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Founder: Prof. Pierre Lalive

Editor: Matthias Scherer



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Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

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Enforcement of Arbitral Awards under the New York Convention in Switzerland

An overview of the current practice and case law of the Swiss Supreme Court

CATHERINE A. KUNZ*

1. Introduction

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “Convention” or the “NYC”) entered into force in Switzerland in 1965. The Convention applies to the recognition and enforcement of all foreign arbitral awards in Switzerland pursuant to Article 194 of the Swiss Private International Law Act (“PILA”), regardless of whether the state in which the award was rendered is a party to the Convention.¹

The Swiss Supreme Court has held that in order to qualify as an “arbitral award” under the Convention, a decision must at least be comparable to a decision rendered by state courts.² This is the case if it has been rendered by a tribunal offering sufficient guarantees of impartiality and independence.³ An arbitral award is “foreign” within the meaning of Article

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¹ Although Switzerland had initially declared under Article I(3) NYC that the Convention would only apply between Switzerland and other signatory states, this reservation became moot with the entry into force of the PILA in 1989 and was formally withdrawn by Switzerland in 1993.

² Swiss Supreme Court, Decision 4A_374/2014, 26 February 2015, para. 4.3.2.1, ASA Bull. 2/2015, p. 576.

³ *Ibid.* The Supreme Court was recently faced with the question of whether a decision rendered by the Court of First Instance of the Dubai International Financial Centre (DIFC) qualified as a foreign court decision (governed by Articles 25-27 PILA) or as a foreign arbitral award falling within the scope of the Convention. The Court observed that the qualification of the decision could have an impact on the outcome of the enforcement procedure and must therefore be determined as a preliminary issue by the enforcement court. The matter was remitted to the lower court for determination on this point. Swiss Supreme Court, Decision, 5A_672/2015, 2 September 2016, ASA Bull. 4/2016, p. 1030.

194 PILA if it is rendered by an arbitral tribunal which did not have its seat in Switzerland.⁴

This article presents an overview of the decisions rendered by the Swiss Supreme Court in relation to the recognition and enforcement of foreign arbitral awards under the Convention over the period 2000-2016. The decisions rendered during this period are of particular interest as the Supreme Court has examined several Convention provisions for the first time. The Supreme Court also had the opportunity to confirm, clarify and even overturn its earlier case law.

In a majority of cases, the question of the recognition and enforcement of a foreign arbitral award in Switzerland arises in the context of debt collection proceedings under the Swiss Debt Collection and Bankruptcy Act (DCBA), when the award is relied on by the party seeking its recognition and enforcement (the applicant) to obtain the setting aside of the defendant's objection to a summons to pay the amounts awarded (*procédure de mainlevée de l'opposition*). In such cases, the recognition and enforcement of the award is examined by Swiss courts as a preliminary issue,⁵ without separate *exequatur* proceedings being required. The recognition and enforcement of a foreign arbitral award can also be sought as principal relief before the competent Swiss courts.⁶ Swiss courts will also examine, but only on a *prima facie* basis, whether a foreign award satisfies the conditions for recognition and enforcement in Switzerland when it is relied on by a party to obtain a freezing order over assets located in Switzerland.⁷ The conditions for the recognition and enforcement of a foreign arbitral award will also be examined by Swiss courts, again as a preliminary issue, when a party invokes

⁴ Swiss Supreme Court, Decision 4A_508/2010, 14 February 2011, para. 3.1, ASA Bull. 1/2012, p. 108. By operation of Article 192(2) PILA, the Convention also applies by analogy to the recognition and enforcement of awards rendered in the context of international arbitrations by arbitral tribunals seated in Switzerland, even though they do not qualify as "foreign", in cases where the parties validly waived their right to challenge the award.

⁵ Article 81(3) DCBA; Stéphane ABBET, *Décisions étrangères et mainlevée définitive*, SJ 2016 II pp. 325-349, 335.

⁶ See Article 393 of the Swiss Civil Code of Procedure.

⁷ Article 271(1)(6) DCBA. Swiss Supreme Court, Decision 139 III 135 (5A_355/2012), 21 December 2012, para. 4, ASA Bull. 1/2013, p. 156, commented by Blaise STUCKI/Louis BURRUS, *Sentence arbitrale étrangère, séquestre et exequatur, Note sur l'arrêt du Tribunal fédéral 5A_355/2012 du 21 décembre 2012*, ASA Bull. 2/2013, pp. 429-438.

its preclusive effect (*res judicata*) on court or arbitral proceedings initiated in Switzerland.⁸

2. The requirement of an arbitration agreement in writing (Article II NYC)

A couple of recent decisions of the Swiss Supreme Court concern the formal requirement under Article II(1) and (2) NYC that the arbitration agreement on the basis of which a foreign award has been rendered be “in writing”. Pursuant to Article II(2) NYC this formal requirement is satisfied if the arbitration agreement or clause is signed by the parties or contained in an exchange of letters or telegrams.

The question whether there is an arbitration agreement “in writing” has arisen in particular in the commodity trading and shipping industries, in situations where the contract containing the arbitration agreement was not signed by the parties, having been arranged through an intermediary.⁹ This issue was examined on two occasions by the Supreme Court over the period under review. In both cases, which are summarised below, the Supreme Court found that the formal requirements of Article II NYC had not been satisfied. However, in one of the two cases, the Supreme Court ruled that the award was enforceable despite the absence of a written arbitration agreement on the basis that the conduct of the defendant during the arbitration precluded it from relying on the absence of a written agreement at enforcement stage under the principle of good faith.

This case concerned a contract containing a GAFTA arbitration clause that had not been signed by the buyer and seller, having been arranged through a broker. In its decision dated 4 February 2016,¹⁰ the Supreme Court noted that whilst agreements were usually signed through brokers in the food commodity trading industry, no information had been provided in this particular case on the broker’s role and on any past relationship between the parties. The Court therefore found that the arbitration clause relied on by the

⁸ Preclusive effect of a foreign award – on arbitral proceedings (Article 194 PILA): see Swiss Supreme Court Decision, 4A_374/2014, 26 February 2015, para. 4.2.1, ASA Bull. 3/2015, p. 576 (discussed in Section 5.2 below); – on court proceedings (Article 25 PILA): see Swiss Supreme Court, Decision 4A_508/2010, 14 February 2011, para. 3, ASA Bull. 1/2012, p. 108 (see Section 4.3 below).

⁹ See *e.g.* Swiss Supreme Court, Decisions 110 II 54, 7 February 1984, ASA Bull. 3/1984, p. 156; 121 III 38, 16 January 1995, ASA Bull. 3/1995, p. 503.

¹⁰ Swiss Supreme Court, Decision 5A_441/2015, 4 February 2016, ASA Bull. 2/2016, p. 482.

applicant did not satisfy the written agreement requirement of Article II NYC. The Supreme Court however recalled that, in accordance with the principle of good faith, a party's conduct can cure formal shortcomings in the arbitration agreement, including the absence of a written arbitration agreement required under Article II NYC. The Court observed that, in this case, the defendant had not objected to the absence of a written agreement during the arbitral proceedings, but had on the contrary expressly relied on the arbitration agreement in its written submissions. The Court found that, as a result, the defendant's reliance on Article II NYC at enforcement stage amounted to an abuse of right.

The other decision, which was rendered in 2002,¹¹ concerned an arbitration clause contained in the general terms and conditions of a charterparty which had been arranged through a shipbroker, but had not been signed by either party. In that case, the Supreme Court upheld the lower court's decision to refuse the requested recognition and enforcement of the award. The Supreme Court observed that the applicant must establish the existence of an arbitration agreement that complies with the requirement of Article II(2) NYC as part of the requirement to produce a valid arbitration agreement under Article IV(1)(b) NYC. The Supreme Court found that although the applicant had produced a statement by the shipbroker confirming that the charterparty had been sent to the parties for signature, there was no evidence that the defendant had ever seen the general terms and conditions containing the arbitration agreement. The mere fact that the shipbroker had signed eight charterparty agreements for the defendant in the past was not considered sufficient, as the applicant had failed to establish that the defendant had been provided with the arbitration clause contained in those agreements. The Supreme Court also found that the powers granted by a party to a shipbroker to enter into an oral charterparty on its behalf could not cure the formal shortcomings of the arbitration agreement, considering that such an agreement required the written form to be valid. It noted that the defendant had expressly denied having seen or signed the charterparty at the start of the arbitration. The Court therefore considered that the applicant had failed to demonstrate that the defendant had, by its conduct, accepted to be bound by the arbitration agreement it contained.

This second decision can be distinguished from an earlier decision rendered by the Supreme Court in 1995 in relation to an arbitration clause contained in the general conditions printed on the back of a bill of lading, which had been signed by one of the parties (the carrier) but not the other

¹¹ Swiss Supreme Court, Decision 4P.102/2001, 4P.104/2001, 31 May 2002, ASA Bull. 2/2003, p. 364.

(the shipper).¹² In that case, the Court found that the principle of good faith precluded the shipper from relying on the absence of a written agreement as the shipper had established the bill of lading and the carrier had, in the past, regularly approved contractual documents prepared by the shipper, including the general conditions containing the arbitration clause.

The above decisions show that the Supreme Court applies a two-pronged test in practice in relation to the requirement of a written agreement set out in Article II(2) NYC:

- (i) The Supreme Court first examines whether there is an arbitration agreement in writing signed by the parties or contained in an exchange of letters or telegrams as required under Article II(2) NYC;
- (ii) The Supreme Court then applies the principle of good faith to determine whether the defendant's conduct precludes it from relying on the absence of a written arbitration agreement to resist the recognition and enforcement of the award on the basis that this would amount to an abuse of right. In other words, the principle of good faith operates as a corrective to the strict application of Article II(2) NYC in certain circumstances.

As regards the first prong of this test, the Supreme Court stated in 1995 that the requirements of Article II(2) NYC should be interpreted in light of Article 178(1) PILA, which governs the formal validity of arbitration agreements in international arbitrations conducted in Switzerland, on the basis that the two provisions overlap.¹³ The Court, however, appears to have slightly recanted since. The Court has indeed recently stated instead that the formal requirements of Article II(2) NYC are in any event not less stringent than those set out in Article 178(1) PILA.¹⁴ In accordance with the rule of autonomous interpretation of treaties, the enforcement court should conduct the analysis solely on the basis of Article II(2) NYC,¹⁵ to the exclusion of provisions of Swiss arbitration law (although the latter might be invoked under the more favourable law provision contained in Article VII(1) NYC). In the two recent decisions summarised above, the Court concluded that the

¹² Swiss Supreme Court, Decision 121 III 38, 16 January 1995, ASA Bull. 3/1995, p. 503.

¹³ Swiss Supreme Court, Decision 121 III 38, 16 January 1995, para. 2b, ASA Bull. 3/1995, p. 503. Criticised by Jean-François POUDRET/Gabriel COTTIER in *Remarques sur l'application de l'article II de la Convention de New York (Note – 16 janvier 1995 – Tribunal fédéral)*, ASA Bull. 3/1995, pp. 383-393, 389 *et seq.*

¹⁴ Swiss Supreme Court, Decision 4A_34/2015, 6 October 2015, para. 3.4.1.

¹⁵ Swiss Supreme Court, Decision 110 II 54, 7 February 1984, para. 3a, ASA, Bull. 3/1984, p. 156.

requirements of Article II(2) NYC had not been met, indicating that these requirements are applied to the letter in this first prong of the test.¹⁶

Under the second prong of the test, a defence based on Article II(2) NYC will be unsuccessful if the defendant participated in the arbitration without objecting to the absence of a written agreement. A defence based on Article II NYC might also be considered abusive in further circumstances where the defendant, expressly or impliedly, by its conduct, must be deemed to have accepted the arbitration clause on which the award is based.¹⁷

3. The documents to be provided in support of the request for recognition and enforcement under Article IV NYC

Article IV NYC requires the party seeking the recognition and enforcement of an award to provide the following documents in support of its request:

- (i) The award: the duly authenticated original or a duly certified copy of the original (Article IV(1)(a) NYC);
- (ii) The arbitration agreement: the original agreement referred to in Article II NYC or a duly certified copy of the original (Article IV(1)(b) NYC); and
- (iii) A translation of such documents if those documents are not in the official language of the country of enforcement, certified by an official or sworn translator or by a diplomatic or consular agent.

The Swiss Supreme Court has adopted a pragmatic and purposive approach to the requirements of Article IV NYC. The Supreme Court indeed considers that since the purpose of the Convention is to facilitate the

¹⁶ Within this framework, the Supreme Court tends to adopt a pro-enforcement approach with respect to issues not specifically addressed in the Convention. In its decision 110 II 54 of 7 February 1984, the Supreme Court thus admitted that an incorporation of the arbitration agreement by reference in a contract signed by the parties was sufficient for the purposes of Article II(2) NYC in light of the circumstances of the case.

¹⁷ See Swiss Supreme Court, Decision 121 III 38, 16 January 1995, ASA Bull. 3/1995, p. 503. See also, Marika R.P. PAULSSON, *The 1958 New York Convention in Action, Chapter 3: Enforcing Arbitration Agreements*, Kluwer Law International 2016, pp. 61-96, 78: “An overly formalistic approach to the requirements of Article II would violate a good faith understanding of it. Judges ought to apply the “in-writing” requirement in a manner consistent with current practices in international trade and acknowledge agreements to arbitrate established through conduct if the evidence establishes the parties’ mutual intent to arbitrate.”

recognition and enforcement of foreign awards, the form requirements set out in Article IV NYC must not be applied strictly and a formalistic approach must be avoided.¹⁸

The Swiss Supreme Court has had the opportunity to confirm its liberal interpretation of the form requirements of Article IV NYC in several recent cases.

3.1 Production of the duly authenticated original award or a duly certified copy thereof (Article IV(1)(a) NYC)

Is the authentication of all arbitrators' signatures required?

The form requirements under Article IV(1)(a) NYC were examined by the Swiss Supreme Court for the first time in a decision rendered in 2010.¹⁹ In that case, the requesting party had produced a certified copy of the award, but only the signature of the chairperson had been authenticated, not however the signatures of the other arbitrators or the tribunal's acting secretary. The issue before the Supreme Court was whether the authentication of all signatories of the award was required under Article IV(1)(a) NYC.

The Supreme Court recalled that since the aim of the New York Convention was to facilitate the enforcement of arbitral awards, a strict application of the form requirements in Article IV NYC was not warranted. The Supreme Court considered that "authentication" within the meaning of Article IV(1)(a) NYC signified attesting that the signatures of the arbitrators are genuine, the purpose of which is ultimately to confirm the authenticity of the award itself.²⁰ The Supreme Court therefore found that an authentication was not compulsory when the authenticity of the award was not disputed by the party resisting enforcement. As the authenticity of the award had not been challenged in this case and there was no indication of any forgery, the Supreme Court upheld the finding of the lower court that the award could be recognised and enforced even if not all signatures on the award had been authenticated.

¹⁸ See e.g. Swiss Supreme Court, Decision 5A_427/2011, 10 October 2011, ASA Bull. 2/2013, p. 404.

¹⁹ Swiss Supreme Court, Decision 4A_124/2010, 4 October 2010, para. 4.2, ASA Bull. 1/2012, p. 76.

²⁰ The requirement that the copy of the award or arbitration agreement be "duly certified" means the formality by which such copy is attested to constitute true copy of the whole original: Marika R.P. PAULSSON, *The 1958 New York Convention in Action, Chapter 5: Article IV: Requesting Enforcement of Awards*, Kluwer Law International 2016, pp. 137-156, 143.

Neither the lower court nor the Supreme Court expressly determined whether and in what circumstances the authentication of signatures beyond that of the chairperson might be required under Article IV(1)(a) NYC. In view of the reasoning followed by the Supreme Court in this case, the authentication of further signatures should only be required if the authenticity of the award and the signatures of the remaining arbitrators are challenged.

Time for production of the documents referred to in Article IV NYC

In the same case, the question arose as to the time for production of the documents referred to in Article IV NYC and, in particular, whether a *new application* can be introduced to satisfy the form requirements under that provision.²¹

The requesting party had applied for the recognition and enforcement of a foreign arbitral award but had then withdrawn its application; a few years later, it reintroduced a new application for the enforcement of the same award. The defendant claimed that the requesting party had failed to produce the documents required under Article IV NYC with its first application and only did so with its second application. The defendant argued that the termination order rendered in the first enforcement proceedings had *res judicata* effect and precluded the requesting party from seeking enforcement a second time.

The Supreme Court interpreted the requirement in the chapeau of Article IV(1) NYC that the documents be produced “*at the time of the application*” as referring only to the pending proceedings. The Court therefore found that nothing in the text of the Convention prevented a party having withdrawn a request for enforcement from submitting a new application at a later stage. The Supreme Court noted that the defendant’s interpretation would create a new procedural obstacle to enforcement, which had not been included in the text of the Convention and would be contrary to its pro-enforcement spirit. The Court further noted that courts and legal scholars were in general quite liberal in accepting that the applicant can cure any irregularities as to the form of documents by submitting documents in the appropriate form at a later stage of the proceedings or, at least, by introducing a new application with the appropriate documents.

The Supreme Court ruled that the admission of the second application was not contrary to the principles of Swiss procedural law on claim preclusion (*res judicata*). In particular, the Court found that, although, as a rule, a termination order rendered further to a withdrawal of a claim has a *res*

²¹ Swiss Supreme Court, Decision 4A_124/2010, 4 October 2010, para. 3, ASA Bull. 1/2012, p. 76.

judicata effect, there were exceptions to this rule, for example, where the withdrawal occurred at an early stage of the proceedings or was made so that the claim could be reintroduced in a better form. The Supreme Court however noted that it was questionable whether a termination order rendered in recognition and enforcement proceedings in relation to a foreign arbitral award could even attract *res judicata* – in the author’s view, rightly so. The termination order was issued *in casu* in the context of debt collection proceedings and, more specifically, the setting aside of the defendant’s objection to summons to pay (*procédure de mainlevée de l’opposition*). As such, its *res judicata* effect should be limited to the pending proceedings and the documents produced in those proceedings.²²

The possibility for an applicant to cure a defect in its compliance with the requirements of Article IV(1)(a) NYC at a later stage in the *same proceedings* had already been confirmed by the Supreme Court in an earlier decision rendered in 2003. In that case, the Supreme Court ruled that the requirements of Article IV NYC had been met on the basis that the original arbitration agreement had been produced in the appeal proceedings before the appeal court (and admitted by the court of appeal although new evidence was not allowed at appeal stage under the applicable procedural rules), even though only an uncertified photocopy had been produced in the proceedings before the first instance court.²³ In the words of the Court, what mattered was that “*the cantonal court [of appeal] had been presented with the original of the contract containing the arbitration agreement when it rendered its decision on the enforcement of the award*”.²⁴

3.2 Production of the original arbitral agreement or a duly certified copy thereof (Article IV(1)(b) NYC)

In two recent cases, the Supreme Court examined whether a copy of the arbitration agreement was sufficient, in spite of the fact that it had not been “duly certified” as required under Article IV(1)(b) NYC.

In the first case,²⁵ the defendant itself had claimed to be bound by the arbitration agreement in the proceedings before the appellate arbitral tribunal

²² See Swiss Supreme Court, Decision 5A_427/2011, 10 October 2011, para. 2, ASA Bull. 2/2013, p. 404; see also Supreme Court Decision 100 III 48, 7 August 1974, para. 3.

²³ Swiss Supreme Court, Decision 4P.173/2003, 8 December 2003, para. 2, ASA Bull. 1/2005, p. 119.

²⁴ *Ibid.*

²⁵ Swiss Supreme Court, Decision 5A_441/2015, 4 February 2016, para. 3.2, ASA Bull. 2/2016 p. 482.

and had also recognised that the contract referred disputes to arbitration under the GAFTA rules. On that basis, the Supreme Court considered that the copy of the arbitration agreement produced by the applicant was sufficient evidence of the *prima facie* authenticity of the arbitration agreement and its binding effect on the parties.

In the other case,²⁶ the party seeking enforcement produced certified fax copies of contractual documents exchanged during the call for tenders referring to the arbitration agreement and a copy of a *pro forma* invoice issued by the defendant reproducing the arbitration agreement. The defendant alleged that the arbitration agreement had been modified, but the applicant claimed that the only document the defendant relied on in support of its allegation was a forgery. The Supreme Court found that a subsequent modification of the arbitration agreement had not been established, in particular as the defendant itself had subsequently designated the arbitration authority referred to in the original arbitration agreement. It also recalled that courts should “avoid any excessive formalism” in relation to the requirements of Article IV(1)(b) NYC and that, when the authenticity of the arbitration agreement is not disputed, enforcement should not be denied simply because the applicant has failed to produce a certified copy or the original of the arbitration agreement.²⁷

The above decisions are in line with the Court’s earlier case law.²⁸

3.3 The translation of the award and arbitration agreement (Article IV(2) NYC)

In 2012, the Supreme Court ruled for the first time that the requirements of Article IV(2) NYC are not mandatory and that a full

²⁶ Swiss Supreme Court, Decision 5A_427/2011, 10 October 2011, para. 5, ASA Bull. 2/2013, p. 404.

²⁷ In another matter, the production of a certified copy of the award in which the arbitration agreement had been reproduced was considered sufficient by the cantonal court in order for the applicant to be granted a freezing order on the basis of a foreign award. That being said, in such proceedings, the party seeking the freezing order must only establish the *prima facie* enforceability of the award. The cantonal decision in question is referred to in Swiss Supreme Court, Decision 139 III 135 (5A_355/2012) 21 December 2012, ASA Bull. 1/2013, p. 156. See also Blaise STUCKI/Louis BURRUS, *Sentence arbitrale étrangère, séquestre et exequatur, Note sur l’arrêt du Tribunal fédéral 5A_355/2012 du 21 décembre 2012*, ASA Bull. 2/2013, pp. 429-438, 437.

²⁸ See Swiss Supreme Court, Decision 5P.201/1994, 9 January 1995, para. 3, ASA Bull. 2/2001, p. 294, in which a photocopy of the contract containing the arbitration agreement was considered sufficient in circumstances where its authenticity was not disputed.

translation of an award rendered in English does not have to be submitted in each case.²⁹

This ruling was handed down in a case where the applicant only produced a certified German translation (German being the official language of the Swiss canton in which enforcement was being sought) of the operative part of the award, as well as an uncertified German translation of the section of the award dealing with the arbitration costs and of the tribunal's interpretation of the award on this same issue. The defendant resisted enforcement on the basis that the applicant had failed to produce a German translation of the entire award. The lower court, considering that no such translation was necessary as its command of the English language was sufficient to understand the award, granted the requested recognition and enforcement.

The Supreme Court upheld the decision of the lower court. It noted that Switzerland, in the UNCITRAL's 1995 survey relating to the legislative implementation of the Convention, had declared that documents referred to in Article IV NYC must, as a rule, be produced in the official language at the place of enforcement but that, in practice, it could not be excluded that courts might accept other languages.³⁰ The Court then proceeded to an autonomous interpretation of Article IV(2) NYC in accordance with the principles of interpretation set out in Articles 31-33 of the 1969 Vienna Convention on the law of treaties. It found that the purpose of Article IV(2) NYC is to ensure that the enforcement court is able to understand the award in order to decide on the grounds for refusing recognition and enforcement set out in Article V NYC. The Supreme Court therefore held that it would be overly formalistic to request that the applicant submit a translation of the entire award since Swiss courts generally do not need a translation if the award is in English, as expressly confirmed by the enforcement court in this case. It observed that a narrower interpretation of Article IV NYC would go against the pro-enforcement spirit and objective of the Convention.

The Supreme Court confirmed these findings in a decision handed down in 2016.³¹ In that case, the applicant had produced a French translation (French being the official language of the Swiss canton in which enforcement was being sought) of the operative part of an award in English, but had failed to produce a translation of the complete award and of the arbitration

²⁹ Swiss Supreme Court, Decision 138 III 520 (5A_754/2011), 2 July 2012, para. 5, ASA Bull. 1/2013, p. 156.

³⁰ See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_implementation.html (last consulted: 2 November 2016).

³¹ Swiss Supreme Court, Decision 5A_441/2015, 4 February 2016, para. 3.2, ASA Bull. 2/2016, p. 482.

agreement (also in English). The Supreme Court recalled that the requirement of a translation set out in Article IV(2) NYC was not mandatory, in particular when the original language of the documents was English. The Court therefore held that the enforcement of the award should not be denied simply because of the applicant's failure to produce the translations required under Article IV(2) NYC. It also noted that in any event the applicant had produced a free translation of an extract of a pleading that the defendant had submitted before the appellate arbitral tribunal, in which the arbitration agreement had been reproduced in its entirety, and that it did not matter that this translation had not been certified.

3.4 Comments on the requirements of Article IV NYC in light of the recent decisions of the Swiss Supreme Court

In light of the recent decisions of the Supreme Court, the requirements of Article IV NYC should, as a rule, be implemented as follows in Switzerland:

- (i) The applicant must at the very least produce the original or a copy of the award and the arbitration agreement (as per Article II NYC) in support of its application;
- (ii) The authentication or certification of those documents will, as a rule, not be required by Swiss courts unless their authenticity is not disputed;
- (iii) A translation of documents which are not in the official language should not be required if they are in a language which the enforcement court sufficiently masters so as to understand their content, which is generally the case if they are in English. A translation of the relevant parts of the documents relied upon may be sufficient. An unofficial translation should be considered sufficient, unless the defendant objects that it is not a true and accurate translation of the original;
- (iv) The applicant should, as a rule, be allowed by the enforcement court to cure any defect in its compliance with the requirements of Article IV NYC in the same proceedings or be able to file a new application to cure any such defect;
- (v) For the purposes of Article IV NYC, additional documents confirming the enforceability of the award in the country of origin are not required.³²

³² See also Section 4.5 below.

Once Swiss courts are satisfied that the applicant has complied with the requirements of Article IV NYC, they consider that the applicant has established *prima facie* the existence of an enforceable award rendered on the basis of a valid arbitration agreement. In accordance with Article III NYC, recognition and enforcement will then only be denied on one of the grounds listed in Article V NYC.

4. The grounds for denying recognition and enforcement under Article V(1) NYC

Article V(1) NYC lists five grounds on which recognition and enforcement may be refused at the request of the party against which it is sought. These grounds are addressed in turn.

4.1 Incapacity of the parties or invalidity of the arbitration agreement (Article V(1)(a) NYC)

There is to the best of the author's knowledge no decision of the Swiss Supreme Court dealing with the *incapacity* of the parties as a ground for denying enforcement pursuant to Article V(1)(a) NYC. Cases concerning the *invalidity* of the arbitration agreement under Article V(1)(a) NYC mainly relate to the requirement of a written arbitration agreement (see above discussion on Article II(1) and (2) NYC).

4.2 No proper notice or violation of due process (Article V(1)(b) NYC)

No proper notice

The lack of proper notice as a ground for denying recognition and enforcement of an award under Article V(1)(b) NYC was addressed by the Supreme Court in some detail in a decision of 2014 in relation to an award rendered under the 1998 rules of arbitration of the ICC.³³

It concerned a case in which the ICC had notified the request of arbitration to the defendant at an address in Cannes, which had been provided by the claimant and had been used by the defendant in two previous proceedings. Delivery of the request to the defendant at that address was confirmed, but the request was then returned to the ICC. The ICC was notified

³³ Swiss Supreme Court, Decision 5A_409/2014, 15 September 2014, paras. 5.2 and 5.3, ASA Bull. 4/2016, p. 1015.

that the defendant had moved when further communications were sent to the defendant at the same address. The request was then successfully served by a bailiff to an employee of the defendant at his Cannes address. In parallel, it was also sent to the defendant by email and uploaded onto an online file-sharing site, of which the defendant was informed by the applicant through an online social network. Subsequent communications were then sent to the defendant by mail to his Cannes address and by email. At enforcement stage, the defendant claimed that it had not received proper notice of the arbitration on the basis that the documents relating to the procedure had been addressed to his former address in Cannes and not to his official domicile in Monaco.

The Supreme Court first examined which law had to be applied by the enforcement courts when deciding on a defence to enforcement for lack of proper notice pursuant to Article V(1)(b) NYC. Drawing a distinction between Article V(1)(b) and (d) NYC, the Supreme Court noted that Article V(1)(b) NYC, which aims at safeguarding the parties' right to be heard, merely sets a minimum standard; as such, it has the effect of limiting the parties' autonomy to agree on the arbitral procedure (V(1)(d) NYC). The Court considered that, as a result, the respect of this minimum standard cannot (exclusively) be assessed by reference to the parties' agreement. The Court then observed that the question of whether Article V(1)(b) NYC sets an international standard of the right to be heard is subject to controversy, but that courts tend to use as starting point the way this right is understood at the place of enforcement, in this case Switzerland, taking into account the specificities of international arbitration and international criteria.

The Supreme Court then proceeded to interpret the requirement that the parties be given "proper notice" within the meaning of Article V(1)(b) NYC in light of the minimum standard of the right to be heard. It found that "proper notice" meant that the form of the communication must be appropriate and must be sent to the correct address. It held that domestic procedural rules applicable in the context of court proceedings are not relevant to determine whether the form of the communication is appropriate and that this has led to a variety of different forms of notification having been considered adequate (*e.g.* mail, registered mail, fax or telex). It held that the form of the communication is in any event appropriate if it complies with the domestic law of the state in which the addressee is domiciled.³⁴ The Court

³⁴ In Switzerland, the requirements regarding the form of communications applicable in court proceedings are set out in Articles 138 and 139 of the Swiss Code of Civil Procedure. Pursuant to these provisions, summons, procedural orders and decisions must be sent by registered mail or by other means requiring confirmation of receipt, whereas other

further found that a communication which is made to the addressee's last known address in accordance with the relevant arbitration rules (as provided under Article 3 of the 1998 ICC Rules) was sufficient to respect the addressee's right to be heard, in particular when the addressee could reasonably expect to receive such a communication.

Applying this reasoning to the case at hand, the Supreme Court ruled that the defendant had been properly notified of the arbitration and had sufficient knowledge of the proceedings to assert its rights in the arbitration. The Court in particular took into account the fact that the request for arbitration had successfully been served by a bailiff to one of his employees at his Cannes address and subsequent communications were made both by mail at that address and by email, as well as the fact that the notification complied with the requirements of the applicable arbitration rules.

Failure to participate in the arbitration

In two further decisions rendered in 2011, the Supreme Court rejected the defendants' objections that the enforcement of the award should be refused pursuant to Article V(1)(b) NYC on the basis that they had not been able to participate in the arbitration. In the first,³⁵ the Court found that the defendant had in fact been notified of the request for arbitration and could not rely on Article V(1)(b) NYC at enforcement stage simply because it had refused to designate its arbitrator and to participate in the arbitration. In the other,³⁶ the Supreme Court found that the defendant had failed to satisfy its burden of establishing that there were grounds for refusing enforcement, recalling that in an appeal to the Supreme Court it is not sufficient for the defendant to merely allege that it had not been able to participate in the arbitration without any discussion as to why the lower court's contrary findings should be disregarded.³⁷

Lack of reasoning

In a decision rendered in 2013,³⁸ the Supreme Court examined whether the lack of reasoning of a decision rejecting the defendant's challenge of an

documents may be sent by mail. Documents may only be sent by email if the addressee consents to this form of communication.

³⁵ Swiss Supreme Court, Decision 5A_427/2011, 10 October 2011, ASA Bull. 2/2013, p. 404.

³⁶ Swiss Supreme Court, Decision 5A_441/2011, 16 December 2011.

³⁷ Pursuant to Article 106(2) of the Swiss Supreme Court Act, the Supreme Court only examines a violation of fundamental rights if the violation was invoked by the appellant and its pleadings on this point are duly reasoned.

³⁸ Swiss Supreme Court, Decision 5A_68/2013, 5A_69/2013, 26 July 2013, para. 4, ASA Bull. 2/2014, p. 326.

arbitrator (a reasoning not being required under the 1998 ICC Rules which applied in that case) violated the defendant's right to be heard such as to constitute a ground for refusing the requested enforcement of the award. It ruled that the lack of reasoning was not a ground for denying the recognition and enforcement of the award under Article V(1)(b) NYC.

The Supreme Court, applying the general principles governing the relationship between a *lex specialis* and a *lex generalis*, observed that this issue had to be determined primarily on the basis of Article V(1)(b) NYC rather than under the public policy exception set out in Article V(2)(b) NYC, the latter being necessarily of a subsidiary nature. The Court then referred to a case rendered under the 1927 Geneva Convention on the execution of foreign arbitral awards,³⁹ in which it had held that, although the lack of reasoning renders the enforcement court's mission more difficult, it is a risk that must be borne by parties who have voluntarily accepted to refer the dispute to arbitration. The Court recalled its established case law rendered in the context of challenge proceedings in Switzerland (Article 190(2)(e) PILA), according to which the rule that decisions of ordinary state courts must be duly reasoned does not necessarily apply to arbitration, where party autonomy plays a much more important role and where the right to be heard does not include the right to a reasoned decision.⁴⁰

The Court concluded that since the parties had freely agreed to refer their dispute to arbitration under the ICC Rules, they could not complain at enforcement stage that the ICC Rules departed from the provisions applicable to state court proceedings.

4.3 Arbitral tribunal decided on matters not covered by the arbitration agreement (*extra potestatem*) or granted relief beyond the relief requested by the parties (*ultra petita*) (Article V(1)(c) NYC)

The ground set out in the first alternative of Article V(1)(c) NYC, *i.e.* the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, was briefly discussed by the Swiss

³⁹ Swiss Supreme Court, Decision 101 Ia 521, para 4e. The Geneva Convention ceased to have effect in Switzerland as of 20 March 2007.

⁴⁰ See Swiss Supreme Court, Decisions 134 III 186 (4A_468/2007), 22 January 2008, para. 6.1, ASA Bull. 2/2008, p. 353; 133 III 235 (4P.172/2006), 22 March 2007, para. 5.2, ASA Bull. 3/2007, p. 592; 130 III 125 (5P.315/2003), 9 December 2003, para. 2.2, ASA Bull. 3/2004, p. 583.

Supreme Court in a decision of 2011.⁴¹ It concerned a case in which a Swiss court had denied its jurisdiction to hear a claimant's claim for damages arising from unjustified attachment proceedings in Switzerland on the basis that such a claim fell within the scope of the arbitration agreement between the parties and had already been rejected by an arbitral tribunal in a partial award. The Supreme Court observed that Swiss courts are only bound by the preclusive effect of a foreign arbitral award if it is enforceable in Switzerland under the Convention. The Court held that enforcement should be denied under the first alternative of Article V(1)(c) NYC if an arbitral tribunal has decided matters over which it lacked jurisdiction (*extra potestatem*) because such matters did not fall within the subject-matter or personnel scope of the arbitration agreement. It remitted the matter to the lower court for decision on the enforceability of the award.

4.4 Irregularity in the composition of the arbitral tribunal (Article V(1)(d) NYC)

Lack of jurisdiction & irregular composition

In a decision rendered in 2010,⁴² the Supreme Court addressed the irregularity in the composition of the arbitral tribunal as a ground for denying enforcement under Article V(1)(d) NYC.

The arbitral agreement in that case provided for arbitration before the arbitral tribunal of the chamber of commerce and industry of Czechoslovakia. By the time the dispute arose, however, this institution had ceased to exist following the dissolution of Czechoslovakia. By operation of law, it had been replaced by another institution. The defendant resisted the enforcement of the award rendered by a tribunal of the successor institution on the basis that it lacked jurisdiction as it did not correspond to the tribunal designated by the parties in their arbitration agreement. The defendant also complained that the tribunal had not applied the relevant procedural rules.

The Supreme Court upheld the lower court's finding that the award had been rendered by a tribunal which had been established in accordance with the agreement of the parties. The reasoning of the lower court was that the original institution no longer existed and the intention of the parties when opting for arbitration was to exclude the jurisdiction of state courts. The

⁴¹ Swiss Supreme Court, Decision 4A_508/2010, 14 February 2011, para. 3, ASA Bull. 1/2012, p. 108.

⁴² Swiss Supreme Court, Decision 4A_124/2010, 4 October 2010, para. 6, ASA Bull. 1/2012, p. 76.

lower court found that the tribunal of the successor institution, being a private and trustworthy independent tribunal, fulfilled the objectives initially pursued by the parties. The lower court further found that, the parties having not specifically agreed on the applicable procedural rules, the rules of the replacement tribunal should apply, provided they did not significantly differ from the rules applicable before the tribunal originally designated in the arbitration agreement. The Supreme Court agreed with the lower court's finding that the only difference in the two sets of rules concerned the right for the parties to request security for costs and that this did not aggravate the parties' position or deprive them of their procedural rights.

The defendant also invoked the irregular composition of the tribunal on the basis that the decision on jurisdiction had been taken by a panel of 10 people instead of the three-member tribunal required under the arbitration clause. The Supreme Court recalled its established case law⁴³ according to which the principle of good faith commands that objections of a formal nature be raised already during the proceedings on the merits and precludes a party from making such objections only once the outcome is known. In the words of the Supreme Court *"this principle also applies to procedural objections to the enforcement of an award under the NYC, which were not raised in a timely fashion already in the arbitration proceedings. ... The NYC does not, however, require a party which has raised such an objection, but without success, to in addition use all possible remedies available to challenge the award."*⁴⁴ It is sufficient if the objection is made during the arbitration and is not subsequently withdrawn. The Court suggested that the defendant had not clearly objected to the composition of the tribunal in the arbitration itself and upheld the lower court's findings that the decision on jurisdiction had been taken in accordance with the applicable substantive law and procedural rules.

Lack of independence and impartiality

The second decision in which the ground of Article V(1)(d) NYC was addressed by the Supreme Court concerns a case in which the defendant claimed that the award had been rendered by a tribunal which did not present sufficient guarantees of impartiality.⁴⁵ The defendant argued that the applicant's counsel and the arbitrator had practised law before the same court of appeal in the United States and had met on one occasion at a time when

⁴³ See e.g. Swiss Supreme Court, Decision 130 III 66 (4P.162/2003), 21 November 2003, para. 4.3, ASA Bull. 1/2004, p. 144.

⁴⁴ Swiss Supreme Court, Decision 4A_124/2010, 4 October 2010, para. 6.3.3.1, ASA Bull. 1/2012, p. 76.

⁴⁵ Swiss Supreme Court, Decision 4A_233/2010, 28 July 2010, ASA Bull. 1/2012, p. 97.

the applicant's counsel worked in the law firm in which the arbitrator's daughter was doing her internship (a fact which had been brought to the attention of the defendant's counsel at the outset of the arbitration but had not given rise to a challenge of the arbitrator at the time). The defendant argued that the enforcement of the award should be denied as a result under Article IV(1)(d) and under the public policy exception of Article V(2)(b) NYC.

Unsurprisingly, the Supreme Court ruled that the facts invoked by the defendant were not sufficient to conclude to the arbitrator's lack of independence and impartiality. The Court made however three interesting observations. It first noted that in order for the enforcement of an award to be denied under Article V(1)(d) NYC, the irregularity in the composition of the tribunal must have played a causal role in the outcome of the arbitration. Second, the Court recalled that the principle of good faith requires an objection regarding the lack of independence and impartiality of an arbitrator to be made as soon as the ground for the objection is known. Third, the Court observed that if the lack of independence or impartiality of the members of the arbitral tribunal were averred, enforcement of the award could be refused under both Article V(1)(d) NYC and Article V(2)(b) NYC. This last observation might have to be slightly nuanced in view of the more recent case law of the Supreme Court referred to in Section 4.2 above,⁴⁶ in the sense that enforcement should primarily be refused on the basis of Article V(1)(d) NYC, which as *lex specialis* should take precedence over the public policy exception of Article V(2)(b) NYC.

4.5 Award not binding, set aside or suspended (Article V(1)(e) NYC)

Pursuant to Article V(1)(e) NYC, recognition and enforcement of an award may be denied if the award has not yet become binding or has been set aside or suspended in the country of origin. In several recent cases, the Supreme Court examined when an award should be considered "binding" within the meaning of Article V(1)(e) NYC.⁴⁷ The Supreme Court has repeatedly stated that the drafters of the Convention wanted to avoid a

⁴⁶ Swiss Supreme Court, Decision 5A_68/2013, 5A_69/2013, 26 July 2013, para. 4, ASA Bull. 2/2014, p. 326. See however, Swiss Supreme Court, Decision 4A_386/2015, 7 September 2016, para. 2.3.4.

⁴⁷ Swiss Supreme Court, Decisions 5A_409/2014, 15 September 2014, para. 6, ASA Bull. 4/2016, p. 1015; 135 III 136 (4A_403/2008), 9 December 2008, para. 3, ASA Bull. 3/2009, p. 530; 5P.292/2005, 3 January 2006, para. 3.2, ASA Bull. 4/2006, p. 748; 4P.173/2003, 8 December 2003, para. 3, ASA Bull. 1/2005, p. 119; 5P.371/1999, 21 March 2000, ASA Bull. 2/2002, p. 266.

“double exequatur”, *i.e.* the requirement of the award’s enforceability in the country of origin or of any procedure to confirm its enforceability in the country of origin.⁴⁸ Accordingly, a foreign arbitral award is considered “binding” in Switzerland if it can no longer be challenged by an ordinary means of recourse, but it does not need to be enforceable in the state in which it was rendered.

However, in accordance with Article V(1)(e) NYC *in fine*, Swiss courts will, as a rule, refuse to enforce an award if it has been set aside in the country of origin or if its effects have been stayed. In a landmark decision rendered in 2008,⁴⁹ the Supreme Court, formally reversing its earlier case law,⁵⁰ held that the stay of an award’s enforceability in the country of origin only constitutes a ground for refusing enforcement in Switzerland pursuant to Article V(1)(e) NYC if the stay is ordered through a decision of the competent courts, not if it simply arises automatically by operation of the law.

Applying the above principles, the Supreme Court refused to deny the enforcement of the award on the grounds of Article V(1)(e) NYC in the following cases:

- The defendant invoked the fact that the challenge of an award rendered by a tribunal seated in France before the French courts automatically led to a stay of its enforceability pursuant to Article 1506 of the French New Code of Civil Procedure.⁵¹
- The defendant argued that no document confirming the enforceability of the award had been issued by the courts of the country of origin (Latvia), which could refuse to issue such a document if a party established that there had been major procedural irregularities in the arbitration.⁵²
- The defendant claimed that an award rendered in England could be challenged before the English courts and that such a challenge would automatically stay its enforceability. The Supreme Court found that the defendant had not only failed to establish that the

⁴⁸ *Ibid.* See already Swiss Supreme Court, Decision 108 Ib 85, 26 February 1985, para. 4e, ASA Bull. 1/1983.

⁴⁹ Swiss Supreme Court, Decision 135 III 136 (4A_403/2008), 9 December 2008, para. 3, ASA Bull. 3/2009, p. 530.

⁵⁰ Swiss Supreme Court, Decision 110 Ib 191, 14 March 1984, para. 2c, ASA Bull. 4/1984, p. 206.

⁵¹ Swiss Supreme Court, Decision 135 III 136 (4A_403/2008), 9 December 2008, para. 3, ASA Bull. 3/2009, p. 530.

⁵² Swiss Supreme Court, Decision 5P.292/2005, 3 January 2006, para. 3.2, ASA Bull. 4/2006, p. 748.

award could still be challenged through ordinary proceedings, but had also not shown that the stay of the award's enforceability had actually been ordered by the English courts.⁵³

- The defendant relied on a decision of the Court of Appeal in London annulling a winding up decision rendered by the High Court of Justice on the basis of an arbitral award issued by a tribunal seated in London. The Supreme Court found that, in its decision, the Court of Appeal neither questioned the validity of the award nor formally ordered the stay of its enforcement. The Court of Appeal had merely refused the requested winding up of the debtor, considering that it would have been an excessively severe measure in circumstances where the debtor had made a serious counterclaim which exceeded the amount of the main claim.⁵⁴

In a decision rendered in 2007,⁵⁵ the Supreme Court was faced with an award that had been rendered in Syria and challenged before the Syrian courts, which had annulled the award and decided on the merits. The Supreme Court held that in cases where the courts of the country of origin have the power to modify an arbitral tribunal's ruling on the merits in appeal proceedings, the foreign decision that is being recognised and enforced in Switzerland is the decision of the Syrian courts, not the arbitral award. The Supreme Court therefore considered that the Convention did not apply.

4.6 Comments on the requirements of Article V(1) NYC in light of the recent decisions of the Swiss Supreme Court

The cases summarised above show that the mere existence of a procedural irregularity is not sufficient for Swiss courts to refuse the recognition and enforcement of a foreign award under Article V(1) NYC. The threshold for successfully resisting recognition and enforcement in Switzerland under Article V(1)(a)-(d) NYC is quite high and will typically require the defendant to establish that:

- (i) There was a procedural irregularity;

⁵³ Swiss Supreme Court, Decision 4P.173/2003, 8 December 2003, para. 3, ASA Bull. 1/2005, p. 119.

⁵⁴ Swiss Supreme Court, Decision 5P.371/1999, 21 March 2000, ASA Bull. 2/2002, p. 266 (confirmed in Decision 5P.246/2000, 29 August 2000).

⁵⁵ Swiss Supreme Court, Decision 4A_137/2007, 20 July 2007, para. 5, ASA Bull. 4/2007, p. 798.

- (ii) In case of an irregularity in the composition of the tribunal,⁵⁶ this irregularity was causal to the outcome of the arbitration; and
- (iii) An objection to the procedural irregularity was raised in a timely fashion already during the arbitration itself (or there are legitimate reasons why the defendant was prevented from doing so).

As regards Article V(1)(e) NYC, a party resisting enforcement will have to establish the following in order for Swiss courts to deny the requested recognition and enforcement:

- (i) The award can still be challenged by an ordinary means of recourse and is therefore not “binding”; or
- (ii) The competent courts in the country of origin have rendered a specific decision suspending the award’s enforceability, annulling the award or declaring it null.

Conversely, the party seeking recognition and enforcement of a foreign award in Switzerland will not have to establish that the award is enforceable in its country of origin.

Unlike enforcement courts in other jurisdictions,⁵⁷ the Swiss Supreme Court has not yet had to decide whether Swiss courts should, in certain circumstances, recognise and enforce an award notwithstanding its annulment in the country of origin. If a defendant relied on a foreign annulment decision as a ground for resisting recognition and enforcement of an award, Swiss courts should, in the author’s view, as a threshold issue, determine whether the foreign annulment decision is enforceable in

⁵⁶ Whether or not a similar requirement applies to procedural irregularities covered by Article V(1)(b) NYC is subject to controversy. See Paolo Michele PATOCCHI/Cesare JERMINI, in *Basler Kommentar, Internationales Privatrecht*, 3rd ed., Basel 2013, ad Article 194 PILA, para. 87. The violation of the right to be heard being considered by the Swiss Supreme Court as a violation of a formal nature, the author’s view is that the defendant invoking a violation of the right to be heard as a ground for refusing enforcement of an award under Article V(1)(b) NYC has to establish the violation, but does not in addition have to establish that the violation was causal to the outcome of the arbitration. See e.g. Swiss Supreme Court, Decision 121 III 331, 25 April 1995, para. 3c, ASA Bull. 4/1995, p. 708.

⁵⁷ See e.g. the recent Decision of the US Court of Appeals, Second Circuit, 2 August 2016, *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V., v Pemex-Exploración Y Producción*, No. 13-4022, in which the US Court of Appeals affirmed a district court decision recognising an arbitral award that had been set aside by a court in Mexico, where the arbitration was seated. See also, Decisions of the French *Cour de Cassation: Putrabali*, Cass. Civ. 1, 29 June 2007, No. 05-18053 and *Hilmarton*, Cass. Civ. 1, 23 March 1994, No. 92-15137 and Cass. Civ. 1, 10 June 1997, Nos. 95-18402 and 95-18403.

Switzerland. As a result, Swiss courts could proceed with the recognition and enforcement of the foreign award in spite of a foreign annulment decision, if the enforceability of the foreign annulment decision in Switzerland must be denied because it was issued by a court which lacked jurisdiction (Article 25(1) PILA) or its enforcement would be contrary to Swiss public policy (Articles 25(3) and 27 PILA).

5. The grounds for denying recognition and enforcement under Article V(2) NYC

This section addresses the two grounds for denying recognition and enforcement of a foreign award which can be examined by the enforcement courts on their own motion pursuant to Article V(2) NYC.

5.1 Lack of arbitrability (Article V(2)(a) NYC)

To the best of the author's knowledge, the lack of arbitrability as a ground for denying recognition and enforcement of an award under Article V(2)(a) NYC has not yet been addressed by the Swiss Supreme Court.

5.2 Public policy (Article V(2)(b) NYC)

Under Article V(2)(b) NYC, recognition and enforcement may be denied if it would be contrary to public policy. According to the established case law of the Swiss Supreme Court, the public policy exception must be interpreted restrictively, in particular when it is relied on as a ground for denying the recognition and enforcement of a foreign court decision, where its scope is narrower than in relation to the direct application of foreign law (so-called "*effet atténué de l'ordre public*").⁵⁸ The Supreme Court recently confirmed that the same principles apply to the public policy exception under Article V(2)(b) NYC.⁵⁹ A foreign decision or award is contrary to public policy if its recognition or enforcement would conflict in an intolerable way with the conception of justice prevalent in Switzerland⁶⁰. Article V(2)(b) NYC covers both procedural public policy and substantive public policy.⁶¹

⁵⁸ See *e.g.* Swiss Supreme Court, Decision 116 II 625, para. 4a.

⁵⁹ Swiss Supreme Court, Decisions 4A_374/2014, 26 February 2015, para. 4.2.2, ASA Bull. 3/2015, p. 576; 4A_124/2010, 4 October 2010, para. 5.1, ASA Bull. 1/2012, p. 76; 4A_233/2010, 27 July 2010, para. 3.2.1, ASA Bull. 1/2012, p. 97.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

The Supreme Court has held that Swiss procedural public policy requires compliance with the fundamental procedural rules derived from the Constitution, such as the right to a fair trial and the right to be heard, including in the context of the recognition and enforcement of a foreign award. The recent decisions of the Supreme Court dealing with the public policy exception under Article V(2)(b) NYC are summarised in this section.

Procedural public policy

Right to be heard

In the period under review, there is only a single instance in which the Supreme Court denied the recognition and enforcement of a foreign award on the grounds of Swiss procedural public policy.⁶²

The circumstances of this case are quite exceptional. A dispute arose between two professional football trainers and a Mexican football club was brought before the Conciliation and Dispute Resolution Commission (“CDRC”) of the Mexican Football Federation. The CDRC rendered a first decision in 2009, in which it stayed the arbitration as a result of criminal proceedings initiated by the club on the basis that one of the contracts at issue in the arbitration had been forged. In a second decision rendered in 2011 the CDRC, put an end to the proceedings. The reasons indicated by the CDRC for terminating the proceedings were their status, the report from the tribunal’s secretary attesting that the parties had taken no procedural step since the stay had been ordered in 2009, and the passage of time since that decision. In the meantime, the trainers had seized the FIFA’s Players’ Status Committee (“PSC”) with the same claims as those brought before the CDRC, which the PSC rejected in 2012. The CSJ’s decision was overturned by the Court of Arbitration for Sport (CAS) in Switzerland, which granted part of the trainers’ claims. The club then brought an application to set aside the CAS award before the Swiss Supreme Court. In its application, the club invoked the preclusive (*res judicata*) effect of the CDRC’s 2011 decision and claimed that the CAS award should be set aside under the public policy exception of Article 190(2)(e) PILA as a result. The Supreme Court recalled that the preclusive effect of a foreign decision or award is only taken into account by Swiss courts if it is enforceable in Switzerland. It is in this context that the Supreme Court proceeded to analyse the enforceability of the CDRC’s 2011 decision in light of the New York Convention.

⁶² Swiss Supreme Court Decision, 4A_374/2014, 26 February 2015, ASA Bull. 3/2015, p. 576.

The Supreme Court first analysed whether or not the CDRC's 2011 decision, having merely been rendered by a body of a sports federation, qualified as an "arbitral award" at all. Leaving open the question of whether this issue had to be determined under the law of the country of origin, the law of the country of enforcement or an autonomous interpretation of the Convention, the Supreme Court held that, in order to qualify as an arbitral award, a decision rendered by a private body must be comparable to a decision rendered by state courts.⁶³ The Court found the CDRC's decision did qualify. It however denied its recognition and enforcement under Article V(2)(b) NYC on the basis that the CDRC's 2011 decision had been rendered in blatant violation of the parties' right to be heard and was therefore contrary to Swiss procedural public policy. The Supreme Court took into account in particular the fact that the CDRC had terminated the proceedings on its own motion, simply because of the passage of time, without having invited the parties to the hearing at which this decision was taken, without informing them of such a hearing or warning the parties of the consequences of further inaction, despite the fact that the withdrawal of action could only occur upon the request of a party and after prior notice to the parties under the applicable law.

The Supreme Court left open the question as to whether a party's failure to invoke a fundamental violation of its right to be heard could, in accordance with the principle of good faith, preclude it from relying on the public policy exception of Article V(2) NYC, which the enforcement court may examine on its own motion. The Court indeed found that in this case the club did not have the opportunity to invoke such a violation during the proceedings before the CDRC and could not reasonably be expected to challenge the CDRC's decision before the CAS merely in order to obtain a declaration that its decision was contrary to the applicable law. The Supreme Court therefore concluded that the club's failure to challenge the CDRC's decision in the country of origin did not preclude it from resisting enforcement on the grounds of Article V(2)(b) NYC.

In another case,⁶⁴ the defendant invoked the public policy exception of Article V(2)(b) NYC, arguing that the sole arbitrator had prejudged the merits of the dispute by ordering it to reimburse to the other party the advance towards the costs of the arbitration in a partial award before having heard the case on the merits and had thereby violated its right to be heard. The Supreme Court rejected the defendant's argument on the basis that

⁶³ See Section 1 above.

⁶⁴ Supreme Court, Decision 4P.173/2003, 8 December 2003, para. 4, ASA Bull. 1/2005, p. 119.

partial awards were expressly allowed under the applicable arbitration rules (ICC Rules), the defendant had not established that the tribunal lacked the power to decide on costs in such partial awards and that, in any event, the decision on the costs relating to the jurisdictional challenge had no impact on the decision on the merits.⁶⁵

Lack of reasoning

In a 2013 decision, the Supreme Court ruled that a tribunal's decision on the challenge of an arbitrator is not contrary to Swiss public policy if it is not reasoned, especially as the absence of reasoning was permitted under the applicable arbitration rules (1998 ICC Rules).⁶⁶ This decision is in line with the Supreme Court's earlier case law rendered in relation to the Geneva Convention, according to which an award is not contrary to public policy if it does not set out the reasons on which it is based.⁶⁷

Lack of impartiality and independence

In a 2010 decision summarised above,⁶⁸ the Supreme Court confirmed that an award is contrary to public policy if it is rendered by arbitrators who do not present sufficient guarantees of independence and impartiality, but found that the tribunal's lack of independence or impartiality had not been established by the defendant in that particular case.⁶⁹

Arbitration proceedings tainted by fraud

In a decision rendered in 2014,⁷⁰ the Supreme Court confirmed that the recognition and enforcement of an award obtained fraudulently can be

⁶⁵ See further Supreme Court, Decision 138 III 520 (5A_754/2011), 2 July 2012, para. 6, ASA Bull. 1/2013, p. 156, which refers to a decision by the lower instance court in which that court found that the arbitral tribunal's decision to award costs according to the "loser pays it all" rule was not contrary to Swiss public policy. The Supreme Court did not review the lower court's decision on this point for lack of sufficient motivation of the appeal.

⁶⁶ Swiss Supreme Court, Decision 5A_68/2013, 5A_69/2013, 26 July 2013, para. 4, ASA Bull. 2/2014, p. 326.

⁶⁷ Swiss Supreme Court, Decision 101 Ia 521, 12 December 1975, para. 4a and 62 I 143, 9 October 1936.

⁶⁸ Swiss Supreme Court, Decision 4A_233/2010, 28 July 2010, para. 3, ASA Bull. 1/2012, p. 97. See Section 4.4.

⁶⁹ The lack of independence and impartiality of the tribunal as a ground for resisting recognition and enforcement under Article V(2)(b) NYC was also rejected in another case on the basis that this objection had not been raised previously and was therefore inadmissible pursuant to Article 99 of the Supreme Court Act: Decision 5A_427/2011, 10 October 2011, para. 7.2.3, ASA Bull. 2/2013, p. 404.

⁷⁰ Swiss Supreme Court, Decision 5A_165/2014, 25 September 2014, para. 6, ASA Bull. 2/2015, p. 393.

contrary to procedural public policy. The Court however observed that the recognition and enforcement will not be denied if the fraud has not had any influence on the arbitral award. The Court therefore found that the mere fact that witnesses were under criminal investigation for having given false testimony during the arbitration was not a ground for refusing enforcement if their testimony did not have any influence on the outcome of the arbitration. The Court also found that the criminal complaint relied on by the defendant was not sufficient proof that a criminal offence had actually been committed in relation to the arbitration.

Res judicata

The Swiss Supreme Court has held on several occasions, albeit in decisions unrelated to the Convention, that the principle of *res judicata* is part of procedural public policy.⁷¹ This principle was recently invoked as a defence to the recognition and enforcement of an award under Article V(2)(b) NYC in a case where the defendant argued that the arbitral tribunal's finding that a payment had been obtained fraudulently was incompatible with a decision by the French criminal authorities.⁷² The Supreme Court, recalling that under Swiss law a civil court is only bound by a criminal court's determination of fault and the extent of the damage but not by its findings of fact,⁷³ rejected this argument as it found that, contrary to the defendant's allegations, the French criminal authorities had not confirmed the absence of fraud. The Court also rejected the defendant's alternative argument that the award was contrary to Swiss public policy because it wrongly condoned an unjust enrichment, as it rightly found that this was an issue of substantive law which could not be reviewed by the enforcement court.

Substantive public policy

An award is contrary to Swiss substantive public policy if it is contrary to the fundamental principles of Swiss substantive law to the point where it is no longer compatible with the Swiss legal system and prevailing values, such

⁷¹ See e.g. Supreme Court, Decision 136 III 345 (4A_490/2009), 13 April 2010, para. 2.1, ASA Bull. 3/2010, p. 511. See also, Bernhard BERGER/Franz KELLERHALS, *International and domestic arbitration in Switzerland*, 3rd ed., Bern 2015, p. 738; Nathalie VOSER/Julie RANEDA, *Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution*, ASA Bull. 4/2015, pp. 742-779, 757 *et seq.*

⁷² Supreme Court, Decision 5A_427/2011, 10 October 2011, para. 7, ASA Bull. 2/2013, p. 404.

⁷³ See Article 53(2) of the Swiss Code of Obligations.

as *pacta sunt servanda*, the principle of good faith, prohibition of abuse of right, prohibition of discriminatory measures and spoliation.⁷⁴

Pactum de quota litis

A violation of Swiss substantive public policy was invoked in relation to a contingency fee arrangement (*pactum de quota litis*) between a Canadian attorney and its client, such contingency fee arrangements being prohibited under Swiss law.⁷⁵ The Supreme Court recalled that the public policy exception should not lead to a review by the enforcement court of whether the award is legally correct and had to be applied restrictively if there existed only a remote or fortuitous connection with Switzerland. Referring to its case law regarding the enforcement of foreign decisions or awards,⁷⁶ the Court recalled that an agreement on legal fees is not contrary to public policy simply because it does not exist under Swiss law. What is decisive is whether the difference between the amount of fees due on that basis and the amount which would be obtained under Swiss law is such as to be incompatible with the sense of justice under Swiss law. In this case, the Court ruled that a success fee representing 2% of the amounts awarded was not incompatible with Swiss public policy, considering that the value of the settlement agreement eventually reached by the parties was USD 80 million. The Court also dismissed the argument that the agreement was not allowed under the laws governing the dispute on the basis that the legality of the award cannot be reviewed at enforcement stage.

The above decisions show that the public policy exception of Article V(2)(b) NYC is interpreted very narrowly in Switzerland. Only the most egregious procedural irregularities which have led to a violation of a party's fundamental rights of due process will qualify as a public policy issue. It is also not sufficient for a defendant to establish that the award leads to a result which is contrary to provisions of Swiss law (even mandatory provisions) for enforcement to be denied on the basis that it would be contrary to Swiss substantive policy. The threshold for denying recognition

⁷⁴ See Swiss Supreme Court, Decisions 5A_409/2014, 15 September 2014, para. 7, ASA Bull. 4/2016, p. 1015; 4A_304/2013, 3 March 2014, para. 5.1.1, ASA Bull. 2/2014, p. 384; 138 III 322 (4A_558/2011), 27 March 2012, para. 4.1, ASA Bull. 3/2012, p. 591; 132 III 389 (4P.278/2005), 8 March 2006, para. 2.2.1, ASA Bull. 3/2006, p. 521.

⁷⁵ Swiss Supreme Court, Decision 5A_409/2014, 15 September 2014, para. 7, ASA Bull. 4/2016, p. 1015.

⁷⁶ Thus, in a case relating to the recognition and enforcement of an arbitral award under the Convention, the Supreme Court ruled that a *pactum de palmario* providing for 30% of the amounts awarded in case of success did not bar enforcement: Supreme Court, Decision 5P.201/1994, 9 January 1995, para. 7, ASA Bull. 2/2001, p. 294. See also, Supreme Court, Decision 5P.128/2005, 11 July 2005, para. 2.3.

and enforcement under the public policy exception of Article V(2)(b) NYC is thus extremely high.

6. Conclusion

The recent decisions of the Swiss Supreme Court confirm that Swiss courts continue to take a liberal, pragmatic and pro-enforcement approach to the New York Convention in practice.

This is particularly true in relation to the implementation of the requirements of Article IV NYC. In accordance with the findings of the Supreme Court, Swiss courts will, as a rule, avoid excessive formalism and only insist on strict compliance with the requirements of Article IV NYC if the authenticity of the documents submitted by the applicant in support of its application is disputed.

Moreover, the decisions discussed in this article show that a foreign award can be recognised and enforced in Switzerland even in spite of the absence of an arbitration agreement in writing as required under Article II(1) and (2) NYC or procedural irregularities under Article V NYC in circumstances where the defendant's reliance on those provisions is contrary to the principle of good faith.

Finally, recent decisions confirm that the threshold for successfully resisting recognition and enforcement under the public policy exception of Article V(2)(b) NYC is extremely high and will only be attained in exceptional circumstances.

The above may explain the relatively small number of reported cases in which recognition and enforcement of a foreign arbitral award has been refused by Swiss courts and confirms Switzerland's long-standing tradition of being an arbitration-friendly jurisdiction.

Catherine A. KUNZ, *Enforcement of Arbitral Awards under the New York Convention in Switzerland*

Summary

This article presents an overview of the current practice and case law of the Swiss Supreme Court in relation to the implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

More specifically, this article examines the decisions rendered by the Swiss Supreme Court over the period 2000-2016. Decisions are discussed in relation to the relevant provision of the Convention on an article-by-article basis. For each provision of the Convention, a short commentary is included highlighting the relevant requirements and thresholds that need to be met in light of the recent case law of the Swiss Supreme Court in order for a party to obtain or to successfully resist the recognition and enforcement of a foreign award in Switzerland.

The decisions of the Swiss Supreme Court rendered during the period under review are of particular interest as the Supreme Court has examined several Convention provisions for the first time, whilst confirming, clarifying and even overturning its earlier case law. These decisions confirm that Swiss courts continue to take a liberal, pragmatic and pro-enforcement approach to the New York Convention in practice.

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Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (**mscherer@lalive.ch**) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

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