

LECTURE TWENTY

Recognition and Enforcement of Arbitral Awards

Pursuant to

The Arbitration Act 1996

The New York Convention on the Recognition and Enforcement of International Arbitral Awards 1957

Aim:

To provide a clear outline of the principal issues relating to the legally binding resolution of conflict of laws disputes via arbitration under the Arbitration act 1996.

Objectives:

After carefully reading the following notes & other prescribed readings, you should be able to:

1. Discuss, orally and in writing, the considerations to be taken into account to determine the choice of law in the absence of an express choice having been made by the parties;
2. Explain the circumstances under which a stay of action under the **1996 Act** may be granted; and
3. Explain what reasons could be upheld for refusing to enforce a foreign arbitral award.

Introduction

It is not a necessary prerequisite for the resolution of a dispute between corporations via arbitration that an arbitration agreement is a term of a pre-existing contract between the particular parties to the dispute. Indeed, there need be no pre-existing contract at all, let alone a contract of a commercial nature. Any dispute between corporations or, indeed, disputes other than those relating to the status of a natural person, for example, may be resolved by arbitration and be legally binding on the parties who have agreed to subject themselves to, and be bound by, arbitration.

If the parties to a dispute believe that the ability to choose an arbitrator they trust and in whom they have the utmost confidence, and the conducting of arbitration in private together with the anticipated savings in costs is mutually beneficial, then the general rule is that party autonomy prevails and arbitration becomes the method to resolve any ensuing dispute between them.

Given that arbitration is a legally binding process, however, and that it *may* be scrutinised by the courts, it is essential that the arbitration is conducted in accordance with rules of law: the process is not an informal one of mediation or conciliation nor is it merely a procedural stage destined to end in court action.

In essence, it is the *Arbitration Act 1996* that is the current source of law relating to the choice of law for the arbitration process and the enforcement of foreign arbitral awards.

International Commercial Arbitrations to be Determined, or Enforced, in England.

Whether party autonomy has prevailed in selecting arbitration and whether the arbitrator has detracted from the formalities of arbitration are just two of the questions that might have to be addressed if an enforceable arbitral award is to be made. Indeed, the questions are those that have been developed and refined from the common law, via the *Arbitration Act 1950 Part II*, the *Arbitration Acts of 1975 and 1979*, through to the *Arbitration Act 1996*.

As many as five questions might have to be addressed before the arbitration process can proceed or a foreign award enforced, viz;

1. what choice of law governs the arbitration agreement;
2. what choice of law governs the arbitration process;
3. what choice of law will govern the resolution of the dispute by the arbitrator;
4. what impact does an arbitration agreement have on the jurisdiction of the English courts; and
5. what circumstances must prevail for a foreign arbitral award to be enforced in England?

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1. The Law Governing an Arbitration Agreement

Neither the Brussels Convention nor the Rome Convention provides for arbitration agreements. The exclusion of arbitration agreements from the scope of the Rome Convention means that under English law the validity and construction of any arbitration agreement would have to be determined in accordance with its *proper law* as governed by the common law; i.e., the proper law is, basically, the common law equivalent of the applicable law under the Rome Convention. In essence, if the parties to the arbitration agreement have made an express choice of law to govern their agreement then it will generally prevail. **The absence of an express choice will lead to an inference of the proper law being that of the seat of the arbitration**, i.e., the place (country / law district) where the arbitration is centred. Failing both an express choice and an agreement providing for the seat of arbitration, the appropriate choice of law is that of the law of the country with which the arbitration process is most closely connected.

That the proper law of an arbitration agreement may differ from the law governing the procedural issues is acknowledged and accepted in English law as affirmed in the House of Lords decision in: **James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd** [1970].¹

2. The Law Governing the Arbitration Process

Two elements arise for discussion under this heading, viz; internal and external procedures. The *internal* procedure provides for the procedure to be followed in the arbitration process and for the powers of the arbitral tribunal in relation to the procedure. The *external* procedure is concerned with the powers of the court to support (via, for example, the appointment of an arbitrator, if necessary, and grant, say, a *Mareva injunction*) and supervise the arbitration process by, if necessary, setting aside the arbitral award if the arbitrator has acted *ultra vires*: **s.67 Arbitration Act 1996**.

Moreover, the Arbitration Act 1996 contains provisions which, firstly, aim to address the potentially conflicting issues of: (a) the country which is the seat of the arbitration having an input into the arbitral proceedings in order to ensure that a minimum standard of fairness is evidenced; and (b) respecting the party autonomy that underpins the consensual nature of the arbitration process. To these ends, **s.2(1) of the Arbitration Act 1996** provides that the Act *prima facie* applies to an arbitration that has its seat in England: the *prima facie* applicability indicating that the powers are discretionary and their exercise is to be considered in relation to the parties' connection with England.

Secondly, **s.4 and Schedule 1** of the Act divide provisions of the Act into mandatory and non-mandatory provisions. The court's supervisory powers are within the mandatory provisions notwithstanding they are discretionary powers, whereas **s.4(2) and (3)** provide that the non-mandatory provisions apply only to the extent that the parties to the arbitration have not made their own arrangements in respect, say, of the choice of law.

Whilst procedural provisions of the Act have no effect on arbitrations whose seat is abroad, provisions relating, *inter alia*, to the **staying of actions** brought in breach of arbitration agreements and **granting interim injunctions** are of universal application: **ss.2(2) and 44**.

3. The Choice of Law Governing Resolution of the Dispute

Clarkson & Hill² note that: "It is well established that the arbitral tribunal is required to apply the choice of law rules of the seat of arbitration." The choice of law rules are now found in **s.46 Arbitration Act 1996**. **S.46** provides for rules to deal with three different types of situation, viz;

- Where the parties have expressed a choice of law – here the basic principle is one of party autonomy (**s.46(1)(a)**) and *renvoi* is excluded: **s.46(2)**;
- Where the parties have chosen 'other considerations' such as general principles common to each party's domicile or an equity clause requiring the dispute to be decided in terms of an equitable / fair resolution as opposed to using strict rules of law, for example; or

¹ **James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd** [1970] AC 583

² **Clarkson & Hill**, *Jaffey on the Conflict of Laws*, 2/e. London: Butterworths, 1997, p284

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- Where the parties have failed to express a choice of law – in which case **s.46(3)** provides that *'the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.'* The significance of this last provision is that arbitrators are not *bound* to apply the same choice of law rules that courts would have to abide by: they have freedom to do so if they so wish; the choice is theirs.

There is little doubt that an arbitrator has to take into account the mandatory rules of the seat of the arbitration and/or the country in which the award will be enforced in order to avoid the award being legally ineffective by virtue of a serious irregularity or by being contrary to public policy: **s.68 Arbitration Act 1996**.

4. The Impact of an Arbitration Agreement of the Jurisdiction of the English Courts

Here, the focus is on the attitude of the courts to a party that has commenced litigation in breach of an arbitration clause. **ss.5, 9, 20 Arbitration Act 1996** contain the essential provisions for determining whether a stay will be granted and may be dependent on the satisfaction of five conditions, viz;

- i. Under **s.5**, *the arbitration agreement must be in writing* – a provision which is given a broad interpretation and may include: an agreement being evidenced in writing; and cases where the parties agree otherwise than in writing to terms which are in writing or to an agreement being recorded by any means; and this includes the oral acceptance of the terms of a standard form contract that contained an English arbitration clause: **Zambia Steel and Building Supplies v. Clark & Eaton** (1986).³
- ii. That the legal proceedings are *'in respect of a matter which under the agreement [between the parties] is to be referred to arbitration'*: **s.9(1)**. This means that: (a) the defendant cannot secure a stay unless the matter in dispute is within the jurisdiction of the arbitrator; (b) whether it is in dispute is a matter to be decided under the common law concept of the proper law of the arbitration agreement.
- iii. **s.9(4)** requires that the arbitration agreement is not *'null and void, inoperative or incapable of being performed.'* This, also, is to be determined under its proper law.
- iv. Submission to the jurisdiction of the court via contesting a substantive claim disqualifies the defendant from a right to a stay: **s.9(3)**.
- v. **s.81(1)(a)** requires that the subject-matter of the dispute must be capable of settlement by arbitration. This is not the case where third parties may be adversely affected – such as a creditor being disadvantaged by the winding-up of a company.

Cross reference the following provisions of the Arbitration Act 1996 :-

Stay of legal proceedings.

- 9.(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
- 9.(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
- 9.(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
- 9.(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.
- 9.(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

The seat of the arbitration.

3. In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated-
 - (a) by the parties to the arbitration agreement, or
 - (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
 - (c) by the arbitral tribunal if so authorised by the parties,or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.

³ **Zambia Steel and Building Supplies v. Clark & Eaton** (1986). 2 Lloyd's LR 225

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Separability of arbitration agreement.

7. Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

Whether agreement discharged by death of a party.

- 8(1) Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party.
- 8(2) Subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death.

Competence of tribunal to rule on its own jurisdiction.

- 30(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-
- (a) whether there is a valid arbitration agreement,
 - (b) whether the tribunal is properly constituted, and
 - (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.
- 30(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

Objection to substantive jurisdiction of tribunal.

- 31(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.
A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.
- 31(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.
- 31(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.
- 31(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may-
- (a) rule on the matter in an award as to jurisdiction, or
 - (b) deal with the objection in its award on the merits.
- If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.
- 31(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).

Determination of preliminary point of jurisdiction.

- 32(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.
A party may lose the right to object (see section 73).
- 32(2) An application under this section shall not be considered unless-
- (a) it is made with the agreement in writing of all the other parties to the proceedings, or
 - (b) it is made with the permission of the tribunal and the court is satisfied-
 - (i) that the determination of the question is likely to produce substantial savings in costs,
 - (ii) that the application was made without delay, and
 - (iii) that there is good reason why the matter should be decided by the court.
- 32(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.
- 32(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.
- 32(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.
- 32(6) The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal.

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But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

Rules applicable to substance of dispute.

- 46(1) The arbitral tribunal shall decide the dispute-
- (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
 - (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.
- 46(2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.
- 46(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Challenging the award: substantive jurisdiction.

- 67(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court-
- (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
 - (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
- A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
- 67(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.
- 67(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order-
- (a) confirm the award,
 - (b) vary the award, or
 - (c) set aside the award in whole or in part.
- 67(4) The leave of the court is required for any appeal from a decision of the court under this section.

Challenging the award: serious irregularity.

- 68(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
- A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
- 68(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-
- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
 - (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
 - (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
 - (d) failure by the tribunal to deal with all the issues that were put to it;
 - (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
 - (f) uncertainty or ambiguity as to the effect of the award;
 - (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
 - (h) failure to comply with the requirements as to the form of the award; or
 - (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
- 68(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may-
- (a) remit the award to the tribunal, in whole or in part, for reconsideration,
 - (b) set the award aside in whole or in part, or
 - (c) declare the award to be of no effect, in whole or in part.
- The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

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68(4) The leave of the court is required for any appeal from a decision of the court under this section.

Appeal on point of law.

69(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

69(2) An appeal shall not be brought under this section except-

- (a) with the agreement of all the other parties to the proceedings, or
- (b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

69(3) Leave to appeal shall be given only if the court is satisfied-

- (a) that the determination of the question will substantially affect the rights of one or more of the parties,
- (b) that the question is one which the tribunal was asked to determine,
- (c) that, on the basis of the findings of fact in the award-
 - (i) the decision of the tribunal on the question is obviously wrong, or
 - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
- (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

69(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

69(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

69(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

69(7) On an appeal under this section the court may by order-

- (a) confirm the award,
- (b) vary the award,
- (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
- (d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

69(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

Challenge or appeal: supplementary provisions.

70(1) The following provisions apply to an application or appeal under section 67, 68 or 69.

70(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted-

- (a) any available arbitral process of appeal or review, and
- (b) any available recourse under section 57 (correction of award or additional award).

70(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

70(4) If on an application or appeal it appears to the court that the award-

- (a) does not contain the tribunal's reasons, or
- (b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,

the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

70(5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

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- 70(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.
The power to order security for costs shall not be exercised on the ground that the applicant or appellant is-
- (a) an individual ordinarily resident outside the United Kingdom, or
 - (b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.
- 70(7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.
- 70(8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).
This does not affect the general discretion of the court to grant leave subject to conditions.

Challenge or appeal: effect of order of court.

- 71(1) The following provisions have effect where the court makes an order under section 67, 68 or 69 with respect to an award.
- 71(2) Where the award is varied, the variation has effect as part of the tribunal's award.
- 71(3) Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct.
- 71(4) Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award.

Miscellaneous Saving for rights of person who takes no part in proceedings.

- 72(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question-
- (a) whether there is a valid arbitration agreement,
 - (b) whether the tribunal is properly constituted, or
 - (c) what matters have been submitted to arbitration in accordance with the arbitration agreement,
- by proceedings in the court for a declaration or injunction or other appropriate relief.
- 72(2) He also has the same right as a party to the arbitral proceedings to challenge an award-
- (a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or
 - (b) by an application under section 68 on the ground of serious irregularity (within the meaning of that section) affecting him;
- and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.

Loss of right to object.

- 73(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection-
- (a) that the tribunal lacks substantive jurisdiction,
 - (b) that the proceedings have been improperly conducted,
 - (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
 - (d) that there has been any other irregularity affecting the tribunal or the proceedings,
- he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.
- 73(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling-
- (a) by any available arbitral process of appeal or review, or
 - (b) by challenging the award,
- does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

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5. Enforcing a Foreign Arbitral Award and Resisting an Award

In essence, the most significant of the arbitration awards that may be enforced in England and Wales are those that may be enforced under the **Arbitration Act 1996**. Enforcement is dependent on the award being a 'New York convention award'; that it is an agreement in writing; and that the award was made at the seat of the arbitration – regardless of where it was signed: **ss.53 and 100**.

Enforcement may be **refused** for any one of **eight** grounds provided for under Act but for no other reason: i.e., the grounds are exhaustive and refusal of enforcement has no basis outside the Act. The grounds are set out in s103(2) Arbitration Act 1996, mirroring the text of the New York Convention 1957.

PART III RECOGNITION AND ENFORCEMENT OF CERTAIN FOREIGN AWARDS

Enforcement of Geneva Convention awards

Continuation of Part II of the Arbitration Act 1950.

99. Part II of the Arbitration Act 1950 (enforcement of certain foreign awards) continues to apply in relation to foreign awards within the meaning of that Part which are not also New York Convention awards.

Arbitration Act 1950

An Act to consolidate the Arbitration Acts, 1889 to 1934.

PART II : ENFORCEMENT OF CERTAIN FOREIGN AWARDS

Awards to which Part II applies.

35(1) This Part of this Act applies to any award made after the twenty-eighth day of July, nineteen hundred and twenty-four –

- (a) in pursuance of an agreement for arbitration to which the protocol set out in the First Schedule to this Act applies; and
 - (b) between persons of whom one is subject to the jurisdiction of some one of such Powers as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be parties to the convention set out in the Second Schedule to this Act, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid; and
 - (c) in one of such territories as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be territories to which the the said convention applies;
- and an award to which this Part of this Act applies is in this Part of this Act referred to as "a foreign award".

35 (2) His Majesty may by a subsequent Order in Council vary or revoke any Order previously made under this section.

35 (3) Any Order in Council under section one of the Arbitration (Foreign Awards) Act, 1930, which is in force at the commencement of this Act shall have effect as if it had been made under this section.

Effect of foreign awards.

36 (1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable in England either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 66 of the Arbitration Act 1996.

36 (2) Any foreign award which would be enforceable under this Part of this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in England, and any references in this Part of this Act to enforcing a foreign award shall be construed as including references to relying on an award.

Conditions for enforcement of foreign awards.

37 (1) In order that a foreign award may be enforceable under this Part of this Act it must have –

- (a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- (b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;
- (c) been made in conformity with the law governing the arbitration procedure;
- (d) become final in the country in which it was made;
- (e) been in respect of a matter which may lawfully be referred to arbitration under the law of England; and the enforcement thereof must not be contrary to the public policy or the law of England.

37 (2) Subject to the provisions of this subsection, a foreign award shall not be enforceable under this Part of this Act if the court dealing with the case is satisfied that –

- (a) the award has been annulled in the country in which it was made; or

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- (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented; or
- (c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:

Provided that, if the award does not deal with all the questions referred, the court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court may think fit.

- 37 (3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (a), (b) and (c) of subsection (1) of this section, or the existence of the conditions specified in paragraphs (b) and (c) of subsection (2) of this section, entitling him to contest the validity of the award, the court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Evidence.

- 38 (1) The party seeking to enforce a foreign award must produce—
- (a) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made; and
 - (b) evidence proving that the award has become final; and
 - (c) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in paragraphs (a), (b) and (c) of subsection (1) of the last foregoing section are satisfied.
- 38 (2) In any case where any document required to be produced under subsection (1) of this section is in a foreign language, it shall be the duty of the party seeking to enforce the award to produce a translation certified as correct by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law of England.
- 38 (3) Subject to the provisions of this section, rules of court may be made under section ninety-nine of the Supreme Court of Judicature (Consolidation) Act, 1925, 84 of the Supreme Court Act 1981 with respect to the evidence which must be furnished by a party seeking to enforce an award under this Part of this Act.
- 38 (3) Subject to the provisions of this section, rules of court may be made under section 55 of the Judicature (Northern Ireland) Act 1978 with respect to the evidence which must be furnished by a party seeking to enforce an award under this Part of this Act.

Meaning of final award".

39. For the purposes of this Part of this Act, an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Saving for other rights, &c.

40. Nothing in this Part of this Act shall—
- (a) prejudice any rights which any person would have had of enforcing in England any award or of availing himself in England of any award if neither this Part of this Act nor Part I of the Arbitration (Foreign Awards) Act, 1930, had been enacted; or
 - (b) apply to any award made on an arbitration agreement governed by the law of England.

Application of Part II to Scotland.

- 41 (1) The following provisions of this section shall have effect for the purpose of the application of this Part of this Act to Scotland.
- 41 (2) For the references to England there shall be substituted references to Scotland.
- 41 (3) For subsection (1) of section thirty-six there shall be substituted the following subsection:—
- "(1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable by action, or, if the agreement for arbitration contains consent to the registration of the award in the Books of Council and Session for execution and the award is so registered, it shall, subject as aforesaid, be enforceable by summary diligence".*
- 41 (4) For subsection (3) of section thirty-eight there shall be substituted the following subsection:—
- "(3) The Court of Session shall, subject to the provisions of this section, have power, . . . , to make provision by Act of Sederunt with respect to the evidence which must be furnished by a party seeking to enforce in Scotland an award under this Part of this Act,"*

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Application of Part II to Northern Ireland.

42 (1) The following provisions of this section shall have effect for the purpose of the application of this Part of this Act to Northern Ireland.

PART III : GENERAL

Short title, commencement and repeal.

44 (1) This Act may be cited as the Arbitration Act, 1950.

44 (2) This Act shall come into operation on the first day of September, nineteen hundred and fifty.

44 (3) The Arbitration Act, 1889, the Arbitration Clauses (Protocol) Act, 1924, and the Arbitration Act, 1934, are hereby repealed except in relation to arbitrations commenced (within the meaning of subsection (2) of section twenty-nine of this Act) before the commencement of this Act, and the Arbitration (Foreign Awards) Act, 1930, is hereby repealed; and any reference in any Act or other document to any enactment hereby repealed shall be construed as including a reference to the corresponding provision of this Act.

SCHEDULES

FIRST SCHEDULE

Sections 4, 35.

PROTOCOL ON ARBITRATION CLAUSES SIGNED ON BEHALF OF HIS MAJESTY AT A MEETING OF THE ASSEMBLY OF THE LEAGUE OF NATIONS HELD ON THE TWENTY-FOURTH DAY OF SEPTEMBER, NINETEEN HUNDRED AND TWENTY-THREE

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:—

1. *Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.*

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

2. *The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.*

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. *Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.*

4. *The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.*

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or become inoperative.

5. *The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the signatory States.*

6. *The present Protocol shall come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.*

7. *The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other signatory States and inform them of the date of which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.*

8. *The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the under-mentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.*

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The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory States. They will take effect one month after the notification by the Secretary-General to all signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

SECOND SCHEDULE

Section 35.

CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS SIGNED AT GENEVA ON BEHALF OF HIS MAJESTY ON THE TWENTY-SIXTH DAY OF SEPTEMBER, NINETEEN HUNDRED AND TWENTY-SEVEN

ARTICLE I

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "*a submission to arbitration*") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:—

- (a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
- (b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;
- (c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- (d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to **opposition, appel or pourvoi en cassation** (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
- (e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

ARTICLE 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:—

- (a) That the award has been annulled in the country in which it was made;
- (b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
- (c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it think fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

ARTICLE 3

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (a) and (c), and Article 2 (b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

ARTICLE 4

The party relying upon an award or claiming its enforcement must supply, in particular:—

- (1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

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- (2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made;
- (3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

ARTICLE 5

The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

ARTICLE 6

The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923.

ARTICLE 7

The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

ARTICLE 8

The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratifications on its behalf with the Secretary-General of the League of Nations.

ARTICLE 9

The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, ipso facto, the denunciation of the present Convention.

ARTICLE 10

The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

ARTICLE 11

A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

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Arbitration Act 1975

An Act to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Effect of arbitration agreement on court proceedings

Staying court proceedings where party proves arbitration agreement.

- 1 (1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.
- 1 (2) This section applies to any arbitration agreement which is not a domestic arbitration agreement; and neither section 4(1) of the ~~M~~Arbitration Act 1950 nor section 4 of the Arbitration Act (Northern Ireland) 1937 shall apply to an arbitration agreement to which this section applies.
- 1 (3) In the application of this section to Scotland, for the references to staying proceedings there shall be substituted references to sisting proceedings.
- 1 (4) In this section "*domestic arbitration agreement*" means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and to which neither—
 - (a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom; nor
 - (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom;is a party at the time the proceedings are commenced.

Enforcement of Convention awards

Replacement of former provisions.

2. Sections 3 to 6 of this Act shall have effect with respect to the enforcement of Convention awards; and where a Convention award would, but for this section, be also a foreign award within the meaning of Part II of the Arbitration Act 1950, that Part shall not apply to it.

Effect of Convention awards.

3. (1) A Convention award shall, subject to the following provisions of this Act, be enforceable—
 - (a) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950;
 - (b) in Scotland, either by action or, in a case where the arbitration agreement contains consent to the registration of the award in the Books of Council and Session for execution and the award is so registered, by summary diligence;
 - (c) in Northern Ireland, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 16 of the Arbitration Act (Northern Ireland) 1937.
3. (2) Any Convention award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in the United Kingdom; and any reference in this Act to enforcing a Convention award shall be construed as including references to relying on such an award.

Evidence.

4. The party seeking to enforce a Convention award must produce—
 - (a) the duly authenticated original award or a duly certified copy of it; and
 - (b) the original arbitration agreement or a duly certified copy of it; and
 - (c) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

Refusal of enforcement.

- 5.(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
- 5.(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves—
 - (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or
 - (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or

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- (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (d) (subject to subsection (4) of this section) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or
 - (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or
 - (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
- 5.(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.
- 5.(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.
- 5.(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f) of this section, the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.

Saving.

6. Nothing in this Act shall prejudice any right to enforce or rely on an award otherwise than under this Act or Part II of the Arbitration Act 1950.

General

Interpretation.

7. (1) In this Act—
“*arbitration agreement*” means an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration;
“*Convention award*” means an award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention; and
“*the New York Convention*” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.
- 7.(2) If Her Majesty by Order in Council declares that any State specified in the Order is a party to the New York Convention the Order shall, while in force, be conclusive evidence that that State is a party to that Convention.
- 7.(3) An Order in Council under this section may be varied or revoked by a subsequent Order in Council.

Short title, repeals, commencement and extent.

8. (1) This Act may be cited as the Arbitration Act 1975.
- 8.(2) The following provisions of the Arbitration Act 1975 are hereby repealed, that is to say—
(a) section 4(2);
(b) in section 28 the proviso;
(c) in section 30 the words “(except the provisions of subsection (2) of section 4 thereof)”;
(d) in section 31(2) the words “subsection (2) of section 4” ; and
(e) in section 34 the words from the beginning to “save as aforesaid”.
- 8.(3) This Act shall come into operation on such date as the Secretary of State may by order made by statutory instrument appoint.
- 8.(4) This Act extends to Northern Ireland.

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CHALLENGING NEW YORK CONVENTION AWARDS.

Introduction

The recognition of, enforcement of and challenge to foreign arbitration awards is dealt with by a distinct and separate part of the Arbitration Act 1996 which specifically reincorporates the Arbitration Act 1979 provisions on the incorporation of the New York Convention into English Law. The mere fact that an award is in respect of an international dispute will not be sufficient. Where the award was governed by English Law and jurisdiction s66 applies.



An arbitral award will not be enforced if the arbitration agreement was not in writing, which is more stringent than the requirement under s5 of the Act that for the Act to apply the agreement must be in writing, though that fact will not render the award unenforceable at law.

Whilst of limited importance today, it should also be noted that s99 Arbitration Act 1996 states that "*Part II of the Arbitration Act 1950 (enforcement of certain foreign awards) continues to apply in relation to foreign awards within the meaning of that Part which are not also New York Convention awards.*"

The primary remit of Part III of the Arbitration Act 1996 is the recognition of foreign arbitral awards, but for present purposes this includes provisions for the refusal of recognition and thus provides an effective mechanism for a challenge to the enforcement of a foreign award.

Recognition and enforcement of New York Convention awards

New York Convention awards.

100(1) *In this Part a "New York Convention award" means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.*

100(2) *For the purposes of subsection (1) and of the provisions of this Part relating to such awards-*

(a) *"arbitration agreement" means an arbitration agreement in writing, and*

(b) *an award shall be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties.*

In this subsection "agreement in writing" and "seat of the arbitration" have the same meaning as in Part I.

100(3) *If Her Majesty by Order in Council declares that a state specified in the Order is a party to the New York Convention, or is a party in respect of any territory so specified, the Order shall, while in force, be conclusive evidence of that fact.*

100(4) *In this section "the New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.*

Section 100(2) New York Convention Awards DAC 1997.

58. *In Paragraph 392 of Chapter 6, we recommended that this provision be amended so as to cross-refer to the definition of writing to be found in Part I of the Act, and also to incorporate our recommendation that an award be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties. This recommendation was adopted.*

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Mixing domestic arbitration and international arbitration law : the old & new regimes.

The CA held that an award was 'made' for the purposes of s 7(1) Arbitration Act 1975 when and where it was perfected, which was where it was signed, in the absence of anything in the arbitration agreement or the rules under which the arbitration was conducted, requiring some further formality in *Hiscox v Outhwaite* [1991].⁴ The award was signed and dated in Paris. It was made in Paris and was accordingly a Convention award. Where an English court was both the curial court and the enforcing court the High Court remained capable of exercising its curial jurisdiction over the arbitration and of adjourning, if it thought fit, any decision on the enforceability of the award until the pending proceedings for review had been determined. On appeal the House of Lords in *Hiscox v Outhwaite (No 1)* [1991].⁵ noted that whilst the hearing had been held in London where the award was also drafted it was in fact signed in Paris. Where then is an arbitration award 'made' for the purposes of s7(1) Arbitration Act 1975? The House confirmed that this was Paris and the award was accordingly a Convention Award. This however led to the further question as to what extent, if at all, do the Arbitration Acts 1950 and 1979 apply to a Convention Award where the procedural law of the arbitration is that of England & Wales and thus whether or not the appellant was estopped by his conduct from raising either point? The court concluded that the High Court had jurisdiction to exercise supervisory powers over conduct of the arbitral proceedings. Compare now s100(2)(b) which avoids this conundrum since the seat is the governing factor.

Under the Arbitration Act 1996, the crucial factor, where English procedural law applies, is the seat of the arbitration. Thus under the 1996 Act if the seat of a tribunal is England it would result in a domestic award, and the English Court would not apply the New York Convention, though a foreign court might if the parties were from differing states. Conversely, if France was the seat it would be a foreign award subject to New York Convention enforcement proceedings before the English court.

Recognition and enforcement of awards.

101(1) *A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.*

101(2) *A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.*

As to the meaning of "the court" see section 105.

101(3) *Where leave is so given, judgment may be entered in terms of the award.*

Section 101(2) New York Convention Awards DAC 1997.

59. *A minor textual amendment was made to Section 101(2), in order to refer to the new Section 105, that was added.*

Evidence to be produced by party seeking recognition or enforcement.

102(1) *A party seeking the recognition or enforcement of a New York Convention award must produce-*

- (a) *the duly authenticated original award or a duly certified copy of it, and*
- (b) *the original arbitration agreement or a duly certified copy of it.*

102(2) *If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.*

⁴ *Hiscox v Outhwaite (No 1)* [1991] 3 All ER 124. before Donaldson MR; McCowan LJ; Leggatt LJ. 11th March 1991

⁵ *Hiscox v Outhwaite (No 1)* [1991] 3 All ER 641. before Lords Mackay; Keith; Brandon; Ackner; Oliver. 24th July 1991

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Refusal of recognition or enforcement.

Challenging the Award.

The challenge under s103 takes a negative form in that as opposed to setting aside an award or declaring that it is invalid the court simply refuses to recognise or enforce it. The consequence is broadly the same but achieved by other means. However, whilst a decision to set aside an award by a competent authority of the country in which of under the law of which it was made would render the award completely unenforceable, a refusal to recognise an award by the court of one state would not prevent a party seeking to enforce the award in another jurisdiction (s103(2)(f)). Thus where the losing party has funds in more than one country an applicant could seek enforcement sequentially in more than one jurisdiction until the award had been satisfied.

Refusal of recognition or enforcement.

- 103(1) *Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.*
- 103(2) *Recognition or enforcement of the award may be refused if the person against whom it is invoked proves-*
- (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;*
 - (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;*
 - (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;*
 - (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));*
 - (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;*
 - (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.*
- 103(3) *Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.*
- 103(4) *An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.*
- 103(5) *Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award. It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.*

Clause 103 New York Convention Awards DAC 1996

392. *For the reasons set out in our discussion in Chapter 3, this Clause should be amended so as to cross-refer to the definition of writing to be found in Part I of the Bill, and should also incorporate the recommendation that an award should be treated as made at the seat of the arbitration, regardless of where it was signed, dispatched or delivered to any of the parties.*

This is not an appeal mechanism. A party wishing to appeal the award must do so before the courts of the state where the seat of the arbitration is located. Thus an error of law is not included as a s103 ground to resist enforcement, but if the court of the arbitral seat sets aside an award a foreign court governed by the

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Convention no longer has jurisdiction to enforce the award. However, as noted above, since another foreign court (i.e. not the court of the seat of the tribunal) rules against enforcement (as opposed to setting aside the award which it would not have the power to do) for whatever reason, that would not preclude an action for enforcement before a court of another Convention state. In *Yukos Oil v Dardana* [2001]⁶ Tuckey LJ confirmed that the reasons for resisting a New York Award are contained exclusively in s103. There is no room for introducing additional grounds.

The New York Convention provisions are permissive not mandatory in the UK.

Subsections 103(2) and (3) both state that “Recognition or enforcement of the award *may* be refused...” it does not require refusal. Thus the discretion of the court is established, which can lead to differing outcomes before different courts.

Natural justices challenges.

Audi alterem partem : the right to take an active part in a trial applies equally to New York Convention awards. Accordingly in *Kanoria v Guinness* [2006]⁷ the court declined to enforce an award in circumstances where a party had not been notified of the arbitration, depriving him of the opportunity to defend himself. By contrast in *Minmetals v Ferco* [1999]⁸ there was an unsuccessful attempt to set aside order to enforce two Chinese Arbitral Awards. The applicant’s assertions that they had had no opportunity to put their case on a particular issue not accepted by the court, which held that they had simply failed to take up the opportunity to pursue the matter. They were not prevented from doing so.

Nemo Iudex in Causa Sua : Bias : the basic rule that an adjudicator should have no interest in the dispute and should act in an unbiased manner, whilst of universal recognition and can taint a New York or any other award, nonetheless whether the parties have appointed a tribunal knowing of its connections it is more problematical to establish bias. Thus in *Irvani v Irvani* [2000]⁹ an application to set aside award was only partially successful in an appeal against a 1st Instance judgement that had upheld the award. Two brothers had appointed their sister as arbitrator. The court found against certain aspects of the award on the grounds of breach of the rules of natural justice, but nonetheless remitted the award back to the arbitrator for further deliberations.

Breaches of the rules of due process : Whilst challenges for breaches of rules of engagement are not uncommon, the English courts have been slow to refuse enforcement on such grounds, as demonstrated by the following cases : -

China Agribusiness v Balli Trading (1997).¹⁰ This enforcement action was resisted on the grounds that the arbitration rules had been changed. Whilst this was true, as is common in many arbitral clauses, there was an agreement to use the rules or successor rules, and accordingly there was no reason to refuse enforcement of this CIETAC award.

General Construction v Aegon Insurance [1997].¹¹ The question here concerned whether or not a paper only arbitration procedure was satisfactory under the Law of Mauritius and resulted in a enforceable award. The court upheld the award.

Tongyuan v Uni-Clan (2001).¹² Here a New York Convention award enforcement application was resisted on the grounds that there had been a change of venue for the arbitration. The court found that no prejudice had been caused by this change and further found that despite the fact that the award took an unusual format this did not afford grounds to refuse enforcement.

⁶ *Yukos Oil Company v Dardana Ltd* [2001] EWCA Civ 1077. Tuckey LJ. However, see later regarding State Immunity

⁷ *Kanoria v Guinness* [2006] EWCA Civ 222. before Lord Phillips. Sir Anthony Clarke. May LJ 21st February 2006.

⁸ *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] C.L.C. 647. Colman J.

⁹ *Irvani v Irvani* [2000] 1 Lloyd’s Rep 412 : CA. before Nourse J, Buxton LJJ, Ferris J. 9th December 1999.

¹⁰ *China Agribusiness development Corp v Balli Trading* (1997) Lawtel AC7100112. Before Longmore J. Commercial Court. 20th January 1997

¹¹ *General Construction Ltd v Aegon Insurance Co (UK) Ltd* [1997] EWHC TCC 368. HHJ. Bowsher. 21st May 1997.

¹² *Tongyuan (USA) International trading Group v Uni-Clan Ltd* (2001) Lawtel AC0100770 : Before Moore-Bick J Commercial Court. 19th January 2001

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Personality challenge

Svenska v Lithuania [2005].¹³ Lithuania took part in an arbitration in Denmark. They objected to jurisdiction. The tribunal made a preliminary ruling in favour of jurisdiction which Lithuania did not object to. The successful claimants secured an enforcement judgement in England. Lithuania sought here to set aside enforcement on the grounds of State Immunity. The court held that whilst in usual circumstances this would amount to an issue estoppel, evidence that the tribunal's determination was not final and binding under Danish Law meant Lithuania could still rely on state immunity.

Norsk Hydro v Ukraine [2002].¹⁴ **S100 AA 1996 : Set aside orders.** Application to set aside two court orders. Swedish Arbitral award. Order for enforcement of foreign award. Interim third party debt order. Order set aside – made against the wrong legal personality.

Public policy challenges.

Illegality under domestic and or foreign law. It is a longstanding rule of public policy that the courts will not, under the guise of contract, sanction what would amount to illegality, fraud or other wrongdoing such as blackmail, coercion or duress in the UK or the EC,¹⁵ whether the conduct took place in the UK or elsewhere, conduct of a kind essentially lawful in the UK but illegal abroad (e.g. usury in Islamic States) excepted.¹⁶ *Omnium v Hilmarton [1999]*.¹⁷ is a case in point. Hilmarton had acted as a lobbyist in Algeria. Algerian statute prohibits the intervention of a middleman in connection with any Public Contract or agreement within the ambit of foreign trade. However, such activity would be lawful in Switzerland which was the seat of the tribunal and the tribunal, having determined that no bribery had been established, determined that the lobbying contract was enforceable under Swiss Law. Omnium had paid the first installment of commission but had then sought to evade liability for the second installment. The tribunal awarded damages for breach. The English Court enforced the award.

By contrast foreign tax evasion, whilst the subject of foreign law, would be an offence in the UK if UK tax law was evaded. Thus in *Soleimany v Soleimany [1998]*¹⁸ it was held that an English Court will not enforce an award that involves enforcing an illegal contract, whether that illegality arise out of English Law or the law of a friendly foreign country. A father and son had been engaged in the illegal export of carpets from Iran, with the objective of evading tax laws. Whilst a Beth Din arbitral court in London ignored the illegality during the course of the resultant award, the English Court declined enforcement.

On the other hand, the court will be quick to identify late allegations of fraud or illegality, where the issue was not raised during the arbitral proceedings and the other party had had no opportunity to address the matter. Thus in *Daad Sharab v Usama Salfiti [1996]*.¹⁹ A late attempt to resist enforcement of an award in relation to agency commissions by introducing new evidence that the commercial activities of an agent were allegedly considered to be conduct categorised as illegal "mediation" in Libya were resisted by the court.

A mere allegation of fraud is insufficient, even to establish a stay of an enforcement action as demonstrated by *Billadean v Snamprogetti [1997]*.²⁰ which concerned an appeal under s3 Arbitration Act 1950 against a refusal to stay enforcement of two New York Awards on policy grounds, namely fraud and no actionable case to enforce by arbitration. The CA held that both issues had already addressed adequately at first

¹³ *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania [2005] EWHC 9 (Comm)*. Nigel Teare QC 11th January 2005.

¹⁴ *Norsk Hydro ASA v State Property Fund of Ukraine [2002] EWHC 2120 (Comm)* : Gross Mr Justice. Commercial Court. 18th October 2002

¹⁵ *Eco Swiss China Time (Competition) [1999] EUECJ C-126/97* : Before Iglesias, President. Where a domestic court would set aside an award for policy reasons – it should likewise for policy reasons regarding breach of EU law.

¹⁶ *Soinco SACI v Novokuznetsk Aluminium Plant [1997] EWCA Civ 3014* : Whilst unenforceable in Russia – there was nothing against English Policy to convince the court that a New York award should not be enforced. CA on appeal from Mr Justice Butterfield before Phillips LJ; Waller LJ; Chadwick LJ. 16th December 1997

¹⁷ *Omnium de Traitement et de valorisation. v. Hilmarton Ltd [1999] 2 Lloyd's Rep 222*: Before Walker J. Commercial Court 24th May 1999

¹⁸ *Soleimany v Soleimany [1998] EWCA Civ 285* CA before Morritt LJ; Waller LJ; Sir Christopher Staughton. 19th February 1998.

¹⁹ *Daad Sharab v Usama Salfiti [1996] EWCA Civ 1189*. CA before Nourse LJ; Judge LJ; Waller LJ. 12th December 1996.

²⁰ *Billadean International SA v Snamprogetti Ltd [1997] EWCA Civ 1036* . CA before Saville LJ; Brooke LJ.

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instance and again rejected the application for a stay pending application to appeal. Similarly in *Westacre v Jugoinport [1999]*.²¹ an order for enforcement of New York award was appealed on the grounds that the underlying contract induced by bribery. The Swiss Arbitration had already considered and rejected the allegation. The Court of Appeal refused to take the bribery point and rejected the appeal.

In *Minmetals v Ferco [1999]*²² a further ground for challenge to the enforceability of this CIETAC award was unsuccessfully made on the basis that it was contrary to public policy.

Reprehensible conduct during the course of the arbitration. *Gater Assets v Nak Naftogaz Ukrainiy [2008]*.²³ involved an appeal against an enforcement order on the grounds of public policy – namely an absence of full and frank disclosure. The court concluded that if material now available had been put to the tribunal it would not have altered the outcome and hence the award stood.

Temporary stay of enforcement.

It is not uncommon for a party to resist enforcement on the grounds that the award is subject to a pending challenge in the court of another state. Similarly a stay of English proceedings can be granted in favour of foreign arbitration. Thus *Ssanyong v Daewoo Cars (1999)*.²⁴ involved an application for a temporary stay of action pending the issue of Korean award. The court considered that there was no reason to impugn the tribunal which was provided for by choice of law & arbitration clause and accordingly a stay was ordered.

Apis v Fantazia (2000).²⁵ involved an application for stay of enforcement of an award pending hearing of application to set aside award. The award a New York Convention award from Slovia's perspective, where an enforcement action was pending.

Similarly *IPCO v Nigerian National Petroleum [2005]*.²⁶ concerned an application to set aside enforcement order or to stay enforcement pending challenge and cross application for security of costs. The court held that there was an arguable defence in respect of duplication in award. 13M was un-disputably due – and immediate payment ordered plus 50M security to be paid into court pending outcome of challenge before Nigerian court. In due course the matter came back before the court in *IPCO v Nigerian National Petroleum [2008]*.²⁷ with an application for partial enforcement of the award which was subject to a previous adjournment of enforcement action pending the outcome of a challenge before a Nigerian Court, in circumstances where 3 years had passed and that challenge still ongoing. The court held that it could award partial enforcement of elements of award not seriously subject to challenge and duly did so.

Yukos Oil v Dardana Ltd [2002].²⁸ concerned a challenge to an enforcement ruling. At first instance the court stayed enforcement pending trial but subject to security by the applicants. The CA rejected an appeal against those conditions, The court at first instance and the CA both considered that the challenge was very tentative at best. A Swedish award was currently being challenged in Sweden. The CA stayed enforcement pending the outcome of Swedish proceedings and a prior security or costs order was discharged.

State / Sovereign Immunity²⁹

Contrary to the earlier statement that the grounds for resisting an award set out in s103 are mutually exclusive, this has not prevented challenges to enforcement on the grounds of State Immunity, both in terms of jurisdiction of the tribunal and secondly regarding jurisdiction in enforcement proceedings and execution proceedings.³⁰ The English Courts are governed by the State Immunities Act 1978, which by virtue of s9 will

²¹ *Westacre Investments Inc v Jugoinport-SDRP Holding Co Ltd [1999] EWCA Civ 1401*. Before Waller LJ; Mantell LJ; Sir David Hirst.

²² *Minmetals Germany GmbH v. Ferco Steel Ltd [1999] C.L.C. 647*. Colman J.

²³ *Gater Assets Ltd v Nak Naftogaz Ukrainiy [2008] EWHC 237 (Comm)* : Before Tomlinson Mr Justice 15th February 2008.

²⁴ *Ssanyong Motor Distributors Ltd v Daewoo Cars Ltd & Daewoo Corp (1999) Lawtel* : Before Wright J, Commercial Court . 23rd April 1999.

²⁵ *Apis AS v Fantazia Kereskedelmi KFT (2000) Lawtel AC0300496*. Before Raymond Jack J. Commercial Court 21st September 2000.

²⁶ *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation [2005] EWHC 726 (Comm)*. Gross, Mr Justice 2005.04.27

²⁷ *IPCO (Nigeria) Ltd. v Nigerian National Petroleum Corporation [2008] EWHC 797 (Comm)*. Before Mr Justice Tomlinson. 17th April 2008.

²⁸ *Yukos Oil Company v Dardana Ltd [2002] EWCA Civ 543*. Before Thorpe LJ; Mance LJ; Mr Justice Neuberger

²⁹ See for instance *Ecuador v Occidental Exploration and Production Company [2005] EWHC 774 (Comm)*. [2005] EWCA Civ 1116)

³⁰ For a successful challenge see *Tsavliris Salvage (International) Ltd v The Grain Board of Iraq [2008] EWHC 612 (Comm)* : Mr Justice Gross. 10th April 2008

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enforce an arbitral agreement where the resisting state had agreed in writing to submit a present or future dispute to arbitration. Thus the following are instances where the plea of state immunity against enforcement of an award was rejected by the English Court :-

Sabah Shipyard v Pakistan [2002],³¹ Sabah sought to enforce an award against the Government of Pakistan. The Government and its trading party sought to appeal the award and procured an indefinite injunction in Pakistan. The English Court issued an injunction against those proceedings. The Government of Pakistan had waived state immunity before the English Court. The decision was upheld on appeal.

Svenska v Lithuania [2005],³² Lithuania took part in an arbitration in respect of an exploration venture defending a claim for damages in relation to the issuing of licences. The arbitral tribunal held that the State was a party to the arbitration agreement. Enforcement action in England unsuccessfully resisted on grounds of state immunity.

Svenska v Lithuania [2006],³³ The question here was whether or not the State of Lithuania was a party to a commercial contract and an arbitration agreement, in an appeal against an enforcement of award action. In the circumstances the State was a party. The award was enforceable.

Ecuador v Occidental [2005] :³⁴ The court here was concerned with whether or not questions as to tax involving a state party are justiciable either by arbitration or the court. A challenge to an award was met by a sovereign state immunity plea by the defendant asserting that the award was a treaty. The court held it had jurisdiction since the sovereign had submitted to the jurisdiction of the arbitrator.

Occidental v Ecuador [2005] EWCA Civ 1116:³⁵ The appeal from the above case was met by a challenge to the jurisdiction of English court to hear a challenge to an award, whose seat was stated to be London England. The court held that it had jurisdiction, and the plea of state immunity and non-justiciability was rejected.

Selina Mohsin v Commonwealth Secretariat [2002].³⁶ In this case the court affirmed that the Commonwealth Secretariat does not enjoy State Immunity from arbitral proceedings.

Related matters impacting upon New York Arbitrations and Awards.

Saving for other bases of recognition or enforcement.

104. *Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66.*

Section 104 New York Convention Awards DAC 1997.

Section 104 Saving for Other Bases of Recognition or Enforcement

61. *The concern recorded at Paragraph 393 of Chapter 6 did not lead to any amendment.*

First it should be noted that many English Arbitral awards are potentially New York awards outside the UK. For this reason the significance of the New York Convention is canvassed in many judgements regarding s66 jurisdiction applications and s67-69 challenges.

In addition, a wide range of cases deal with applications in support of or challenging aspects of New York convention arbitrations, where s100-104 are not specifically raised. Some of these are noted below.

³¹ *Sabah Shipyard (Pakistan) Ltd. v Pakistan [2002] EWCA Civ 1643* : CA before Pill LJ; Waller LJ; Sir Martin Nourse. 14th November 2002.

³² *Svenska Petroleum Exploration AB v Lithuania [2005] EWHC 2437 (Comm)*. Before Mrs Justice Gloster. 4th November 2005

³³ *Svenska Petroleum Exploration AB v Lithuania [2006] EWCA Civ 1529*: CA before Sir Anthony Clarke, MR; Scott Baker LJ; Moore-Bick LJ. 13th November 2006.

³⁴ *Ecuador v Occidental Exploration and Production Company [2005] EWHC 774 (Comm)* : Mr Justice Aikens. 29th April 2005

³⁵ *Occidental Exploration & Production Company v Republic of Ecuador [2005] EWCA Civ 1116*: CA before Lord Phillips MR, Clarke LJ; Mance LJ. 9th September 2005

³⁶ *Selina Mohsin v. The Commonwealth Secretariat [2002] EWHC 377 (Comm)* : Mr Justice David Steel. 1st March 2002.

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Security of costs. *Gater Assets v Nak Naftogaz Ukrainiy [2007]*.³⁷ concerned a successful application for security of costs against a defendant's application to set aside a New York Convention enforcement award where the defence had little likelihood of success, as confirmed on appeal in *Gater Assets v Nak Naftogaz Ukrainiy [2007]*. CA.³⁸

Garnishee Order : New York Award. *Soinco v Novokuznetsk Aluminium [1996]*.³⁹ Attempt to overturn a garnishee order in support of a Swiss Award on the grounds that there was a risk that the guarantor might have to pay out twice on the guarantee. Held : No real danger established. Garnishee order sustained.

Stay & denial of justice under Scottish Law. The issue in *Crouch Mining Ltd v British Coal [1996]*.⁴⁰ pursuant to s4 Arbitration Act 1950, was whether a stay to arbitration, due at end of project, likely to be in 2004 deprived a party of opportunity of justice? The court held that it did not. This is what the parties contracted for and must therefore live with.

Stay to arbitration – anti-suit : *Bankers Trust v Jakarta Hotels [1999]*.⁴¹ involved a successful anti-suit injunction against Indonesian litigation in support of an LCIA arbitration agreement.

Notice of discontinuance. In *Sheltam v Mirambo Holdings [2008]*.⁴² a party gave a notice of discontinuance of a challenge to a New York Convention arbitration. The discontinuance notice was challenged to prevent outstanding issues before the English Court being used as a ground for resisting enforcement abroad. The court held that the discontinuance would be permitted subject to assurance that the ground would not be relied upon to prevent a foreign enforcing court obtaining jurisdiction.

Joinder : *ABCI v Banque Franco-Tunisienne [2002]*.⁴³ involved an application for joinder regarding an action for enforcement of a New York Award. The court held that the purpose of joinder was for matters not relevant to enforcement / resistance under the New York Convention and accordingly the application was refused.

Anti-suit injunction : *American Insurance v Abbott Laboratories [2003]*.⁴⁴ concerned an application pursuant to CPR r. 6.20(5)(c). challenging the validity of arbitration agreement.

NEW YORK AWARDS AND THE MODEL LAW

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

•Article 35. Recognition and enforcement

35(1) *An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.*

35(2) *The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. if the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.****

****The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.*

³⁷ *Gater Assets Ltd v Nak Naftogaz Ukrainiy [2007] EWHC 697 (Comm)*. before Mr Justice Field.

³⁸ *Gater Assets Ltd v Nak Naftogaz Ukrainiy [2007] EWCA Civ 988*: Before Buxton LJ; Rix LJ; Moses LJ. 17th October 2007.

³⁹ *Soinco SACI v Novokuznetsk Aluminium Plant [1996] EWCA Civ 620* before Phillips LJ; Waller LJ; Chadwick LJ

⁴⁰ *Crouch Mining Ltd v British Coal Corporation (t/a British Coal) [1996] EWCA Civ 981* : before Saville LJ; Brooke LJ.

⁴¹ *Bankers Trust Co v P.T. Jakarta International Hotels & Developments [1999] 1 Lloyd's Rep 910*: Before Cresswell J. Commercial Court 12th March 1999

⁴² *Sheltam Rail Company (Proprietary) Ltd v Mirambo Holdings Ltd [2008] EWHC 829 (Comm)* : Before Mr Justice. Aikens. Commercial Court. 21st April 2008

⁴³ *ABCI v Banque Franco-Tunisienne [2002] EWHC 2024 (Comm)*. Before HHJ Chambers QC

⁴⁴ *American International Speciality Lines Insurance Co. v Abbott Laboratories [2003] 1 Lloyd's Rep 267* : Before Cresswell J Commercial Court. 28th November 2002

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Model Law Commentary : 8. Recognition and enforcement of award;

45. *The eighth and last chapter of the Model Law deals with recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the 1958 New York Convention.*
- (a) *Towards uniform treatment of all awards irrespective of country of origin***
46. *By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law draws a new demarcation line between "international" and "non-international" awards instead of the traditional line between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration takes place. Consequently, the recognition and enforcement of "inter-national" awards, whether "foreign" or "domestic", should be governed by the same provisions.*
47. *By modelling the recognition and enforcement rules on the relevant provisions of the 1958 New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.*
- (b) *Procedural conditions of recognition and enforcement***
48. *Under article 35(1) any arbitral award, irrespective of the country in which it was made, shall be recognised as binding and enforceable, subject to the provisions of article 35(2) and of article 36 (which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of over-coming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.*
49. *The Model Law does not lay down procedural details of recognition and enforcement since there is no practical need for unifying them, and since they form an intrinsic part of the national procedural law and practice. The Model Law merely sets certain conditions for obtaining enforcement: application in writin8, accompanied by the award and the arbitration agreement (article 35(2)).*
- (c) *Grounds for refusing recognition or enforcement***
50. *As noted earlier, the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention. Only, under the Model Law, they are relevant not merely to foreign awards but to all awards rendered in international commercial arbitration. While some provisions of that Convention, in particular as regards their drafting, may have called for improvement, only the first ground on the list (i.e. 'The parties to the arbitration agreement were, under the law applicable to them, under some incapacity') was modified since it was viewed as containing an incomplete and potentially misleading conflicts rule. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention.*

The manner in which the Model Law is incorporated into different states may vary, in that it may apply to both domestic disputes between nationals or may be restricted to disputes between nationals and foreigners or potentially only in respect of foreign awards. Thus, the Model Law may not impact upon the enforcement and recognition of domestic awards, as in Greece where two separate codes apply, viz the pre-existing arbitration law continues to apply to domestic arbitration, the code incorporating the model law being restricted to arbitrations with a foreign element, irrespective of whether the seat of the arbitration is Greece or elsewhere.

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Article 36. Grounds for refusing recognition or enforcement

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
 - (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
 - (b) if the court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.
- (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Model Law Commentary : 7. Recourse against award

40. National laws on arbitration, often equating awards with court decisions, provide a variety of means of recourse against arbitral awards, with varying and often long time-periods and with extensive lists of grounds that differ widely in the various legal systems. The Model Law attempts to ameliorate this situation, which is of considerable concern to those involved in international commercial arbitration.
- (a) **Application for setting aside as exclusive recourse**
41. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other means of recourse regulated in another procedural law of the State in question. An application for setting aside under article 34 must be made within three months of receipt of the award. It should be noted that "recourse" means actively "attacking" the award; a party is, of course, not precluded from seeking court control by way of defence in enforcement proceedings (article 36). Further-more, "recourse" means resort to a court, i.e. an organ of the judicial system of a State; a party is not precluded from resorting to an arbitral tribunal of second instance if such a possibility has been agreed upon by the parties (as is common in certain commodity trades).

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(b) *Grounds for setting aside*

42. *As a further measure of improvement, the Model Law contains an exclusive list of limited grounds on which an award may be set aside. This list is essentially the same as the one in article 36(1), taken from article V of the 1958 New York Convention: lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; award deals with matters not covered by submission to arbitration; composition of arbitral tribunal or conduct of arbitral proceedings contrary to effective agreement of parties or, failing agreement, to the Model Law; non-arbitrability of subject-matter of dispute and violation of public policy, which would include serious departures from fundamental notions of procedural justice.*
43. *Such a parallelism of the grounds for setting aside with those provided in article V of the 1958 New York Convention for refusal of recognition and enforcement was already adopted in the European Convention on International Commercial Arbitration (Geneva, 1961). Under its article IX, the decision of a foreign court setting aside an award for a reason other than the ones listed in article V of the 1958 New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.*
44. *Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences should be noted. Firstly, the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State h' question (i.e. State of setting aside or State of enforcement). Secondly, and more importantly, the grounds for refusal of recognition or enforcement are valid and effective only in the State (or States) where the winning party seeks recognition and enforcement, While the grounds for setting aside have a different impact. The setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of article V(1)(e) of the 1958 New York Convention and article 36(1)(a)(v) of the Model Law.*

New York Award and The Republic of Eire

Brostrom Tankers AB v. Factorias Vulcano SA [2004].⁴⁵ It was asserted that since the award purportedly may have infringed Spanish Law it would be against Irish Public Policy to enforce the award resulting in a 90% greater recovery than would be available under Spanish Law. Opposing council asserted that the dispute was governed by Norwegian Law and further disputed whether under the facts the claim was caught by Spanish Insolvency Legislation. In the circumstances Mr Justice Kelly concluded that enforcement did not offend Irish Public Policy and upheld the award.

Status 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴⁶

State	Signature	Ratification, Accession or Succession	Entry into force
Afghanistan (a), (b)		30 November 2004 (c)	28 February 2005
Albania		27 June 2001 (c)	25 September 2001
Algeria (a), (b)		7 February 1989 (c)	8 May 1989
Antigua and Barbuda (a), (b)		2 February 1989 (c)	3 May 1989
Argentina (a), (b), (d)	26 August 1958	14 March 1989	12 June 1989
Armenia (a), (b)		29 December 1997 (c)	29 March 1998
Australia		26 March 1975 (c)	24 June 1975
Austria		2 May 1961 (c)	31 July 1961
Azerbaijan		29 February 2000 (c)	29 May 2000
Bahamas		20 December 2006 (c)	20 March 2007
Bahrain (a), (b)		6 April 1988 (c)	5 July 1988
Bangladesh		6 May 1992 (c)	4 August 1992

⁴⁵ *Brostrom Tankers AB v. Factorias Vulcano SA* [2004] IEHC 198 (19 May 2004).

⁴⁶ This list is updated whenever the UNCITRAL Secretariat is informed of changes in status of the Convention. List as of 12th January 2007. ©2006 UNCITRAL

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Barbados (a), (b)		16 March 1993 (c)	14 June 1993
Belarus (e)	29 December 1958	15 November 1960	13 February 1961
Belgium (a)	10 June 1958	18 August 1975	16 November 1975
Benin		16 May 1974 (c)	14 August 1974
Bolivia		28 April 1995 (c)	27 July 1995
Bosnia and Herzegovina (a), (b), (f), (g)		1 September 1993 (h)	6 March 1992
Botswana (a), (b)		20 December 1971 (c)	19 March 1972
Brazil		7 June 2002 (c)	5 September 2002
Brunei Darussalam (a)		25 July 1996 (c)	23 October 1996
Bulgaria (a), (e)	17 December 1958	10 October 1961	8 January 1962
Burkina Faso		23 March 1987 (c)	21 June 1987
Cambodia		5 January 1960 (c)	4 April 1960
Cameroon		19 February 1988 (c)	19 May 1988
Canada (i)		12 May 1986 (c)	10 August 1986
Central African Republic (a), (b)		15 October 1962 (c)	13 January 1963
Chile		4 September 1975 (c)	3 December 1975
China (a), (b), (o)		22 January 1987 (c)	22 April 1987
Colombia		25 September 1979 (c)	24 December 1979
Costa Rica	10 June 1958	26 October 1987	24 January 1988
Côte d' Ivoire		1 February 1991 (c)	2 May 1991
Croatia (a), (b), (f), (g)		26 July 1993 (h)	8 October 1991
Cuba (a), (b), (e)		30 December 1974 (c)	30 March 1975
Cyprus (a), (b)		29 December 1980 (c)	29 March 1981
Czech Republic (f), (j)		30 September 1993 (h)	1 January 1993
Denmark (a), (b)		22 December 1972 (c)	22 March 1973
Djibouti (f)		14 June 1983 (h)	27 June 1977
Dominica		28 October 1988 (c)	26 January 1989
Dominican Republic		11 April 2002 (c)	10 July 2002
Ecuador (a), (b)	17 December 1958	3 January 1962	3 April 1962
Egypt		9 March 1959 (c)	7 June 1959
El Salvador	10 June 1958	26 February 1998	27 May 1998
Estonia		30 August 1993 (c)	28 November 1993
Finland	29 December 1958	19 January 1962	19 April 1962
France (a)	25 November 1958	26 June 1959	24 September 1959
Gabon		15 December 2006 (c)	15 March 2007
Georgia		2 June 1994 (c)	31 August 1994
Germany (a), (k), (l)	10 June 1958	30 June 1961	28 September 1961
Ghana		9 April 1968 (c)	8 July 1968
Greece (a), (b)		16 July 1962 (c)	14 October 1962
Guatemala (a), (b)		21 March 1984 (c)	19 June 1984
Guinea		23 January 1991 (c)	23 April 1991
Haiti		5 December 1983 (c)	4 March 1984
Holy See (a), (b)		14 May 1975 (c)	12 August 1975
Honduras		3 October 2000 (c)	1 January 2001
Hungary (a), (b)		5 March 1962 (c)	3 June 1962
Iceland		24 January 2002 (c)	24 April 2002
India (a), (b)	10 June 1958	13 July 1960	11 October 1960
Indonesia (a), (b)		7 October 1981 (c)	5 January 1982
Iran (Islamic Rep. of) (a), (b)		15 October 2001 (c)	13 January 2002
Ireland (a)		12 May 1981 (c)	10 August 1981
Israel	10 June 1958	5 January 1959	7 June 1959

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Italy		31 January 1969 (c)	1 May 1969
Jamaica (a), (b)		10 July 2002 (c)	8 October 2002
Japan (a)		20 June 1961 (c)	18 September 1961
Jordan	10 June 1958	15 November 1979	13 February 1980
Kazakhstan		20 November 1995 (c)	18 February 1996
Kenya (a)		10 February 1989 (c)	11 May 1989
Kuwait (a)		28 April 1978 (c)	27 July 1978
Kyrgyzstan		18 December 1996 (c)	18 March 1997
Lao People's Democratic Republic		17 June 1998 (c)	15 September 1998
Latvia		14 April 1992 (c)	13 July 1992
Lebanon (a)		11 August 1998 (c)	9 November 1998
Lesotho		13 June 1989 (c)	11 September 1989
Liberia		16 September 2005 (c)	15 December 2005
Lithuania (e)		14 March 1995 (c)	12 June 1995
Luxembourg (a)	11 November 1958	9 September 1983	8 December 1983
Madagascar (a), (b)		16 July 1962 (c)	14 October 1962
Malaysia (a), (b)		5 November 1985 (c)	3 February 1986
Mali		8 September 1994 (c)	7 December 1994
Malta (a), (m)		22 June 2000 (c)	20 September 2000
Marshall Islands		21 December 2006 (c)	21 March 2007
Mauritania		30 January 1997 (c)	30 April 1997
Mauritius (a)		19 June 1996 (c)	17 September 1996
Mexico		14 April 1971 (c)	13 July 1971
Moldova (a), (g)		18 September 1998 (c)	17 December 1998
Monaco (a), (b)	31 December 1958	2 June 1982	31 August 1982
Mongolia (a), (b)		24 October 1994 (c)	22 January 1995
Montenegro (a), (b), (g)		23 October 2006 (h)	3 June 2006
Morocco (a)		12 February 1959 (c)	7 June 1959
Mozambique (a)		11 June 1998 (c)	9 September 1998
Nepal (a), (b)		4 March 1998 (c)	2 June 1998
Netherlands (a)	10 June 1958	24 April 1964	23 July 1964
New Zealand (a)		6 January 1983 (c)	6 April 1983
Nicaragua		24 September 2003 (c)	23 December 2003
Niger		14 October 1964 (c)	12 January 1965
Nigeria (a), (b)		17 March 1970 (c)	15 June 1970
Norway (a), (n)		14 March 1961 (c)	12 June 1961
Oman		25 February 1999 (c)	26 May 1999
Pakistan (a)	30 December 1958	14 July 2005	12 October 2005
Panama		10 October 1984 (c)	8 January 1985
Paraguay		8 October 1997 (c)	6 January 1998
Peru		7 July 1988 (c)	5 October 1988
Philippines (a), (b)	10 June 1958	6 July 1967	4 October 1967
Poland (a), (b)	10 June 1958	3 October 1961	1 January 1962
Portugal (a), (o)		18 October 1994 (c)	16 January 1995
Qatar		30 December 2002 (c)	30 March 2003
Republic of Korea (a), (b)		8 February 1973 (c)	9 May 1973
Romania (a), (b), (e)		13 September 1961 (c)	12 December 1961
Russian Federation (e), (p)	29 December 1958	24 August 1960	22 November 1960
Saint Vincent and the Grenadines (a), (b)		12 September 2000 (c)	11 December 2000
San Marino		17 May 1979 (c)	15 August 1979

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Saudi Arabia (a)		19 April 1994 (c)	18 July 1994
Senegal		17 October 1994 (c)	15 January 1995
Serbia (a), (b), (g), (q)		12 March 2001 (h)	27 April 1992
Singapore (a)		21 August 1986 (c)	19 November 1986
Slovakia (f), (j)		28 May 1993 (h)	1 January 1993
Slovenia (a), (b), (f), (g)		6 July 1992 (h)	25 June 1991
South Africa		3 May 1976 (c)	1 August 1976
Spain		12 May 1977 (c)	10 August 1977
Sri Lanka	30 December 1958	9 April 1962	8 July 1962
Sweden	23 December 1958	28 January 1972	27 April 1972
Switzerland (r)	29 December 1958	1 June 1965	30 August 1965
Syrian Arab Republic		9 March 1959 (c)	7 June 1959
Thailand		21 December 1959 (c)	20 March 1960
The former Yugoslav Republic of Macedonia (a), (b), (f), (g)		10 March 1994 (h)	17 September 1991
Trinidad and Tobago (a), (b)		14 February 1966 (c)	15 May 1966
Tunisia (a), (b)		17 July 1967 (c)	15 October 1967
Turkey (a), (b)		2 July 1992 (c)	30 September 1992
Uganda (a)		12 February 1992 (c)	12 May 1992
Ukraine (e)	29 December 1958	10 October 1960	8 January 1961
United Arab Emirates		21 August 2006 (c)	19 November 2006
United Kingdom of Great Britain and Northern Ireland (a)		24 September 1975 (c)	23 December 1975
United Republic of Tanzania (a)		13 October 1964 (c)	12 January 1965
United States of America (a), (b)		30 September 1970 (c)	29 December 1970
Uruguay		30 March 1983 (c)	28 June 1983
Uzbekistan		7 February 1996 (c)	7 May 1996
Venezuela (Bolivarian Republic of) (a), (b)		8 February 1995 (c)	9 May 1995
Vietnam (a), (b), (e), (s)		12 September 1995 (c)	11 December 1995
Zambia		14 March 2002 (c)	12 June 2002
Zimbabwe		29 September 1994 (c)	28 December 1994

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- (a) *Declarations and reservations (excludes territorial declarations and certain other reservations and declarations of a political nature). This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.*
- (b) *Declarations and reservations (excludes territorial declarations and certain other reservations and declarations of a political nature). This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.*
- (c) *Accession.*
- (d) *Declarations and reservations (excludes territorial declarations and certain other reservations and declarations of a political nature). Argentina declared that the Convention should be construed in accordance with the principles and rules of the National Constitution in force or with those resulting from reforms mandated by the Constitution.*
- (e) *Declarations and reservations (excludes territorial declarations and certain other reservations and declarations of a political nature). With regard to awards made in the territory of non-contracting States, this State will apply the Convention only to the extent to which those States grant reciprocal treatment.*
- (f) *The date of effect of the succession is as follows: for Bosnia and Herzegovina, 6 March 1992; for Croatia, 8 October 1991; for the Czech Republic, 1 January 1993; for Djibouti, 27 June 1977; for Slovakia, 1 January 1993; for Slovenia, 25 June 1991; and for the former Yugoslav Republic of Macedonia, 17 September 1991.*
- (g) *Declarations and reservations (excludes territorial declarations and certain other reservations and declarations of a political nature). This State will apply the Convention only to those arbitral awards which were adopted after the entry into effect of the Convention.*

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- (h) *Succession.*
- (i) *Declarations and reservations (excludes territorial declarations and certain other reservations and declarations of a political nature). Canada declared that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that were considered commercial under the laws of Canada, except in the case of the Province of Quebec where the law did not provide for such limitation.*
- (j) *The former Czechoslovakia signed the Convention on 3 October 1958 and deposited an instrument of ratification on 10 July 1959. On 28 May and 30 September 1993, respectively, Slovakia and the Czech Republic deposited instruments of succession.*
- (k) *The former German Democratic Republic acceded to the Convention on 20 February 1975 with the reservations mentioned in footnotes (a), (b), (e).*
- (l) *On 31 August 1998, Germany withdrew the reservation made upon ratification mentioned in footnote (a).*
- (m) *The Convention only applies with regard to Malta with respect to arbitration agreements concluded after the date of Malta's accession to the Convention.*
- (n) *Declarations and reservations (excludes territorial declarations and certain other reservations and declarations of a political nature). This State will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in the State, or a right in or to such property.*
- (o) *Upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of China extended the territorial application of the Convention to Hong Kong, Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention. On 19 July 2005, China declared that the Convention shall apply to the Macao Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention.*
- (p) *The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and the multilateral treaties deposited with the Secretary-General.*
- (q) *The former Yugoslavia acceded to the Convention on 26 February 1982. On 12 March 2001, the Secretary-General received from the Government of Yugoslavia a notification of succession, confirming the declaration dated 28 June 1982 by the Socialist Federal Republic of Yugoslavia (see footnotes (a), (b) and (g) above).*
- (r) *Declarations and reservations (excludes territorial declarations and certain other reservations and declarations of a political nature). On 23 April 1993, Switzerland notified the Secretary-General of its decision to withdraw the reciprocity declaration it had made upon ratification.*
- (s) *Viet Nam declared that interpretation of the Convention before the Vietnamese Courts or competent authorities should be made in accordance with the Constitution and the law of Viet Nam.*

WORKSHOP QUESTIONS

1. Compare and contrast the prerequisites for enforcement of an Award under the domestic provisions of the Arbitration Act 1996 with those regarding foreign awards under the New York Convention
2. Compare and contrast the grounds for resisting an Award under the domestic provisions of the Arbitration Act 1996 with those regarding foreign awards under the New York Convention.
3. What is the distinction between a domestic and a foreign award?
4. To what extent is it either possible or desirable for the English Courts to exercise supervisory jurisdiction over the conduct of international arbitral proceedings which might lead to the setting aside of an award for misconduct by the tribunal?

ADDITIONAL READING

Challenging an award His Honour Judge Diamond QC and V. V. Veeder QC

Enforcement of foreign arbitral awards & a comparative analysis in certain jurisdictions by Jeffery Elkinson

A potential appeal process for arbitration. Prof. G.M.B. Hartwell

New York Convention – a supra national code? Prof. G.M.B. Hartwell

Enforcing the award and the New York Convention. Richard Kreindler

Supervisory powers of the Court. Peter Aeberli

Challenging the international award : What has changed? Norton Rose 1997.

Appealing the unappealable: Vacating arbitration awards (US) : Marc S. Dobin Boose Casey Ciklin Lubitz Martens McBane & O'Connell

The Supervisory Powers of the Court in respect of awards. Substantive & Procedural Law of Arbitration. Chapter 11. NMA 2006. Hartwell & Spurin

WEB SITE

UNCITRAL : www.uncitral.org/uncitral/index.html