

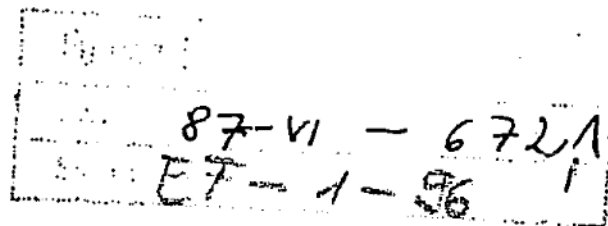
Vorträge, Reden und Berichte aus dem Europa-Institut / Nr. 88

herausgegeben

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**THE APPLICATION OF THE NEW YORK CONVENTION
TO ARBITRATION TO WHICH A STATE IS A PARTY**



Vortrag vor dem Europa-Institut der Universität des Saarlandes

Saarbrücken, 5. Juni 1987

THE APPLICATION OF THE NEW YORK CONVENTION TO ARBITRATION TO WHICH A STATE IS A PARTY^{*)}

I. INTRODUCTION

The question which I want to discuss is whether municipal courts can enforce against a state an arbitration award which had as a subject matter the acts of that state. If municipal courts could have adjudicated every act of a state whether commercial or not and whether emanating from a foreign state or not and determined its validity according to its injurious effect on the individual, there would have been no question to discuss. But that is unfortunately not the case. Municipal courts very often accept certain acts of a state as valid and as not justiciable and apply them in respect of individuals. For example, a state may adopt new monetary regulations, like exchange control or higher tax rates, by way of legislation or executive acts and thereby effectively destroying a foreign investor's chances of earning any income on this investment. It is not only a foreigner's chances of making profit out of an agreement with the state that may be frustrated by subsequent acts of that state, but also a state's own citizen's. But in the latter instance, the relationship between the individual and state is domestic in nature and hardly concerns international law.

When concluding an agreement with a state, the individual is normally in the best bargaining situation and it is customary for the individual to opt for an arbitration clause to protect his rights when a subsequent dispute in connection with the agreement may arise. The mere fact of arbitration does not provide an adequate protection. The effectiveness of the

^{*)} This lecture is part of a more extensive research project relating to the arbitrability of acts of state conducted by the author as an Alexander von Humboldt scholar at the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg. The author wishes to thank the Humboldt-Stiftung for financial assistance in this regard and the Max-Planck-Institute for making its research facilities available.

arbitration process depends also, although not conclusively, on the effective juridical enforceability of any prospective favourable award. This is true regardless of whether or not the original agreement with the state containing the arbitration agreement was internationalised or subjected to its own rules or a combination of international law, municipal law, its own law and international commercial principles.

The purpose is, therefore, to concentrate on the enforceability in domestic courts of arbitration awards in order to ascertain the possible effectiveness of any agreed limitations on the power of the state to perform acts frustrating agreements with the individual. The agreement with the state not to perform certain acts, the clause to refer any dispute which might arise from the agreement to arbitration and the enforcement of any resulting arbitration award, are therefore discussed in their "home sphere" and an individual is primarily governed by municipal and not international law¹.

While all acts of state are justiciable whether by judicial process or arbitration in the international sphere and according to international law, this is not always the case in the municipal sphere. This is the vital difference between international and municipal arbitration involving a state. Municipal courts may sometimes, according to their respective domestic laws, not adjudicate the validity of the actions of a foreign state but must accept them as valid, especially if they are performed in the latter state's own territory². It is an axiom that municipal courts must abide by acts like legislation or other sovereign acts of their own states and that they cannot protect the individual against economic detriment caused by constitutionally valid state actions.

1 See Anglo-Iranian case I.C.J. Reports 1952, p. 93 at 112ff.

2 See e.g. Underhill v. Hernandez 168 U.S. 250. (1897); Buttes Gas Oil Co. v. Hammer and Others [1981] 3 W.L.R. 787; Banco Nacional de Cuba v. Sabbatino 376 U.S. 398 (1964). See for a discussion of this aspect, D.P. O'Connell, International Law, vo.2, 2 ed., at 794ff; Richard B. Lillich,

International law, on the other hand, does not contain an obligation on states and their courts to recognise all acts of a foreign state even if performed in the latter's own territory. This is true especially if the recognition of such acts will be against the state's own public policy³.

A state is entitled to refuse recognition of foreign acts of state if they expropriate contractual rights or even if they are violative of pacta sunt servanda. Pacta sunt servanda is a cardinal principle of international law and it is expected from a state to honour its contractual obligations voluntarily accepted in its agreement with the individual⁴. International law does not compel foreign states to recognise or to accept acts performed contrary to this principle or to abstain from adjudicating those acts⁵. Arbitration tribunals have emphasised that the state's sovereignty is not affected by adjudicating the acts of the state violating its self-accepted contractual obligations⁶ or by applying the principle pacta

(Note 2 continued):

The Protection of Foreign Investment-Six Procedural Studies (1965); M. Singer, "The Act of State Doctrine of the United Kingdom: An Analysis with Comparisons to United States Practice", 75 (1981) A.J.I.L. 283ff.

3 See A. Verdross & B. Simma, Universelles Völkerrecht, 3 ed. 637; Rudolf Geiger, Grundgesetz und Völkerrecht (1985), 329ff.

4 See generally, Hans Wehberg, "Pacta sunt servanda", in: Selected Readings on Protection by Law of Private Foreign Investments by the International and Comparative Law Center, The Southwestern Legal Foundation, Dallas (1964) 51ff; Lowell C. Wadmond, "The Sanctity of Contract between a Sovereign and Foreign National" in: Selected Readings, supra, 139ff.

5 See Verdross (note 3), 774ff.

6 See the discussion of the arbitral awards in the Libyan nationalization cases, Robert V. von Mehren and Nicholas Kourides, "International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases". 75 (1981), A.J.I.L., 476 at 502-4.

sunt servanda in respect of agreements with individuals against the state⁷.

2. THE NEW YORK CONVENTION

One of the conventions which is important in determining and providing for the enforcement of an arbitration award against a state, is the Convention on the Recognition and Enforcement of Foreign Arbitration Awards, New York, June 10, 1958⁸, just called the New York Convention of 1958. The New York Convention makes provision for 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 sought⁹. It is trite law that this convention applies to arbitration agreements and arbitral awards to which a state is a party "if it relates to a transaction concerning commercial activities in their widest sense"¹⁰. And, if the other party to the agreement or award is a private persons, physical or legal¹¹.

7 See e.g. the ICSID arbitral award of 30 November 1979 in: AGIP-Com Spa v. Government of the Popular Republic of the Congo, in: vol. VIII (1983) Y.C.A., 133 at 140. See also Wadmond (note 4), 160, for references to old arbitral decisions; M. Domke, "Foreign Nationalization: Some Aspects of Contemporary International Law", in: Selected Readings (note 4), 303 at 317ff; Von Mehren and Kourides (note 6), 514ff.

8 See 330 UN Treaty Series 38, no. 4739 (1959).

9 Art. I (1).

10 See A.J. van den Berg, The New York Arbitration Convention of 1958 - Towards a Uniform Judicial Interpretation (1981), 279; R. Kaiser, Das europäische Übereinkommen über die internationale Handelsschiedsgerichtsbarkeit vom 21. April 1961 (1967, 62; J. Buhmann, Das auf den internationalen Handelsschiedsvertrag anzuwendende nationale Recht unter besonderer Berücksichtigung der neueren multilateralen Konventionen (1972), 72; Lionello Cappelli-Perciballi, "The Application of the New York Convention of 1958 to Disputes between States and between State Entities and Private Individuals; The Problem of Sovereign Immunity, 12 (1978), International Lawyer, 197.

11 See Van den Berg (note 10), 282.

The recognition and enforcement, in terms of the convention, of arbitration awards against states¹² and against private entities on application by states¹³ had occurred in the practice of municipal courts. In Shaheen Natural Resources Company Inc. v. Sonatrach¹⁴, for example, was a company, which was regarded as an arm of the Algerian Government, successful to enforce before the United States Court of Appeals an arbitration award rendered in Switzerland in terms of the convention, although Algeria itself was not a party to the convention. Arbitration agreements between states and private persons have also been enforced by municipal courts in the sense that a dispute between them was referred to arbitration¹⁵.

2.1. The Nature of the award

2.1.1. Foreign awards

For present purposes, the obligation to enforce an arbitration award given in another state or which is considered as non-domestic¹⁶ arises if the award was given in pursuance of an agreement to submit all differences "in respect of a defined legal relationship whether contractual or not, concerning a

12 Birch Shipping Corporation v. The Embassy of the United Republic of Tanzania, 507 F. Supp. 311 (1980); Maritime International Nominees Establishment v. The Republic of Guinea, 505 F. Supp. 141 (1981) (DDC); Ipitrade International S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (1978) (DDC); see also SEEE v. Socialist Federal Republic of Yugoslavia, Court of Appeal of Rouen of 13 November 1984, in: vol. XI (1986), Y.C.A., 491.

13 Imperial Ethiopian Government v. Baruch Foster Corporation, 535 F. 2d 334 (1976); The Government of Kuwait v. Sir Frederick Snow & Partners and Others, vol. 1 (1983), Lloyd's Law Reports, 596, vol. IX (1984), Y.C.A., 451, House of Lords in 16 March (1984) 2 W.L.R., 340.

14 585 F. Supp. 57 (1983), 733 F. 2d 260 (1984) in: vol. X (1985), Y.C.A., 540.

15 See McDonnell Douglas Corporation v. Kingdom of Denmark, United States District Court, 607 F. Supp. (1985) 1016 in: vol. XI (1986), Y.C.A., 581ff; Union of India v. Lief Hoegh & Co., 1983, All India Reports, Gujarat 34.

16 Art. I (1).

subject matter capable of settlement by arbitration"¹⁷, to arbitration.

The obligation to recognise and enforce exists in respect of awards given in another state. However, it is not a requirement that the subject matter of the arbitration must have been international in nature. The subject matter could be a domestic transaction¹⁸ provided, of course, that the award is foreign. This means that if a state concludes with its own nationals an agreement containing a curtailment on its power to perform specific acts in relation to that national and it provides for arbitration in another state, any arbitration award rendered in pursuance of that agreement would at least, theoretically, be enforceable according to the convention.

2.1.2. The non-domestic award

The convention also applies to awards made in the same country where enforcement is sought if they are "not considered as domestic awards"¹⁹. Presumably may an award become non-domestic, and thus international,

- if the parties or at least one of them, are foreigners i.e. non nationals²⁰ or
- if the award is rendered not according to the state's municipal law but according to either a foreign munici-

17 Art. II (1).

18 See van den Berg (note 10), 17ff.

19 Art. I (1).

20 For example, in Britain arbitration is international if one of the parties is a foreigner while in Belgium both parties must be foreigners - see Alain Vanderelst, "Increasing the Appeal of Belgium as an International Arbitration Forum? - The Belgian Law of March 27, 1985, Concerning the Annulment of Arbitral Awards", June 1986, Journal of International Arbitration, 77, at 82ff. See Susan P. Brown, "Enforcement of Foreign Arbitral Awards - The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", vol. 14 (1) (1984), The Georgia Journal of International and Comparative Law, 217, at 232.

- pal law²¹ or international law or
- if the award is rendered by an international tribunal
 - i.e. the basis of the tribunal is a treaty or
 - if the award concerns an international subject matter or might have international ramifications or
 - if the award has any combination of the above elements.

An example of an award which would presumably not be considered as domestic by most states if it were to have been rendered in their territories, is one rendered by the Iran-United States Claims Tribunal. This tribunal was established by international agreement between Iran and the U.S.A. with compulsory arbitration jurisdiction to decide claims of nationals of the U.S.A. against Iran and of nationals of Iran against the U.S.A. if the claims arose out of contract or expropriation. The Hague, The Netherlands, was chosen as the place of arbitration without any apparent juridical reason. The law to be applied and the procedure applicable, were not that of The Netherlands but were specifically provided for²². According to Dutch law, in the strict sense of the word, this tribunal might have been a nullity because, except for the implied permission of the Dutch government, the tribunal did not fulfil the legal requirements for an arbitration tribunal. But, because its existence and jurisdiction were recognised by the law of Iran and the U.S.A., it could have been recognised as a valid arbitration tribunal although the New York Convention did not apply to the awards rendered because of the lack of any previous agreement between the parties to

21 In Sigval Bergesen, Owners of the M/T Sydfonn, Frostfonn and Nordfonn v. Joseph Muller, 710, F. 2d 928 (1983), at 932; Horst Wetzmüller, Der "internationale" Schiedsspruch im UN-Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche vom 10.6.1958 von New York (1966) (Dissertation) at 56ff.

22 See arts. V and III of the Claims Settlement Declaration of Jan. 19, 1981, in vol. VII (1982), Y.C.A., 257ff.

arbitrate, as required by the convention²³.

2.1.3. The a-national award

With the a-national award is meant an award which is, as a result of the agreement between the parties, not governed by any municipal procedural legal system²⁴. The arbitration in such a case is not conducted in accordance with any municipal legal system and the mandatory provisions of municipal legal systems are not applicable to it²⁵. The arbitration and the award is "de-nationalized". It is clear that the "de-nationalized" award is recognised not only by authors²⁶, but also by the legislation of countries²⁷, by municipal courts²⁸, and arbitration tribunals²⁹. The fact that one of the parties to arbitration is a state, has played a role with arbitration tribunals to de-nationalise an award if that award is rendered in a foreign country; the ration being not to subject the state to the control of the courts of the foreign state.³⁰...

23 See Dallal v. Bank Mellat (1986), 1 All E.R., 239 (Q.B.), 250 and 252.

24 See Van den Berg (note 10), 29 ff.

25 Ibid., 33.

26 See Von Mehren & Croff in: Aksen & Von Mehren, International Arbitration between Private Parties and Governments (1982), 97; Wetzmüller (note 21), 39 and 41; see also Von Mehren & Kourides (note 6), 508.

27 E.g. of France, see Craig, Park & Paulsson, "French Codification of a legal framework for International Commercial Arbitration: The Decree of May 12, 1981", in: vol. VII (1982), Y.C.A., 407, at 411.

28 See Société Européenne d'Etudes v. Socialist Federal Republic, The Netherlands Supreme Court, 26 October 1973, 65, I.L.R., 356, at 362ff and SEEE v. Yugoslavia, in: vol. I (1976), Y.C.A., 198; see also SEEE v. Socialist Federal Republic of Yugoslavia, Court of Appeal of Rouen of 13 November 1984, in: vol. XI (1986), Y.C.A., 491, at 498.

29 See Saudi Arabia v. Arabian American Oil Co. (Aramco), award of 23 August 1958, in: 27 (1963) I.L.R., 117, at 154ff; Texaco Overseas Petroleum Co. v. The Government of the Libyan Arab Republic award of 19 January 1977, in: 53 (1979) I.L.R., 389, at 433.

30 Ibid.

2.2. The nature of the agreement

2.2.1. Legal Relationship

According to the New York Convention, the states undertook to recognise an agreement under which the parties undertake to submit to arbitration differences in respect of a defined legal relationship, whether contractual or not³¹. This article should be read together with the one allowing states to accept the convention with the reservation that they will apply it 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 reservation³². This implies that in the absence of such a reservation, the convention does apply to differences arising out of legal relationships which are not commercial. It also applies to non-contractual legal relationships. This means that differences arising out of administrative agreements are also within the application sphere of the convention because they are covered by the words of the convention as being defined legal relationships³³. The convention may, therefore, apply to agreements between a state and an individual concerning public matters and which are governed not by private but public law. The commercial nature of a relationship should be determined by looking at the national law of a state in the widest sense³⁴. In other words, a legal relationship may be regarded as commercial by mere recognition by the national legal system although not according to the law in its normal and strict sense.

31 Art. II (1).

32 Art. I (3).

33 For the meaning of administrative agreements, see H. Booyesen, "A Survey of Legal Relations flowing from State Agreements", 10 (1984), S.A.Y.I.L., 56, at 80ff.

34 See European Grain & Shipping Ltd. v. Bombay Extractions Ltd., High Court of India, Appellate Branch of Bombay, November 5, 1981, in: vol. VIII (1983), Y.C.A., 371, at 373.

In B.V. Bureau Wijsmuller v. USA³⁵ a United States court regarded an arbitration agreement to arbitrate in London between the captain of a warship of the U.S.A. and a Dutch salvage company, as null and void because it was against the legislation of the United States and because relations arising out of the activities of warships are not, according to U.S. law, commercial within the meaning of the commercial reservation to the NYC which the U.S. has made. This is an unfortunate and unacceptable decision in view of its narrow view of the meaning of "commercial" and its strict adherence to U.S. legislation. In the case of the reservation, the relationship giving rise to the differences must be commercial. To which relationship is the reservation referring when the agreement to arbitrate refers to a commercial relationship, but is affected by a non-commercial relationship? In other words, which relationship is conclusive when two relationships - the one commercial, the other not - can be regarded as being the cause of the differences?

For example, state X buys pencils for its civil servants from a foreign individual A and provides in the contract that any differences as far as the interpretation of the contract is concerned, will be referred to arbitration. State X, thereafter, adopts monetary regulations allowing foreigners to take only a limited amount of money out of the country. The result of the enactment of these regulations, is that A can take only 75 % of the contracted amount out of the country. A avers that according to the contract, he is entitled to repatriate the entire purchase price and that the regulations violate the provisions of the contract. He applies for special permission to be exempted from the monetary regulations basing his application on his contract with the state, but is unsuccessful in his application. The difference between A and X can be

35 Vol. III (1978), Y.C.A., 290, US District Court for the southern district of New York, December 21/1976.

viewed as arising from the administrative relationship flowing from the monetary regulations and A's application and therefore, outside the reservation because of the non-commerciality of the relationship. On the other hand, the difference may also be regarded as arising from the purchase agreement and thus clearly of a commercial nature and falling within the limits of the reservation.

This problem does not only arise in connection with the commercial reservation but also becomes relevant to determine generally whether or not a particular dispute falls within the arbitration agreement. In other words, whether or not a particular difference is in respect of a defined legal relationship. It also relates to the question whether a particular subject matter is capable of settlement by arbitration.

In Libyan American Oil Co. v Socialist People's Libyan Arab Jamahiriya³⁶, the United States District Court, district of Columbia, had to consider the enforcement of an arbitration award given in pursuance to an arbitration clause in certain petroleum concessions, granted by Libya to an American corporation, Liamco. The differences between the parties were caused by an act of nationalization of Liamco's rights in terms of concession agreement. Although the court based its jurisdiction on the original agreement containing the arbitration clause, the court separated the original relationship (the concessionary agreements) from the second relationship (the act of nationalization). The application for enforcement of the arbitration award is refused, because the act of nationalization is an act of state of a foreign government and not justiciable by the American courts, and one may imply, not arbitrable in terms of the convention according to this particular court³⁷.

36 482 F. Supp. 1175 (1980).

37 At 1178ff.

Although the splitting-up of relationships is not entirely unknown and has occurred in respect of more or less comparable issues³⁸, it should be avoided in this type of situation³⁹. It is, of course, a question of interpreting the relevant arbitration clause to determine whether or not a particular dispute is covered by it⁴⁰, but in construing the arbitration agreement, a policy favouring arbitration has been rightly followed by courts, especially as far as international contracts are concerned⁴¹. The mere fact that a foreign act of state, or non-commercial act, does affect a commercial relationship, does not mean that the latter loses its commercial nature. A difference may be the result of a non-commercial act of state as in the hypothetical example above, without implying that all differences must take the character of the relationship created by that act. The effect of a non-commercial act of state can be accepted as a fact and be adjudicated on as far as its implications for a commercial relationship are concerned, without necessarily implying that the non-commercial act of state is adjudicated, or that its validity is questioned, or that the relationship created by that non-commercial act of state, is the direct justiciable subject. The formulation of the claimant's claim will natural-

38 See Nova Jersey Knit Ltd. v. Kammgarn Spinnerei GmbH (1977) 1 W.L.R. 713 (H.L.).

39 The U.S.A. decision in the Liamco case, is regarded as being devoid of any precedential value in the U.S.A. because a motion to vacate the district court decision was granted by the Court of Appeals - see M.V. Forrestal "Examples of and Reasons for Increased Use of International Arbitration" in G. Aksen and R.B. von Mehren International Arbitration between Private Parties and Governments (1982), 52ff. See also Libyan American Oil Co. (Liamco) v. Socialist People's Libyan Arab Yamahirya in vol. VII (1982), Y.C.A. 382.

40 See Van den Berg (note 10) 149ff.

41 See e.g. U.S. Court of Appeals decision in Becker Autoradio U.S.A. Inc. v. Becker Autoradio-Werk GmbH, 585 F. 2d 39 (3d Cir. 1979).

ly play an important role in determining whether the subject of adjudication arises from the one or the other relationship.

For example, in the hypothetical facts given previously, A could base his claim on the contract and the fact that it allows him to receive in his country the whole purchase price. The act of state - the promulgation of the regulations - frustrates the contract by making that impossible. The difference amounts to a construction of the contract, viz. whether A has the right to repatriate the whole purchase price or not. The validity of the act of state is not questioned, neither the state's sovereign power to perform it⁴². The state is merely not allowed to hide behind its own act or to use it as an excuse to frustrate its contractual relationship with a particular individual. The difference between the parties is still one arising from a commercial relationship. On the other hand, would A base his claim on the fact that the administration wrongly exercised its discretion in not allowing him, in terms of the regulations, to take all his money out of state X, he is clearly basing his claim on an administrative relationship and the difference between the parties cannot be characterised as arising out of a commercial relationship.

2.2.2. Subject matter

The state must, according to the NYC, recognise an agreement to arbitrate differences "concerning a subject matter capable of settlement by arbitration"⁴³. Recognition and enforcement

⁴² See the argument in the Arbitral Award of 30 November 1979 of the International Centre for the Settlement of Investment Disputes in A.G.I.P. Com. S.p.A. v. Government of the Popular Republic of the Congo in vol. VIII (1983) Y.C.Y., 133 at 140.

⁴³ Art. II (1).

of an arbitral award given in pursuance of such an agreement may also be refused if the competent authority in the country where recognition and enforcement are sought, finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country⁴⁴. The law according to which the arbitrability of the subject matter should be ascertained, is not clear at all. Various different national systems can become relevant in this regard.

It may happen that the arbitrability of a particular subject in respect of which the difference between the parties arises must be ascertained by a multitude of national legal systems before the whole arbitration process and the enforcement of the award are completed⁴⁵. For example, the arbitration agreement may be enforced in one country in which case the arbitrability of the dispute will have to be proved by the lex fori, the award may be rendered in another and attacked there on account of the non-arbitrability of the subject matter according to the lex fori or the applicable law and lastly, enforcement of the award may be sought in a third country where the enforcement may be attacked on the ground of the non-arbitrability of the dispute according to the lex fori or according to the law to which the parties have subjected the arbitration agreement. It is only after the arbitrability of the subject matter had survived the scrutiny of all these different municipal systems that the arbitration process and the enforcement of the award may have a successful ending and can be regarded as effective.

The arbitrability of the subject matter is closely connected

44 Art. V (2) (a)

45 See Jorg-Gentinetta, Die Lex Fori Internationaler Handelsschiedsgerichte (1973), at 306, who avers that the arbitrability of the subject matter is to be determined "anhand jener Rechtsordnung(en), in deren Bereich das streitige Verhältnis hineingreift".

to the public policy of a specific country and is often regarded as forming part of the whole concept of public policy⁴⁶. According to this view, it becomes superfluous as a separate concept and is absorbed into the public policy concept. The same distinction which exists in respect of public policy, viz. between domestic public policy and international public policy, should then also exist in respect of the concept of arbitrability.

National courts should therefore, not adhere to the letter of their national laws in determining the arbitrability of a subject matter but should adopt a more flexible approach as far as international transactions and international arbitration are concerned.

From the existing, but unfortunately scant case law, the following very general guidelines can be deduced:

Firstly, although the US District Court decided in Liamco v. Socialist People's Libyan Arab Jamahiriya⁴⁷ that the executive and legislative act of nationalization of a foreign country is a non-arbitrable subject, the Swedish Court of Appeal decided on the same facts that the subject matter is arbitrable according to Swedish law⁴⁸. As has been pointed out, the latter decision is the acceptable one. There is certain-

46 Van den Berg, (note 10), 368; Hans-Viggo von Hülse, Die Gültigkeit von internationalen Schiedsvereinbarungen (1973), at 142; Bertheau, Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche (1965), at 60.

47 482 F. Supp. 1175 (1980), at 1178.

48 Liamco v. Socialist Peoples Arab Republic of Libya, decision of the Svea Court of Appeal, Juni 18, 1980 in vol. VII (1982) Y.C.A., 359, at 361.

ly no reason why a municipal court should not allow the arbitration of the effect of the legislative and executive acts of a foreign state on an agreement voluntarily concluded by that state with a foreign individual.

Secondly, some municipal courts have limited arbitrable matters to those allowed by the strict application of their own municipal laws and which are not conclusively governed by their own municipal legislation as applied by their own courts⁴⁹.

But fortunately, others have adopted a more liberal approach. The latter have been less inclined to adhere to the strict application of their own municipal laws and were even prepared to forsake mandatory provisions of their municipal law, especially as far as procedure is concerned, for the sake of international arbitration⁵⁰. The latter approach is to be preferred and there is no reason why it should not logically

49 See SA Agima v. Smith Industries Ltd., Belgian Tribunal de Commerce, Brussels, September 13, 1979 in vol. VIII (1983) Y.C.A., 360; Audi-NSA Auto Union A.G. v. SA Adelin Petit & Cie, Belgian Cour d'Appel de Liege, 12 May 1977 in vol. IV (1979) Y.C.A., 254, at 256; see also B.V. Bureau Wijsmuller v. U.S.A., U.S. District for the southern district of New York, December 21, 1979, in vol. III (1978) Y.C.A., 290ff; Sherk Enterprises Aktiengesellschaft v. Société des Grandes Marques, Corte de Cassazione, May 12, 1977, n 3989 in vol. IV (1979), Y.C.A., 286.

50 See decision of the Oberlandesgericht, Hamburg of April 3, 1975, in vol. II (1977), Y.C.A., 241; Decision of the Oberlandesgericht, Hamburg of 6 September 1984, text in Gaja, International Commercial Arbitration-New York Convention vol. 2 V. 188:1; SA Tradax Export v. S.p.a. Carapelli, Corte di Appello di Firenze, October 22, 1976, in vol. III (1978), Y.C.A., 279; Total Soc. It. p.a. v. Archillo Lauro, Italian Corte Di Cassazione, January 25, 1977, n 361 in vol. IV, (1979), Y.C.A., 284; Bobbie Brooks Inc. v. Lanificio Walter Banci s.a.s., Corte Di Appello Di Firenze, October 8, 1977 in vol. IV (1979) Y.C.A. 289; see also the decision of the Spanish Supreme Court, October 8, 1981, in vol. VIII (1983), Y.C.A., 406.

and consistently be applied to the question of arbitrable subject matters. Every constitutional law rule and principle of a state which prohibit certain acts of the state of being the subject matter of arbitration, especially as far as their effects are concerned, should therefore, not be applied in the case of conventional arbitration, i.e. arbitration to which the NYC applies.

Thirdly, between the non-arbitrable subject matters according to a country's own municipal law applicable to domestic arbitration and the principle that in international - conventional - arbitration the non-arbitrability of those subject matters should not apply, there is a conflict which has to be solved by a judicial weighing-process. The country's domestic interest in prohibiting a particular subject matter or dispute from being arbitrable should be weighed against the international need to foster international arbitration and provide an effective recognition and enforcement procedure for international arbitration agreements and awards, which underlies the convention⁵¹.

2.3. Grounds for not recognizing and enforcing the award

Only two grounds which are of particular importance to arbitration agreements to which a state is a party and on which the resultant arbitration award may be refused recognition and enforcement by the courts, will be discussed. The fact that recognition and enforcement of an award can also be refused as a result of the non-arbitrability of the subject matter, has already been discussed and repetition is un-

51 Such a weighing process is also suggested for Argentine law - see H. A. Grigera Naon, "Public Policy and International Commercial Arbitration: The Argentine Perspective", June 1986, Journal of International Arbitration, 7, at 25. See also Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc. 105 S.C. (1985), 3346, at 3355ff.

necessary.

2.3.1. The incapacity of the parties

Recognition and enforcement of an arbitration award may be refused, according to the NYC, if proof is furnished by a party that the parties to the arbitration agreement were under the law applicable to them under some incapacity⁵². This article is particularly important as far as state parties are concerned and has a close relationship with the question, which subject-matters are arbitrable. It may be accepted that the capacity of a state to conclude arbitration agreements is determined either by their own national law or public international law⁵³.

The following general remarks relating to the capacity of states to conclude arbitration agreements with individuals, whether nationals or foreigners, may be made:

- Firstly, international law does not really contain limitations on the capacity of states to conclude arbitration agreements.
- Secondly, the capacity or incapacity of a state or other public legal person to conclude an arbitration agreement is not affected by the convention.
- Thirdly, the authority of a particular organ of a state to bind the state to an arbitration agreement, is relevant and should always be considered.
- Fourthly, the conclusion of the so-called stabilization

52 See art. V (1) (a).

53 Van den Berg, (note 10), 278.

clauses may in this regard present particular problems analogous to those already discussed in respect of a non-commercial relationship affecting a commercial one. Can a state, therefore, through an executive organ conclude a commercial agreement with an individual undertaking not to adopt any measures, including legislation, which will have the effect of nullifying any advantage to which the individual is entitled in terms of the agreement and providing that in the case of a dispute arising in respect of the agreement, it will be arbitrable? Will that be possible even if the executive cannot constitutionally curtail the legislature in respect of legislation? Has the executive the capacity to conclude such an agreement and making it arbitrable? The answer should be "yes". The agreement and the arbitration clause do not factually and juridically curtail the power of the legislature. It is also not the power of the legislature and the exercise thereof which directly become the subject of arbitration. The state is simply asked to adhere to its accepted contractual obligation - pacta sunt servanda - and what is referred to arbitration, is the effect of possible, future legislation on that agreement.

2.3.2. Public Policy

An arbitrable award, according to the NYC, may be refused recognition and enforcement by the competent authority in the country if the recognition or enforcement of the award would be contrary to the public policy of that country⁵⁴. Municipal courts had on their own initiative developed a distinction between domestic public policy and international public policy⁵⁵. The mere fact that an international or

54 Art. V (2) (b).

55 See Van den Berg, (note 10), 360ff; Denis Coakley Ltd. v. Ste. Michel Reverdy, Cour d'appel of Reims (Civil Chamber), July 23, 1981 in vol. IX (1984), Y.C.A., 400.

foreign arbitration award violates a mandatory legal rule of the national law or that the award would have been regarded as violating the public policy of the country if it were a domestic award does not mean that the international public policy of the country has been violated.

The violation of a country's policy is therefore not to be accepted lightly in respect of awards falling⁵⁶ under the NYC⁵⁷. The public policy defence is narrowly construed and enforcement or recognition is only denied when enforcement would violate the forum state's most basic notions of morality and justice⁵⁸ or would violate fundamental principles of the country's legal order, hurting intolerably the feeling of justice⁵⁹. National courts have interpreted the public policy defence in the convention in favour of international arbitration even disregarding their own municipal laws in the process, thereby paving the way for a new approach towards international arbitration and presumably also for a more effective arbitration systems in respect of state actions.

2.3.3. Absence of domestic link

The NYC does not require that any link exists between the arbitration award and the state where recognition and enforcement are sought. Forum shopping for the enforcement of arbi-

56 See also Wetz Müller, (note 21), 61ff.

57 See e.g. the decision of the Spanish Supreme Court of October 8, 1981, in vol. VIII (1983), Y.C.A., 406, at 407; Efxinos Shipping Co. Ltd. v. Rawi Shipping Lines Ltd., Corte di Appello of Genova, May 2, 1980 in vol. VIII (1983) Y.C.A., 381; Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier (rakta) 508 F. 2d 969 (2d Cir. 1974) in vol. I (1976), Y.C.A., 205.

58 Fertilizer Corporation of India v IDI Management Inc. 517 F. Supp. 948 (1981) at 955.

59 Leopold Lazarus Ltd. v Chrome Ressources S.A. Cour de Justice, Canton of Genève, September 17, 1976, in vol. IV (1979), Y.C.A., 311.

tration awards on the basis of the presence of assets, is clearly within the provisions of the convention. Socialist People's Libyan Arab Republic Jamahiriya v Libyan American Oil Co⁶⁰ can in this respect not be accepted.

2.4. Immunity of states

The immunity of states is a specialised topic and cannot be discussed here. Only some aspects of particular importance and flowing from the convention discussed will be highlighted.

The NYC contains an obligation on states to recognize and enforce arbitration awards. Although this should be done according to the procedural law of the state, this is true only in so far as the provisions of the convention allow it⁶¹. The immunity of states of the jurisdiction of a foreign court may be regarded as procedural but the obligation to recognize and enforce awards would be meaningless if a state, party to an arbitration award, could frustrate recognition and enforcement by hiding behind its sovereign immunity. Any claim to immunity by a state in a recognition or enforcement process is therefore excluded by the NYC as far as states parties to the convention are concerned. The submission to foreign arbitration by the state has not been regarded as a denial or limitation of the sovereign status of the state⁶².

The consent to arbitrate is normally also regarded as a

60 Decision of 19 June 1980, in: vol. VI (1981), Y.C.A., 151.

61 See art. III.

62 See Union of India v Lief Hoegh & Co. High Court of Gujarat, May 4, 1982, All India Reports 1983, Gujarat 34 in: vol. IX (1984), Y.C.A., 405, at 408ff.

waiver by the state of its immunity⁶³ which cannot unilaterally be revoked⁶⁴. Although the consent to arbitrate is regarded as a waiver of immunity in the recognition and enforcement process, including execution⁶⁵, it should depend on a proper interpretation of the arbitration agreement how far the consent to arbitrate is also a waiver of immunity. Because the jurisdiction of the court in the recognition and enforcement proceedings is based on direct or implied consent - the waiver of immunity - it does not matter that the subject matter of the dispute concerns a non-commercial act or acta jure imperii of the foreign state or the effect thereof. Arbitration tribunals generally also recognise that the agreement to arbitrate by a state amounts to a waiver of immunity normally granted by international or municipal law and that the jure imperii or the jure gestionis character of the subject matter of the agreement is, therefore, irrelevant⁶⁶.

63 See Maritime International Nominees Establishment v. The Republic of Guinea, 505 F. Supp. 141 (1981) (DDC); Libyan American Oil Co. (Liamco) v. Socialist People's Arab Republic of Libya, Svea Court of Appeal, (note 48), 361; Liamco v. Socialist People's Libyan Arab Jamahiriya, 482 F. Supp. 1175 (1980), at 1178.

64 See Ipitrade International S.A. v. Federal Republic of Nigeria, 465 F. Suppl. 824 (1978) (DDC); Birch Shipping Corporation v. The Embassy of the United Republic of Tanzania, 507 F. Supp. 311 (1980), at 312: "An agreement to arbitrate, standing alone, is sufficient to implicitly waive immunity". See also Georges R. Delaume, "State Contracts and Transnational Arbitration", 75 (1981), A.J.I.L., 784, at 786ff.

65 See also Von Mehren & Croff, (note 26), 104.

66 See International Chamber of Commerce Award of February 16, 1983, no. 3493, in: SPP (Middle East) Ltd. v. Arab Republic of Egypt, in vol. IX (1984), Y.C.A., 111, at 120ff.

TEXT OF THE CONVENTION

Article I

1. This 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 arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. 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.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the con-

ditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
 - (a) The duly authenticated original award or a duly certified copy thereof;
 - (b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (b) The 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; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority

in the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Government of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- (c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent

to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument or ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.
 2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.
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