. On the contrary, a careful comparative analysis is necessary to prevent a petitioner from incurring disasterous pitfalls. In other words, all petitioners should devise an overall strategy to guide them in their actions for recognition and enforcement of arbitral awards.

A. *The Choice Between the Immediate Exequatur Strategy and the Double Exequatur Strategy*

At the outset, the party seeking enforcement of an arbitral award in West Germany must decide on whether to submit, before the West German exequatur judge, the arbitral award itself for recognition and enforcement (immediate exequatur strategy); or, whether to first obtain, from the competent United States court, a judgment upon the award and then file for the recognition and enforcement of the judgment before the exequatur in West Germany (double exequatur strategy). If the petitioner submits the arbitral award itself for recognition and enforcement by the West German exequatur judge, it would be immaterial whether the motion was based upon the New York Convention, the Friendship Treaty, or Section 1044 of the West German Code of Civil Procedure [ZPO]. It is the duty of the court to check all statutory devices susceptible of justifying the petition of the claimant (*iura novit curia*).[142] The petition could only be dismissed

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141. Schlosser, *supra* note 120, at 141.

142. As to this basic principle of German law, *see* Bundesgerichtshof (German Federal Supreme Court), Judgment of Dec. 13, 1968, 23 Monatsschrift für Deitsches Recht [MDR] 468 (1969); Jauernig, Zivilprozessrecht, § 25 I, at 72 (22nd ed. 1988). For the choice between the different means for the recognition and enforcement of arbitral awards, *see* Schlosser, *Verfahrensintegrität und Anerkennung von Schiedssprüchen im deutsch-amerikanischen Verhältnis*, 31 Neue Juristische Wochenschrift [NJW] 455, 457 (1978); *cf. also* Schuetze in Schuetze, Tschernning & Wais, *supra* note 106, at 350, annot. 634; Mezger, *supra* note 20, at 648.

if neither the New York Convention, the Frienship Treaty, nor Section 1044 would apply. It may be advisable, nevertheless, to guide the court by submitting a legal opinion—the tactical considerations governing petitioner's choice as to the statutory device upon which the party should preeminently base its immediate exequatur strategy—which will determine the second stage of its immediate exequatur strategy.

1. *The Common Case: Advantages of Immediate Exequatur Strategy and Disadvantages of Double Exequatur Strategy*

A preliminary remark must be made in this context. It has been the particular merit of the aforementioned bilateral and multilateral conventions, and of the liberal West German common law rules on the recognition and enforcement of foreign arbitral awards, to open the door for an immediate exequatur strategy. In the vast majority of cases, the immediate exequatur strategy must be considered superior to the double exequatur strategy. The immediate exequatur strategy saves time and money. Additionally, this strategy generally enables the losing party to the arbitration to raise fewer defenses against the recognition and enforcement of the award—simply on the ground that there is only one procedure.

More than the proceedings, however, are duplicated with the double exequatur strategy. Under normal circumstances, additional reasons lie against this option. No international conventions exist between the United States and West Germany concerning (and facilitating) the recognition and enforcement of judgments and orders rendered by the state courts of either country. The following analysis demonstrates that, under the double exequatur strategy, the substantive questions to be answered are more numerous than under the immediate exequatur strategy. First, the arbitral proceedings and the arbitral award, upon a request of the respondent, would have to be scrutinized by the United States court. Second, the proceedings before the United States confirmation court would have to meet various requirements. In particular, the latter issue would have to be decided by the West German exequatur judge after the arbitral proceedings and the confirmation order have taken place in the United States. Defenses against the arbitral proceedings and the arbitral award also could be raised before the West German judge under certain conditions. Under most circumstances the immediate exequatur strategy thus seems to present to the petitioner more disadvantages than advantages.

2. *The Exception: The Advantages of the Double Exequatur Strategy Prevail*

There may be situations, however, where for one reason or another the winning party to the arbitration has already obtained a United States judgment or enforcement order—possibly because enforcement earlier was sought there, or elsewhere. Under these special circumstances, the double exequatur strategy may be more advantageous to petitioners because they already have passed part of the necessary proceedings.

3. *Difficulties in Evaluating a Particular Case*

The following discussion explores the difficulties which lie in devising the most effective strategy in any given case.

a. *The Arbitration Agreement*

Where the validity and the scope of the arbitration agreement are in dispute, it might be advisable to file in West Germany for the recognition and enforcement of a confirmation order by a United States court, if the order has already been obtained. Then a double exequatur strategy is preferable, for the following reason: Whether the arbitration agreement is valid and whether it covers the subject-matter of the award is open for review, before the West German exequatur judge, under any procedure dealing with the recognition and enforcement of the arbitral award itself. Article V, paragraph (1)(a) of the New York Convention explicitly authorizes the West German exequatur judge to scrutinize the validity of the arbitration agreement, Article 6, paragraph (2) of the Friendship Treaty and Section 1044, paragraph (2)(1) of the West German Code of Civil Procedure [ZPO], implicitly direct the judge to scrutinize the arbitral award by requiring it to be valid under the applicable law. Since, according to the United States arbitration laws, the validity of the award depends upon the existence and scope of the arbitration agreement, the West German exequatur judge is bound to examine the validity and scope under the proper law of the agreement, (e.g., under New York law). A West German exequatur judge's scrutiny of the validity and scope of the arbitration agreement under United States law is, in general, inevitable. A defense deriving from an eventual invalidity of the agreement or from an eventual lack of its scope would lie, however, against the petitioner only as long as the

defense could be raised according to the United States Arbitration Act.[143]

The extent of scrutiny which would have to be carried out by the West German exequatur judge thus would be the same as that which would have to be performed by the United States judge who was asked to issue a confirmation order. Even though New York courts are obviously more apt to deal with matters of New York law than are West German courts, it would not be advisable to seek a confirmation order first from them, and then file, before the West German exequatur judge, for the recognition and enforcement of the order. The double exequatur strategy would not compensate for the disadvantages of having to go through two proceedings.

On the other hand, where a New York court has already rendered a judgment or an order upon the award (where, *e.g.*, the winning party tried to enforce the award already in the United States before), it would be preferable to proceed on a double exequatur strategy. Under this strategy, the West German exequatur judge would rely on the findings of the New York court, absent any indication that these findings could have been reached in violation of due process. The losing party in the arbitration thus would be excluded, before the West German court, from raising any objections against the award which would be based on the invalidity of the agreement or on a deficiency of its scope—objections that it could have raised during the confirmation proceedings in New York.[144]

b. *The Form at The Arbitration Agreement*

If the parties dispute whether the form of the arbitration agreement has been met, the same recommendation applies. Questions of form generally do not pose legal problems serious enough to outweigh the comparative advantages of an immediate exequatur strategy. The New York judge may seem more qualified to deal with New York law; yet, the duplication of proceedings would generally entail, for the petitioner, a comparatively greater loss of time and money than with an immediate exequatur strategy.

Admittedly, Section 1027, paragraph 92 of the West German Code of Civil Procedure [ZPO] does allow agreements not in writing, if

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143. *See supra* note 35 and accompanying text.

144. *See* DIELMANN, *Anmerkung*, 30 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 558, 559 (1984); SCHUETZE, *Anmerkung*, 30 RIW 734, 735; MEZGER, *supra* note 20, at 648.

concluded among merchants,[145] while Article II, paragraph (2) of the New York Convention requires the agreement to be in writing. Section 1027(2), however, applies only to arbitration agreements governed by West German law, or entered into within West Germany. Neither one of these requirements normally will be fulfilled in the cases here under consideration. Therefore, it is the respective U.S. state (*e.g.*, New York) law which will determine the form requirements—by reference either to the United States Arbitration Act or to Article II of the New York Convention. The rule of the writing requirement cannot be avoided even if petitioner chooses the immediate exequatur strategy.

c. *The Arbitral Proceedings*

The same general conclusion follows when a respondent raises objections against the way in which the arbitral proceedings were conducted, and therefore refuses to follow the award. In these cases, an immediate exequatur strategy usually will be more advantageous for petitioner. Nevertheless, a double exequatur strategy seems preferable in those rare situations where petitioner already holds a U.S. confirmation order. Absent these rare circumstances, the following reasoning would be in point: If petitioner first sought a confirmation order from the competent New York court, the court would, by Section 201 of the United States Arbitration Act, be referred to Article V, paragaraph (1)(d) of the New York Convention, which entitiles respondent to prove that "the arbitral procedure was not in accordance with the law of the country where the arbitration took place."[146] Thus, respondent could allege any kind of procedural irregularity as a defense against the award and thereby prevent the confirmation of the award. Furthermore, the New York court's decision would be subject to the requirements of Section 328 of the West German Code of Civil Procedure [ZPO]. Under the immediate exequatur strategy, the same standard of scrutinization (namely, Article V, paragraph (1)(d) of the New York Convention) would be applicable, but without the additional hurdle of Section 328. In the usual case where petitioner has not yet obtained a United States confirmation order, this latter option is more advisable.

Within the immediate exequatur starategy, it is worthwhile to compare the three different means available, and to guide the West

145. SANDROCK, *supra* note 25, at 35. *See also* SCHLOSSER, *supra* note 120, at 456.
146. New York Convention, *supra* note 4, Art. V., para. (1)(d), at 398.

German exequatur judge with respect to the following. Under the New York Convention, the arbitral proceedings have to be scrutinized rather thoroughly by the West German exequatur judge.[147] Any procedural irregularities may be raised as a defense.[148] Similarly, the Friendship Treaty requires the award to have been "duly rendered pursuant to any such contract(s)." On the other hand, Section 1044, paragraph (2)(1) of the West German Code of Civil Procedure [ZPO] merely requires the award to be valid under the applicable law, and therefore only grants a defense to the respondent if the disregard for procedural rules is such that it would render the award invalid under the foreign law.[149] Only one aspect of due process—the right to present one's case—is mentioned separately in Section 1044, paragraph (2)(4). Section 1044 thus may be the best option for petitioner when procedural questions are in dispute.

This does not imply, however, that petitioners will always benefit more from Section 1044, than under the New York Convention or the Friendship Treaty. Section 1044, paragraph (2)(3) may require a double-check of the representation of a party under the foreign procedural law, and under the law applicable according to the West German conflict of laws rules, if these do not match (which, however, they usually do). Neither the New York Convention nor the Friendship Treaty show a comparable requirement.[150]

If, on the other hand, petitioner has already obtained a United States cofirmation order, it mayu be advisable to select the double exequatur strategy and to have the U.S. confirmation order enforced in West Germany. Here, respondent would no longer be able to raise, before the West German exequatur judge, any objections against the arbitral proceedings just as much as respondent would be excluded with any other defense against the award.[151] Respondent would be limited to defenses relating to the court proceedings in New York.

d. *Due Process*

Where a dispute involves a question of due process, the double exequatur strategy generally does not at all reveal itself as preferable

147. *See also* SCHLOSSER, *supra* note 120, at 457.
148. *Id.*
149. SCHLOSSER, *supra* note 120, at 457.
150. Schlosser in STEIN & JONAS, *supra* note 19, at § 1044, annot. 43, 44.
151. *See supra* note 145 and accompanying text.

for petitioners. Petitioners should immediately go before the West German exequatur judge, and there file for the recognition and enforcement of the award. No matter whether the recognition and enforcement would be sought under the New York Convention, the Friendship Treaty, or Section 1044 of the West German Code of Civil Procedure [ZPO], only the basic standards of due process such as they have been established under West German law would have to be met. The West German exequatur judge would not be compelled to give any weight whatsoever to United States legal standards of due process, since no provision under any of the schemes would refer the judge to U.S. law. Instead, only the West German standards of due process would have to be taken into account by the West German exequatur judge, either under the special provision of Article V, paragraph (1)(b) of the New York Convention, or under the public policy clauses of the New York Convention, the Friendship Treaty, or German Code of Civil Procedure [ZPO] Section 1044—clauses which are always the final hurdle before recognition and enforcement of a foreign arbitral or a foreign court decision can be granted. Among the pertinent issues most relevant in the past are due process, the opportunity to present one's case, and the independence of the arbitrators.[152]

The application of West German standards of due process to the arbitral award could not be avoided by taking the path of the double exequatur strategy in first applying for a New York confirmation order. Even after the confirmation order was obtained, the West German exequatur judge, by virtue of the public policy clause contained in Section 328 (1)(4) of the West German Code of Civil Procedure [ZPO], again would have to scrutinize whether the award would meet the most basic West German standards of due process.[153] Since the West German court also would have to review the New York court's confirmation order with respect to due process, and the New York confirmation court would have been compelled to apply its own standards of due process, a cumbersome double or triple check of due process would take place which should be avoided by petitioner.

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152. *See supra* notes 44-49 and accompanying text.

153. Insofar as Schuetze in SCHUETZE, TSCHERNING & WAIS, *supra* note 106, at 350, annot. 633, states that respondent would be excluded from raising due process objections, this can be supported only as long as only minor violations are in question. Serious violations of due process rights during the arbitral proceedings will usually offer a public policy defense, even though there has been a foreign confirmation order in between. *See also* MEZGER, *supra* note 20, at 648.

e. *Public Policy*

Similar to due process concerns, questions of public policy play a substantial role in the strategy process. The analysis in subsection d, above, applies by analogy. As stated previously, arbitrability and public policy are liberally interpreted in West Germany. Issues successfully raised under the public policy notion mostly have concerned due process rights of the parties.[154] The standard is uniform for all ways by which recognition and enforcement of foreign arbitral awards may be sought, and it encompasses only the most basic values of the West German legal order.

Conclusion

A person may seek recognition and enforcement of a New York arbitral award in West Germany by way of four different means. Three of the avenues directly make use of the arbitral award (immediate exequatur strategy). The fourth option utilizes the procedure of having the award first confirmed by a judicial order in the United States and then having the order recognized and enforced in West Germany (double exequatur strategy). Generally, for petitioners, the recognition and enforcement of a foreign arbitral award itself (*i.e.*, the immediate exequatur strategy) proves preferable to the double exequatur strategy.[155] Under the immediate exequatur strategy, there is only one court proceeding (before the West German exequatur judge) instead of two (one for the confirmation in the United States and one for the exequatur in West Germany) as required under the double exequatur strategy. This saves time and money. Moreover, the issues to be examined in those proceedings are fewer where the immediate exequatur is sought from the West German exequatur judge.

Nevertheless, after having obtained a U.S. confirmation order, petitioners may find it advantageous to take the double exequatur route. Where the validity or the scope of the arbitration agreement or an issue of the arbitral procedure other than due process is in dispute, it appears advisable to submit the confirmation order for recognition and enforcement in West Germany rather than to seek the recognition and enforcement of the arbitral award itself. Under

154. *See supra* notes 59-60 and accompanying text.
155. *See* Mezger, *supra* note 20, at 648.

the double exequatur strategy the West German exequatur court would not re-scrutinize the arbitral award, but would rely on the findings of the United States court. If the petitioner, however, has not yet obtained a U.S. confirmation order, it is generally not worthwile to spend time and money on the more burdensome double exequatur strategy.

Two other aspects may favor seeking the recognition and enforcement of a United States confirmation order that is already at hand, rather than submitting the arbitral award to the West German exequatur judge. Confirmation orders by United States courts tend to be much shorter than arbitration awards. Consequently, the cost of translation will be lower. Additionally, the United States confirmation order might contain a pronouncement on the payment of interests which might be lacking in the arbitral award.[156]

There are circumstances, however, under which the immediate exequatur strategy might well commend itself even though the petitioner already is in possession of a U.S. confirmation order. For example, where the dispute between the parties concerns due process or public policy issues, the West German exequatur judge will scrutinize the arbitral award with little regard to the U.S. confirmation order. On the contrary, defects of the confirmation order which relate to due process or to public policy may present an additional hurdle in seeking recognition and enforcement in West Germany. Finally, circumstances may be present which override the inconvenience of the double exequatur strategy. The immediate exequatur strategy may be disadvantageous where the "binding" nature of the award or its "finality and enforceability" is in doubt (to the effect that petitioners eventually would be deprived of the chance to base their motion for recognition and enforcement on the New York Convention and on the Friendship Treaty). The immediate exequatur strategy may be undesirable where respondents allege not to have been duly represented during the arbitral proceedings (an objection which, if justified, would preclude the application of Section 1044 of the West German Code of Civil Procedure [ZPO]).

Only specific Convention reservations can address the pros and cons of exequatur proceedings. Much depends upon the special circumstances of any given individual case. An effective overall strategy requires a close and careful analysis of the impact any

156. *See* SCHLOSSER, *supra* note 120, at 143.

circumstance eventually could have upon the recognition and enforcement of the award in West Germany. It may well be necessary to balance competing factors. Within this analysis, the peculiarities of all four means of recognition and enforcement should be examined. In very difficult cases, (where petitioners have already obtained a U.S. confirmation order and are in doubt over whether to use the immediate or the double exequatur strategy) the petitioners also may submit an auxiliary petition, thereby taking advantage of both options.[157]

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157. *Id.* at 141.