

# EXTRATERRITORIAL ARBITRATION AND THE NEW YORK CONVENTION

## The example of the new UAE Arbitration Law

- 1 On May 3, 2018, the President of the United Arab Emirates signed into law the new Arbitration Act which had been in preparation for more than a decade. In comparison to the UNCITRAL Model Law and the Egyptian Arbitration Law of 1994, both of which have served as models for the UAE Law, it expands judicial control over awards in two dimensions: First, several grounds for setting aside domestic awards are added, including such grounds as the failure to apply the law chosen by the parties and their inability to dispose of the right subject to arbitration. Second, the scope of application is extended beyond awards made in the territory of the UAE to awards which have been submitted to that law and awards in relationships governed by UAE law. This phenomenon has been dubbed “extraterritorial arbitral awards”.
- 2 The presentation explores the treatment of such awards under the New York Convention. In particular, it asks whether the New York Convention allows the setting aside (and, consequently, denial of enforcement) of extraterritorial awards. This idea has been put forward as a result of the combined reading of articles I(1) and V(1)(e) of the Convention under the U.S. Federal Arbitration Act, as well as former Indian Law. The paper re-examines different concepts of determining an award’s nationality with a view to what was formerly known as the procedural principle. Under this concept, the connecting factor is not the state in which the award was made, but the state the procedural rules of which are applied as the *lex arbitri*.
- 3 An analysis of the *travaux* for Articles I(1) and V(1)(e) reveals that these provisions result from attempts by Western European Countries to implement the procedural principle in the Convention. This attempt has failed half-way and, as a result, the state in which the award was made takes precedence over any other connecting factor. Under the Convention, the reading of the “the law under which the award was made” criterion is far narrower than the wording implies. It does not generally permit the contracting states to treat extraterritorial awards as domestic, set them aside and refuse their enforcement. The award may only be set aside in the state under the law of which it was made if it is considered foreign at the place of arbitration.
- 4 Therefore, even though the UAE arbitration law considers extraterritorial awards as domestic, they are considered foreign under the Convention. This applies, of course, to any jurisdiction implementing the concept of extraterritorial arbitral awards. These jurisdictions include the United States and some Arab States such as Bahrain, Egypt, Oman, Qatar and Saudi Arabia. These results call upon legislators and national judges to take the territoriality principle seriously and may serve as guidance for arbitrators and counsel when determining the enforceability of an award.