Ius Comparatum – Global Studies in Comparative Law

George A. Bermann *Editor*

Recognition and Enforcement of Foreign Arbitral Awards

The Interpretation and Application of the New York Convention by National Courts

Springer

Ius Comparatum – Global Studies in Comparative Law

Volume 23

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Académie Internationale de Droit Comparé
International Academy of Comparative Law

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New York, NY, USA

ISSN 2214-6881 ISSN 2214-689X (electronic)
Ius Comparatum – Global Studies in Comparative Law
ISBN 978-3-319-50913-6 ISBN 978-3-319-50915-0 (eBook)
DOI 10.1007/978-3-319-50915-0

Library of Congress Control Number: 2017948011

Printed on acid-free paper

This Springer imprint is published by Springer Nature
The registered company is Springer International Publishing AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

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Introduction

The international arbitration community takes pride in, and makes exceptionally good use of, the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). This is no surprise, given the importance of international arbitration in the resolution of international disputes, and the acute dependence of international arbitration on the mobility of awards.

It was in consideration of the paramount importance of the Convention that the International Academy of Comparative Law commissioned a comparative study of the Convention's application and interpretation by the national courts of contracting States. Like most international treaties, the Convention is only as good as the use that can be, and is, made of it. And, again like most treaties, its efficacy depends on the will and the ability of national courts to act in compliance with it.

The present study does not reveal any pattern of deliberate departure from the letter or spirit of the Convention. The fact remains, however, that many of its provisions may be interpreted, in perfect good faith, in different ways. They may also be applied with different degree of rigor.

Gathering the experience of the courts of 44 different jurisdictions was a massive undertaking and, necessarily, a decentralized one, Its accomplishment would not have been possible without the sincere cooperation of national reporters who agreed to present their nation's understandings and practices regarding the Convention in accordance with a common questionnaire which identified, in the editor's opinion, some of the most important among the Convention's provisions about which varying interpretations could be expected to emerge. They performed this task admirably. At the same, it was necessary to offer assistance to them in ensuring that the information they provided took a form that permitted critical comparisons to be made and sound generalizations reached, where possible. It was also necessary to ensure that the stories the reporters had to tell could be well understood when rendered in English. These latter tasks required dedicated work over a long period by a team of talented Columbia Law School students, JD and LL.M. candidates alike. That work needed in turn to be carefully and thoughtfully coordinated, a task performed masterfully by Katharine Menendez de la Cuesta, Columbia JD, 2016.

It is my hope, as well as the hope of our reporters, our students and Katharine, in particular, that the present work brings real value to our understanding of the workings of an international instrument upon which the success of international arbitration in the resolution of international disputes so powerfully depends.

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Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts

George A. Bermann

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G.A. Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards*,
Ius Comparatum – Global Studies in Comparative Law 23,
DOI 10.1007/978-3-319-50915-0_1

Abstract This General Report provides an analytical overview of critical issues concerning the interpretation and application – in forty-four jurisdictions – of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention. The Chapter surveys and synthesizes national responses to a sample of questions on major Convention topics: implementation of the Convention, enforcement of agreements to arbitrate, grounds for refusal of recognition and enforcement under the Convention, and procedural issues in recognizing and enforcing foreign awards. This report concludes with an assessment of experiences in the implementation of the Convention across jurisdictions.

1 Introduction

The New York Convention, among the most widely ratified treaties in force today, was intended and expected to prove fundamental to the workings of the international arbitral system. It would do so essentially by ensuring that arbitral awards are readily recognizable and enforceable in States other than the State in which they are rendered. It is small wonder that the New York Convention figures prominently in all treatments of international arbitration – whether academic or professional – and remains central to all contemporary discussions of the subject.

Despite its wide adoption and its broad coverage, the New York Convention – like virtually all treaties – is dependent for its efficacy on the behavior of national actors. Depending on the view of international law prevailing in a given State, the Convention's efficacy may require statutory implementation at the national level. The Convention's efficacy also depends in all States – regardless of their general views of international law – on the adequacy of the Convention's application on the ground. Although the literature on the Convention is extensive and rich, systematic attention to the workings of the Convention at the national level, across jurisdic-

tions, has until recently been lacking. Fortunately, recent published works open up a highly useful window on national practice. Especially welcome is the comprehensive database recently assembled – and maintained on an ongoing basis – by the United Nations Commission on International Trade Law (UNCITRAL). This database is in turn critical to production of the extremely valuable UNCITRAL Guide to the New York Convention that recently appeared.

Notwithstanding the availability of these other sources, it seemed useful to the International Academy of Comparative Law to commission this General Report and the numerous national reports on which it is based. Ideally, this inquiry will foster an appreciation of the differences in understanding of the New York Convention that have emerged among national courts from a large number of jurisdictions. For manageability's sake, national reporters were asked specifically to address only certain salient interpretation and application questions. Note that the Convention is in force in all the jurisdictions covered in this study, with the particular exception of Taiwan, which, as will become obvious, has nevertheless taken significant inspiration from the Convention. Note also that Hong Kong and Macau are covered as jurisdictions, despite the fact that they are not independent States.

Comparative law has particular value when deployed in the context of treaty interpretation and application. In addition to performing its usual functions, comparative law helps reveal the challenges and limitations of international unification through the treaty mechanism, thereby shedding light on international legal processes generally.

The forty-four jurisdictions[1] canvassed in this study differ dramatically among themselves in the volume of decided cases interpreting and applying the New York Convention and therefore in the capacity of their national reports to respond to the range of issues raised by the questionnaire on which this General Report is based. Fortunately, there still are for every one of these issues a critical mass of responding jurisdictions and thus a basis for observing the range and distribution of responses.

The heart of the Convention is of course Article V, which designates the grounds, and the only grounds, upon which a foreign award may be denied recognition or enforcement under the Convention, and that subject consumes much of the report that follows. However, a single article (Article II) deals, albeit in highly general terms, with enforcement, not of foreign arbitral awards, but of agreements to arbitrate. Enforcement of arbitration agreements is a matter that is both important in itself and in its relation to the recognition and enforcement of awards. Unless an agreement to arbitrate is enforceable, there may in the end be no award at all to be recognized or enforced. This study of the New York Convention thus encompasses Article II, even though that provision of the Convention does not directly address the recognition or enforcement of awards.

[1] Argentina, Australia, Austria, Brazil, Canada, China, Colombia, Croatia, the Czech Republic, France, Georgia, Germany, Greece, Hong Kong, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Macau, Malaysia, Mexico, the Netherlands, Norway, Paraguay, Peru, Portugal, Romania, Russia, Singapore, Slovenia, Spain, Sweden, Switzerland, Taiwan, Turkey, United Kingdom, United States, Uruguay, Venezuela, and Vietnam.

This study is organized in five substantive parts.

Part 2 on "Basic Implementation of the Convention" looks at core implementation issues. It asks in what form the New York Convention has been implemented into national law. It inquires into the declarations and/or reservations, if any, to which the Convention has been subjected in that process. It also seeks to understand how the basic terms 'arbitral award' and 'foreign arbitral award' are conceived. It considers the more particular question of whether measures of provisional relief ordered by an arbitral tribunal qualify as 'awards' within the meaning of the Convention. Finally, it seeks to know whether the Convention is viewed as preemptive of other national law or whether, on the contrary, a party seeking recognition or enforcement of a foreign arbitral award may, at its option, also rely upon a locally available alternative means and why a party might want to do so.

Part 3 on "Enforcement of Agreements to Arbitrate" treats the enforcement of agreements to arbitrate, as opposed to the enforcement of awards. This, as earlier observed, is a matter that, while addressed by the New York Convention, is far from addressed comprehensively. We limit the inquiries here to the two most basic. First, how do courts, in addressing agreements to arbitrate, interpret the Convention terms 'null, void, inoperative or incapable of being performed' and do they consult any particular choice-of-law rules in determining what that phrase means? Second, what kinds of objections (under the rubric of 'null, void, inoperative or incapable of being performed') are national courts in principle willing to entertain prior to the arbitration, assuming a party resisting arbitration so requests, and by contrast what kinds of objections will the courts in principle decline to entertain at the outset, even though asked to do so, thus allowing arbitral tribunals to decide them at least independently in the first instance?

Part 4 on "Recognition and Enforcement under the Convention" addresses what is widely regarded as the heart of the New York Convention, namely the grounds on which recognition or enforcement of a foreign arbitral award may properly be denied.

Some of the issues raised in this Part are truly transversal, cutting across all the Convention grounds. It is important, for example, to know whether the Convention permits courts to recognize or enforce a foreign arbitral award, even though a ground has been established that would permit them to withhold such recognition and enforcement. If national courts may 'overlook' the presence of grounds for refusing recognition and enforcement, when might they be inclined to do so? We also consider which grounds, if any, are subject to waiver by the parties and how, to that extent, waiver is established. Finally, we consider a particularly elusive question. To what extent does a court, when asked to determine whether a defense to recognition or enforcement of a foreign award is established, defer to judgments that one or more other courts and possibly the arbitral tribunal itself may have made at an earlier phase of the case on an issue – such as the scope of the agreement to arbitrate or the dispute's arbitrability – on which the viability of a defense to recognition or enforcement also depends.

But most of the issues surrounding the grounds for denying recognition or enforcement of awards under the New York Convention are ground-specific, since they depend on our understanding of the meaning of the Convention's several

individual grounds for denial. Each of the Convention grounds raises a large number of questions of interpretation from which were selected, for each ground, those that seem especially interesting or salient.

Article V(1)(a) establishes as a ground for denying recognition or enforcement of an award under the Convention that "[t]he parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." The national reporters were asked, in particular, whether courts actually follow the precise sequence of choice of law rules prescribed by Article V(1)(a) – i.e., the law to which the parties submitted their agreement to arbitrate, followed by the law of the place of arbitration – for determining whether an agreement to arbitrate is valid.

Article V(1)(b) provides for non-recognition and non-enforcement if "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." A question of both academic and practical significance is whether courts apply to foreign arbitral awards essentially the same standards of proper notice and fair hearing as are required by the domestic constitutional law of the jurisdictions in which those courts operate.

Article V(1)(c) addresses the situation in which "[t]he 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." There has arisen in this context the very particular question whether a tribunal is deemed to have decided matters beyond the scope of the agreement to arbitrate if, while admittedly addressing a matter that was made subject to arbitration, it grants a remedy, or form of relief, that the main contract by its terms specifically excluded.

Article V(1)(d) contemplates that the composition of the arbitral authority or the arbitral procedure may not have been "in accordance with the agreement of the parties, or, failing such agreement, … in accordance with the law of the country where the arbitration took place." Though the circumstance rarely arises, one cannot exclude the possibility that the parties may have expressly adopted a procedural feature that is not in accordance with the mandatory law of the jurisdiction in which the arbitration took place. The further question arises as to whether an award should be viewed as not in accordance with the agreement of the parties if the arbitral tribunal applies to the merits of a dispute a body of substantive law other than the one that the parties selected in their contract as the governing law.

According to Article V(1)(e), a court may deny recognition or enforcement if "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Among the most intriguing issues surrounding this provision is whether, and if so when, courts are prepared to recognize or enforce a foreign arbitral award, even though that award has been set aside by a competent court of the place of arbitration. This scenario is of course a particular instance of the more general question raised earlier, namely whether courts are ever prepared to recognize or enforce a foreign arbitral award, even though a ground has been established that would justify them in refusing to do so.

Article V(2)(a) invites non-recognition and non-enforcement of an award if "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of [the] country where recognition or enforcement is sought." There is reason to suppose that jurisdictions differ considerably over the kinds of claims that may be considered to be "non-arbitrable," that is, legally incapable of being arbitrated, but there is also reason to suppose that there may be patterns that recur across jurisdictions.

Article V(2)(b) raises the so-called "public policy" question, justifying non-recognition or non-enforcement of a foreign award if "recognition or enforcement of the award would be contrary to the public policy of [the] country where it is sought." The questionnaire on which this study is based inquires as to the kinds of circumstances under which a foreign arbitral award may be deemed contrary to the public policy of the country in question. It also asks more specifically whether law at the national level draws a distinction for these purposes between "international public policy" *(ordre public international)* and "domestic public policy" *(ordre public interne)*.

As already noted, this study examines only a fraction of the interpretation questions that the New York Convention raises. But, again, the questions chosen are especially important and/or interesting and, taken together, allow us to take a suitably broad view of the Convention

Although the jurisdictional and procedural aspects of judicial actions to enforce foreign arbitral awards tend to take a "back seat" in discussion of the Convention, they too can be quite interesting and even decisive of outcome. Among the more salient procedural issues are these: What is required in order for a court to exercise personal jurisdiction over the award debtor in an action to enforce a foreign arbitral award? Are actions to enforce a foreign arbitral award subject to a limitations, or prescription, period? On what broadly procedural grounds, other than absence of personal jurisdiction or prescription, may a national court decline even to entertain an action to enforce a foreign arbitral award? Part 5 takes up these issues.

Finally, Part Six invites the national reporters to go beyond the issues specifically highlighted in the questionnaire and offer some overall assessments of Convention law and practice in their jurisdictions. Reporters were thus asked to identify the respects, if any, in which the New York Convention is most commonly subject to criticism in their countries, underscoring the principal problems, difficulties or controversies that Convention practice has raised. Reporters were asked in conclusion to identify, on the basis of their own country's experience, any specific reforms of the New York Convention that they consider particularly useful or appropriate.

2 Basic Implementation of the Convention

We begin with certain basics about the Convention, notably whether it has been statutorily implemented in the States studied (and if so, how), whether and to what extent States have interposed reservations and declarations in signing or ratifying the Convention, and how various States go about defining what is an "arbitral

award" and, more particularly, a "foreign arbitral award." A great number of other questions could be posed, but from a general perspective these seem most essential.

2.1 Implementing Legislation

It is important to determine whether, within any given jurisdiction, the New York Convention has received legislative implementation. In jurisdictions that regard international treaties as self-executing, no such implementation is necessary in order for the Convention to have application (though even a self-executing treaty may receive legislative implementation). But in jurisdictions that do not regard international treaties as self-executing (or for some reason do not consider the New York Convention in particular to be self-executing), implementing legislation is presumably necessary. Strictly speaking, in those circumstances, it is that implementing legislation – not the text of the Convention – that will be given direct application by national courts.

Only in a minority – albeit a substantial minority (close to one-third) – of the jurisdictions studied is the New York Convention specifically deemed to be self-executing, and thus automatically applicable without need for implementing legislation.[2] In other jurisdictions, the Convention, though not deemed self-executing, has been implemented by domestic legislation that either reproduces the text of the Convention as such[3] or incorporates the text of the Convention by reference.[4] In

[2] A good example is France. The Convention itself was published in the Official Journal: J.O. du 6 septembre 1959, p. 8726. See also the national reports for China, Japan, Portugal, Mexico, and Sweden. In China, the National Supreme Court expressly declared the New York Convention to be applicable without need of any legislative implementation. (Portugal, Mexico and Switzerland are among those jurisdictions that have enacted legislation implementing the Convention, even though, as a matter of constitutional law, they consider the Convention to be self-executing.)

[3] See, for example, Austria (Federal Law Gazette 1961/200); Korea (Korean Arbitration Act, chapter VII); Colombia (Law 39/90); and Sweden (Swedish Arbitration Act, s 54-60). The fact that a State enacts implementing legislation does not necessarily mean that the Convention is not itself self-executing.

[4] Implementing legislation in Hong Kong (Hong Kong Arbitration Ordinance, s 87) says little more than "A Convention award is enforceable in Hong Kong." Similarly, Art 74 of the Peruvian Arbitration Law 2008 simply states that the Convention shall apply to the recognition and enforcement of foreign arbitral awards. In the United States, Congress implemented the Convention through incorporation by reference in Chapter Two of the Federal Arbitration Act (9 U.S.C. § 201ff). The majority of Canadian provinces have adopted a short implementing statute to which the text of the Convention is simply attached. See the Canadian report, footnote 3 and accompanying text. In Quebec, the Code of Civil Procedure instructs courts to take the Convention into account in interpreting the provisions of the province's Code of Civil Procedure on the subject. Code of Civil Procedure, art 948(2). The obligation to do so was confirmed by the Canadian Supreme Court in *GreCon Dimter Inc. v J.R. Normand, Inc.*, [2005] 2 SCR 401. See also the national reports for Germany (Civil Procedure Code, s 1061); Greece (Code of Civil Procedure, arts 903, 906); Israel (Arbitration Law, 28 LSI (5734-1973/74), s 29A, implemented by Regulation for the Execution of

both of these situations, the domestically applicable law is, for all practical purposes, the Convention's own text. However, in other jurisdictions, the relevant implementing legislation in some measure diverges in content from the Convention.[5] For example, a number of countries take the position that they have adequately implemented the New York Convention statutorily simply by enacting the UNCITRAL Model Law, which contains comparable recognition and enforcement standards.[6] Implementation in this particular fashion is in principle unproblematic. But in other situations, the implementing legislation appears to deviate from the New York Convention in a substantive way. For instance, when Australia implemented the Convention,[7] it paraphrased rather than reproduced the Convention. The paraphrase provided that "in any proceedings in which the enforcement of a foreign award … is sought the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves … that one of the grounds listed in paragraph (5) is available." The Queensland Supreme Court ruled that the omission of the word "only" in the paraphrase meant that a court could refuse, on grounds other than those stated in the Convention, to enforce an award.[8] This misreading of the Convention was remedied through the 2010 amendments to the legislation, reinserting the word "only."[9]

Obviously, national arbitration laws may set out certain terms and conditions governing the Convention's application (above and beyond those that the Convention itself requires) – terms and conditions that may need to be respected in order for an award creditor to successfully invoke the Convention at the national level. But judging by the national reports, only very rarely have signatory States declared the

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the New York Convention, 5738-1978 (1978)); Italy (Law of Jan. 19, 1968, n. 62, further implemented by Civil Procedure Code, arts 839-40); the Netherlands (Arbitration Act 1986, codified in Code of Civil Procedure, art 1075); and Slovenia (Arbitration Act, offc'l gazette no. 45/2008, art 42/2).

[5] See, for example, the 1996 Arbitration Act of the United Kingdom, s 100-04.

[6] See, for example, the national reports for Ireland (Arbitration Act 2010); Malaysia (Arbitration Act 2005, s 38-39); Norway (Arbitration Act, no. 25 (2004)); and Singapore (International Arbitration Act, act no. 23 (1994). Interestingly, Ontario repealed its statute implementing the Convention when it adopted the UNCITRAL Model Law on International Commercial Arbitration through the International Commercial Arbitration Act (RSO 1990, c I-9), in the view that the implementing statute had thereby become superfluous. This led to at least one decision refusing to apply the Convention on the ground that it had not been shown to be in force the province. *Kanto Yakin Kogyo Kabushiki-Kaisha v Can-Eng Mfg. Ltd*, (1992) 4 BLR (2d) 108. Reportedly, a consensus has since emerged that enactment of the International Commercial Arbitration Act constitutes implementation of the Convention.

[7] International Arbitration Act ("IAA") 1974 (1989).

[8] *Resort Condominiums v Bolwell*, (1993) 118 ALR 655.

[9] This did not remedy every ambiguity. As for instance, section 8(1) IAA adds wording not found in the Convention, stating that 'a foreign award is binding … on the parties to the arbitration agreement in pursuance of which it was made'. This has given Australian courts an opportunity to insist that the award creditor proves that the award debtor was a *party* to the arbitration agreement. See in particular Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd (2012) 292 ALR 161 (reversed, on other grounds, in Dampskibsselskabet Norden A/S v Gladestone Civil Pty Ltd [2013] FCAFC 107).

Convention to be non-self-executing, while at the same time failing to adopt adequate implementing legislation.[10] Nor is there anything in the national reports to suggest that the Convention has been implemented through national legislation that purports to alter meaningfully the Convention's substantive import.[11]

2.2 Reservations and Declarations

One of the complexities associated with international treaties is the high incidence of reservations and declarations that signatory States attach to their treaty ratifications. Those complexities are naturally at their minimum when a State makes a reservation or declaration that the treaty in question specifically invites signatory States to make.

The New York Convention contemplates, and indeed invites, two specific reservations. One of them limits the Convention's application to awards in disputes having a commercial character. The other reservation contemplated by the Convention pertains to reciprocity. Article I(3) provides:

> When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Because the Convention specifically contemplates these reservations, they can scarcely be viewed as lessening the Convention's efficacy from the drafters' viewpoint, and States have in fact availed themselves broadly of them. A majority of

[10] The Supreme Court of Indonesia ruled that the courts could not apply the New York Convention to enforce a foreign arbitral award because Indonesia had never statutorily implemented the Convention: *PT Nizwar v Navigation Maritime Bulgars Varna*, case no. 2944 K/Pdt/1983 (1984). Subsequently, the Supreme Court issued Regulation 1 of 1990, requiring recognition and enforcement of foreign awards pursuant to bilateral or multilateral conventions. The legislature thereafter enacted Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution: Undang-Undang Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa (1999). Macau is a special case. In 1999, just prior to ending its administration over Macau, Portugal extended application of the Convention to that territory effective February 10, 2000. In 2005, the government of China formally declared the Convention applicable in Macau, subject to Article 138 of the Basic Law.

[11] The most straightforward scenario is one in which the Convention is literally attached to the implementing legislation. Most of the Canadian provinces have followed that practice. Australia presents a slightly different situation. Australia enacted the New York Convention by way of the Arbitration (Foreign Awards and Agreements) Act of 1974, renamed the International Arbitration Act 1974 in 1989 when the UNCITRAL Model Law was given force of law through Part III of the Act. The provisions of the Convention are paraphrased in Part II of the International Arbitration Act.

States in this study have made both reservations,[12] while most of the remaining States have made one of these reservations (almost always the reciprocity reservation),[13] but not the other. In other words, more countries made both the reciprocity and the commercial reservation than made either of them alone. Even so, in what may be a surprising result, nearly one-third of the States reportedly have made neither of the two reservations contemplated by the Convention.[14]

Obviously reservations and declarations become more problematic when States interpose them without the treaty text having invited them to do so. It appears from the present study that, with one notable exception,[15] the States surveyed have not in fact subjected their signature or ratification of the New York Convention to what might be termed "uninvited" reservations or declarations. From the viewpoint of the Convention's efficacy, this is welcome news.

2.3 The Meaning of "Arbitral Award" and "Foreign Arbitral Award"

The scope of application of the New York Convention obviously turns largely on the meaning attributed to the terms "arbitral award" and "foreign arbitral award." These terms identify the awards that are governed by the New York Convention and therefore benefit from the recognition and enforcement advantages that the Convention offers.

2.3.1 What is an "arbitral award"?

The New York Convention does not purport to define meaningfully the term "arbitral award." Article I(2) merely states that the term "shall include not only awards made by arbitrators appointed for each case but also those made by permanent

[12] See, for example, Argentina, China, Croatia, Hong Kong, Hungary, India, Indonesia, Korea, Macau, Malaysia, Romania, Turkey, the United States, Venezuela, and Vietnam.

[13] See, for example, the Czech Republic, France, Japan, the Netherlands, Portugal, Singapore, and the United Kingdom. The Canadian provinces (other than Quebec) have made the commercial declaration only.

[14] The States that apparently have not made any reservations to the application of the New York Convention include Austria, Brazil, Colombia, Germany, Ireland, Israel, Italy, Mexico, Norway, Paraguay, Peru, Slovenia, Spain, Sweden, Switzerland and Uruguay. Norway presents the unusual situation in which the State made the reciprocity declaration, but is deemed to have abandoned that through its implementing legislation (Arbitration Act, act. no. 25 (2004), s 45).

[15] In addition to interposing the reciprocity and commercial declarations, Vietnam made the following reservation: "All interpretations of the Convention before the courts or other competent authorities of Vietnam shall observe the rules laid down in the Constitution and law of Vietnam" (Decision no. 453/QD-CTN (1995), art 1). According to the national reporter, Vietnam's insistence on interpreting the Convention under its own law "surely impairs the objective of the New York Convention which is to unify internationally rules governing foreign arbitral awards." However, in Decision no. 01/2013/QDST-KDTM (2013), a Vietnamese court reaffirmed this reservation.

arbitral bodies to which the parties have submitted." A very considerable number of jurisdictions reportedly provide no meaningful definition, either in legislation or case law,[16] of "arbitral award." But nearly as many reportedly give the term an exceedingly broad definition.[17] Somewhat smaller groups either expressly build into the term a requirement that the disposition of the dispute be "final and binding" or restate the specific provisions of the UNCITRAL Model Law, Article 31, on "Form and Contents of Award."[18]

Although national law appears largely content with vague definitions of "arbitral award," or no definition at all, it is likely to address related questions of a narrower character, such as whether the notion of award encompasses "partial awards" (i.e.,

[16] China, for example, has not legislated any definition of an "arbitral award." Some national legislation simply reproduces the definition of "arbitral award" found in the New York Convention itself. This is the case, for example, in Australia (International Arbitration Act, s 3(1) and Singapore (International Arbitration Act, s 27(1)). Some jurisdictions provide statutory definitions that are not particularly illuminating. The Arbitration Law of Israel, section 1, defines an arbitral award as "an award made by an arbitrator, including an interim award." Other jurisdictions do not purport to provide any statutory definition of the term. These include Austria, Brazil, Canada, France, India, Korea, Macau, Mexico, the Netherlands, Norway, Paraguay, Peru, the United Kingdom, the United States, Uruguay, Venezuela and Vietnam. In such jurisdictions, it is typically left to courts and scholars to define the term. The French Supreme Court has defined arbitral awards as "decisions by arbitrators that resolve definitively, in whole or in part, the dispute that has been submitted to them, whether on the merits, on jurisdiction or on a procedural motion that leads the arbitrators to bring the proceedings to a close." Cass. Civ 1re, Oct. 12, 2011, Rev arb., 2012.86. Courts have given workable definitions of arbitral awards in other countries as well, including Canada and Greece. In still other countries, such as Austria, scholars play a very large role in defining what is meant by an arbitral award. A number of jurisdictions specify that an arbitral award must be on "the merits." See, for example, the national reports for Portugal and Venezuela. Other jurisdictions, such as Sweden and Taiwan, specify that to be an award a determination must be "final and binding."

[17] The problem is not solved by enacting the UNCITRAL Model Law on International Commercial Arbitration. That instrument defines the terms "arbitration" and "arbitral tribunal," but not "arbitral award." Indeed, even the Model Law's definitions of "arbitration" and "arbitral tribunal" are not particularly instructive. Section 27 of the Swedish Arbitration Act authorizes three types of determinations to take the form of arbitral awards: (1) decisions on issues referred to the arbitrators, (2) decisions to terminate arbitral proceedings without deciding the issues, and (3) confirmation of settlement agreements. Any other determination by an arbitral tribunal takes the form of a "decision," which is not an award.

[18] Art 31 reads:

1. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
2. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Art 30.
3. The award shall state its date and the place of arbitration as determined in accordance with Art 20(1). The award shall be deemed to have been made at that place.
4. After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this Art shall be delivered to each party One State, Greece, makes the definition of an award depend on the law governing the arbitral award, which most likely means the law of the arbitral situs.

awards that dispose in final and binding terms of some but not all the legal claims and issues in a case).[19] A good number of national laws specifically state that partial awards constitute awards within the meaning of the Convention.[20] However, even where the legislation is silent on the matter, the distinct majority view is to that effect.[21] It should be noted in passing that a significant number of national reports use the terms "partial award" and "interim award" interchangeably. The latter formulation is best avoided inasmuch as the term "interim" is most commonly associated with provisional measures issued by arbitrators. While it seems fairly settled that partial awards constitute awards, the same may not be said for interim arbitral measures. As discussed below,[22] the proper characterization of interim arbitral measures remains a contested matter.

As this discussion of partial awards and interim arbitral measures suggests, having a single abstract definition of an award is less critical to the functioning of the Convention system than being able to know whether certain recurring forms are or are not to be treated as awards, whether for recognition and enforcement purposes or otherwise. One such form is the "expert determination." What exactly is meant by an expert determination is not certain, nor is it clear in most jurisdictions whether it is or is not assimilable to an arbitral award.[23] It is a matter that warrants clarification – and ideally not merely at the national level, but at the level of the Convention as a whole. That aside, the reports do not describe the lack of a more meaningful definition of "arbitral award" as especially problematic.

2.3.2 What is a "foreign arbitral award"?

What characteristics does an award need to have under a country's domestic law in order to be considered "foreign" and therefore subject to the Convention? Must an award be made abroad to qualify as "foreign," or is it enough that an award have some feature that may be described as "foreign"? The Convention sheds light on this question by stating, in Article I(1), that "[t]his Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought …" and then adding that "[i]t shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." The last sentence suggests that States may consider as "foreign" awards rendered on

[19] For instance, the Colombian Supreme Court of Justice held in *Drummond v Ferrovías* (December 12, 2011) that a partial foreign award on jurisdiction, given its nature and effects, could be recognized and enforced in Colombia as a Convention award.

[20] Partial awards are expressly recognized as constituting awards under the Convention in Croatia (Law on Arbitration, art 30); Ireland (Arbitration Act 2010, art 2(1)); Malaysia (Arbitration Act 2005, s 2); Peru (Arbitration Law, art 54); and Portugal (Law no. 63/2011, art 42(2)).

[21] See, for example, the national reports for Austria, Germany, Israel, Korea, Norway, and Switzerland. The issue evidently remains open in Slovenia.

[22] See Sect. 2.3.1 of this report.

[23] See the national report for Canada. The prevailing view at least in Switzerland is that expert determinations are not awards.

their own territory, rather than abroad, if they choose to consider those awards as "non-domestic."[24]

The great majority of States treat an award as "foreign," within the meaning of the Convention, only if made on the territory of a foreign country,[25] as the terms of the Convention themselves suggest.[26] Indeed, the reports suggest that an award made abroad will be considered foreign in the enforcing State even if the parties agreed to conduct the arbitration in accordance with the arbitration law of the place where recognition or enforcement is sought.[27] The situation may be slightly different in Turkey; there, under the so-called "procedural law principle," whether an award is domestic or foreign is determined not so much by the place of arbitration as by the procedural framework governing the arbitration. Thus, presumably, an award rendered in Turkey on the basis of the arbitration framework of another State will be treated as "foreign."[28]

Only a distinct minority of States, among them the United States,[29] are prepared to treat as "foreign" awards rendered on their own territory where the case simply presents one or more "foreign" elements.[30] According to the U.S. Federal Arbitration

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[24] It should be pointed out that the term "foreign arbitral award" has a highly distinctive meaning in the United Kingdom. According to the U.K. report, a "foreign arbitral award" is an award rendered in a State that is not a party to the New York Convention.

[25] See, for example, the national reports for Australia (International Arbitration Act, s 3(1)); Brazil (Arbitration Act, art 34); China (Arbitration Law, arts 66, 72); Croatia (Law on Arbitration, art 38); Germany (ZPO s 1025(I) and (IV); Israel (Arbitration Law, s 1); Slovenia (Arbitration Act, art 1/1); Spain (Spanish Arbitration Law, art 46.1); and Sweden (Swedish Arbitration Act, s 52) The same is true according to the national reports for Colombia, France, Italy, Korea, Malaysia, Portugal, and Switzerland. The German national report raises the possibility that a court might decline to treat an award rendered abroad as an award within the meaning of the Convention if, under the law of the rendering State, the award required local judicial confirmation (i.e. reduction to a local court judgment) in order to be enforceable and such confirmation had not in fact taken place (citing BayObLG, 4Z Sch 13/02, SchiedsVZ 2003, 142, para 47-48 (2002)).

[26] The matter is unsettled in certain jurisdictions, such as Venezuela.

[27] See, for example, the national report for Switzerland.

[28] According to the Turkish national report, despite the prevalence of the "principle of procedural law," some courts continue to apply a strict territorial approach or a combination of both. Emphasis is placed in the report on decisions of the 15th Civil Chamber of the Supreme Court, which currently considers that an award rendered under "the authority of a foreign law" is a foreign award, even if rendered in Turkey.

[29] According to the U.S. Federal Arbitration Act, section 202:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in Sect. 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

[30] These States apparently also include China (award made in Beijing is treated as foreign for Convention purposes apparently for the sole reason that it was rendered under aegis of the Court of Arbitration of the International Chamber of Commerce); Hungary (award rendered locally is

Act, the Convention's recognition and enforcement obligation applies even when an award stems from an arbitration seated in the United States, as long as the award "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign States."[31] A few national reports specifically raise the possibility that an award rendered locally may be treated as a Convention award under the Convention if expressly made pursuant to another jurisdiction's law of arbitration.[32] Notably, in Mexico, the lack of definition of "foreign award" seems to be irrelevant, as all arbitral awards, regardless of their domestic or foreign nature, are subject to the same recognition and enforcement regime, including the grounds for denying recognition and enforcement.

2.4 Provisional or Interim Measures as Awards

One of the more vexing questions of definition under the Convention is whether measures of interim or provisional relief issued by an arbitral tribunal may be considered as awards within the meaning of the Convention and thus presumptively entitled to recognition and enforcement.

Obviously recognizing and enforcing arbitral provisional measures enhances the efficacy of such measures and, arguably, the efficacy of arbitration. The difficulty lies in considering such measures to be not only "binding" (which they almost certainly are), but also "final" (which is questionable).

This issue appears to be surrounded by considerable uncertainty among the reporting States. Courts in a number of States – including States where the question

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foreign if institution under whose aegis the award was rendered is outside of Hungary and a majority of the tribunal are non-Hungarians); Indonesia (award rendered locally is foreign if is treated as "international" under Indonesian law); Romania (award rendered locally is foreign if it arises from a "private law relation containing a foreign element"); Uruguay and Vietnam (award rendered locally is foreign if issued within the framework of an international arbitral proceeding).

[31] 9 U.S.C. §202 (2012).

[32] See the national report for France, pointing out that this circumstance has not yet arisen in that country. The Greek report expressly entertains the possibility, but regards it as foreclosed by Law 2735/1999, art 1, which introduced the UNCITRAL Model Law in Greece and contains a strict territorial criterion.

In Taiwan, Art 47 of the Arbitration Act defines a "foreign arbitral award" as "an arbitral award which is issued outside the territory of the Republic of China on Taiwan or issued pursuant to foreign laws within the territory of the Republic of China on Taiwan." The latter include awards made under the arbitration law of another country, under the aegis of a foreign arbitral institution or under the rules of an international organization (which would include the UNCITRAL Model Law). It should be added that since, under the Constitution of the Republic of China, mainland China is still part of the Republic, an arbitral award made on mainland China is not a "foreign award." The same applies to awards made in Hong Kong or Macau.

The question of what awards rendered locally might be deemed "foreign" for Convention purposes is apparently still very much open in Japan.

has arisen – are reported to have no settled rule on the matter.[33] Interestingly, however, even in the absence of case law, national reporters for a good number of countries express a strong view on the matter, either favoring[34] or disfavoring[35] treatment of provisional measures as awards.

Even so, it appears that a clear majority of jurisdictions that have addressed the question – doing so less often by express statutory language than by judicial interpretation or academic consensus – decline to treat provisional measures as awards, thereby excluding them from coverage of the Convention's guarantee of recognition and enforcement.[36] The basic idea is that provisional measures are exactly that –

[33] In a significant number of jurisdictions, the issue has apparently not arisen. See, for example, Hong Kong, Hungary, India, Paraguay, Spain, Uruguay and Vietnam. In other national reports (for example, for Ireland, Israel, Macau and Venezuela,) the issue is simply not addressed.

There is no settled law on the subject in Canada, apart from the two provinces – British Columbia and Ontario – that have statutorily determined that provisional measures may be treated as awards.

The situation is notably unclear in Indonesia. On the one hand, the New Arbitration Law, section 32(1), expressly provides that: "[a]t the request of one of the parties, the arbitral tribunal may render a provisional award or other interim awards …, including granting the attachment of assets, ordering the deposit of goods to a third party or the sale of perishable goods." The statute thus employs the term "award" in this context. The national reporter nevertheless gives voice to some doubt as to enforceability of this species of award.

[34] The authors of the reports for China, Ireland and Korea state their belief that provisional arbitral measures are enforceable as awards, but cannot point to any case law so holding. The Korean national reporter bases his supposition on an unusual "understanding," namely that "the Convention does not require finality of … arbitral awards." Although the Chinese national reporter does not point to any case law to this effect, he strongly advocates treating provisional measures as awards. He notes that the New York Convention uses the term "binding" in Art V, but not the term "final," and so argues that, even if provisional measures are not "final," they are surely "binding," and that should suffice. He also considers the enforceability of provisional measures to be critical to arbitration's efficacy.

[35] Though there is evidently no case law on the subject in their jurisdictions, several national reporters express confidence that provisional measures would not be considered to amount to arbitral awards. See, for example, the national reports for Brazil, and Vietnam.

[36] These jurisdictions appear to include Argentina, Austria, Canada, Croatia, the Czech Republic, Greece, Italy, Japan, the Netherlands, Norway, Russia, Singapore, Switzerland, Taiwan, and Turkey.

This position is expressly stated in the Rules of Arbitration of the Permanent Arbitration Court of the Croatian Chamber of Economy, art 26(2). While the Norwegian legislation does not so state, the legislative history clarifies that measures of provisional relief do not constitute awards for recognition and enforcement purposes. Ot.pr. nr. 27 (2003-2004), s 13, s 23, comment on s 19.In the case of the Netherlands, however, under a proposed amendment to national legislation, a measure of provisional relief issued by a tribunal sitting locally would constitute an award. 2014 Proposal for the New Act (Draft Arbitration Act), art 1043b, para 4: "Unless the arbitral tribunal decides otherwise, a decision of the arbitral tribunal ordering an interim measure shall be an arbitral award." (The proposal specifically provides, however, that such a measure is not subject to annulment as an award.) The national reporter reasonably infers from this that under the proposed revision a measure of provisional relief issued by a *foreign* tribunal would be enforceable in the Netherlands as an award.

The possibility of treating provisional measures rendered by tribunals abroad is also evidently under active consideration in Sweden.