International Commercial Arbitration

Balthasar

2. Auflage 2021
ISBN 978-3-406-74383-2
C.H.BECK

valid arbitration agreement covering the dispute at hand.[326] However, since the NYC does not specifically provide for any preclusion regarding the defences contained in article V, particularly the lack of a valid arbitration agreement under article II or article V(1)(a), there are also some who reject any formal preclusion under the regime of the NYC.[327]

Indeed, the decisive question is what law governs the issue of preclusion. This problem is often not addressed by national courts.[328] The prevailing view seems to be that the issue of preclusion must be analyzed from the perspective of the enforcing court, that is, on the basis of the NYC and the principle of good faith inherent in the Convention[329] (*cf. infra* mn. 198). In that respect, however, it must be observed that the NYC provides only a rather feeble basis for deriving any workable principle of preclusion. In contrast, national arbitration laws typically not only provide for preclusion as such, but also determine in what time and manner an objection must be raised in order to preserve that objection for any later annulment or enforcement proceedings (*supra* mn. 191). If it is up to the applicable law of procedure to determine when and how any objections against the proceedings must be raised, it should also be up to that law to determine the consequences attributed to any failure to so object. Thus, the preclusion for participating in the arbitral proceedings without raising a possible objection should be governed by the applicable *lex arbitri*.[330] This ensures the application of a uniform standard to which the parties can adapt at the time of the arbitral proceedings and avoids the imposition of possibly varying standards of the different enforcement jurisdictions *a posteriori*. **193**

A preclusion resulting from delay in raising a plea as to the arbitral tribunal's jurisdiction is specifically provided for by article V EuC, which is applicable and **194**

China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co. Ltd, YCA XX (1995), 671 (675); *Hebei Import & Export Corp. v. Polytek Engineering Ltd*, [1999] 2 HKC 205 = YCA XXIV (1999), 652 (667); Italy: *Cass.*, YCA XXI (1996), 602 (605); Spain: *Trib. Supr.*, YCA XXXII (2007), 525 (530); Switzerland: *BGer.*, ASA Bull. 2012, 76 = YCA XXXVI (2011), 340 (mns 51 *et seq.*); *BGer.*, ASA Bull. 2016, 134 (139); USA: *AAOT Foreign Economic Association (VO) Technostroyexport v. International Development and Trade Services, Inc.*, 139 F.3d 980 (982) (2nd Cir. 1998); *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (293 *et seq.*) (5th Cir. 2004); *International Standard Electric Corp. v. Bridas SA Petrolera, Industrial y Comercial*, 745 F.Supp. 172 (180) (S.D.N.Y. 1990).

[326] Wilske/Fox, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. II mn. 275; Borris/Hennecke, *ibid.*, Art. V mn. 61; USA: *Exportkhleb v. Maistros Corporation*, 790 F.Supp. 70 (73) (S.D.N.Y. 1992). – With regard to form: van den Berg, *The New York Arbitration Convention of 1958*, 1981, 185; Germany: *OLG Schleswig*, IPRspr 2000, no. 185; 409 (411 *et seq.*) = YCA XXXI (2006), 652 (657 *et seq.*); *OLG Hamburg*, YCA IV (1979), 266 (267); *BayObLG*, YCA XXX (2005), 568 (570 *et seq.*); Greece: *CA Athens*, YCA XIV (1989), 638 (639); Hongkong: *China Nanhai Oil Joint Service Corp. Shenzen Branch v. Gee Thai Holdings Co. Ltd*, YCA XX (1995), 671 (677 *et seq.*). – Also *cf.* China: *Higher People's Court of Zhejiang*, YCA XXXVIII (2013), 347 (350) (regarding an award made in China but held to be governed by the NYC).

[327] Wolff, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. II mn. 51; Germany: *OLG Frankfurt*, IPRax 2008, 517 (518) = YCA XXXII (2007), 351 (352).

[328] See, e.g., Germany: *OLG München*, SchiedsVZ 2013, 62 (64).

[329] Borris/Henecke, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mn. 52; Haas/Kahlert, in: Weigand/Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019, mn. 21.370; Germany: *OLG Schleswig*, RIW 2000, 706 (707 *et seq.*) = YCA XXXI (2006), 652 (657); Switzerland: *BGer.*, ASA Bull. 2012, 76 = YCA XXXVI (2011), 340 (mn. 51). – Also *cf.* Peru, where article 75(4)–(7) of the Arbitration Act 2008 provides autonomous principles of preclusion with regard to the defences of article V(1)(a)–(d).

[330] Nacimiento, in: Kronke *et al.* (eds), *Recognition and Enforcement of Foreign Arbitral Awards*, 2010, 224.

precludes the respective defence of article V(1)(a) NYC under the more-favourable law principle of article VII(1) NYC.[331]

195 *(4) Failure to take recourse against the award in the country of origin.* It is subject to dispute whether the respondent is precluded from raising defences against the enforcement of the award to the extent that the award could have been challenged in setting-aside proceedings in its country of origin and the respondent failed to do so within the respective time limit. While some courts have accepted such a preclusion,[332] the prevailing view among courts and commentators rejects any formal preclusion, arguing that the NYC does not require a party to the arbitration to take recourse against the award in order to preserve the right to raise a defence under article V.[333]

196 However, even where no formal preclusion is assumed for mere failure to make a timely application to have the award set aside, courts may resort to the principle of good faith and the prohibition of contradictory behavior (*infra* mn. 198) where the respondent behaved in a way that the claimant could reasonably assume that enforcement of the award would not later be resisted on those grounds.[334] However, the mere failure to take recourse against the award in itself will normally not establish contradictory behavior on the part of the respondent.

197 In this respect as well, the analysis should not be made exclusively from the perspective of the country of enforcement and the NYC, but should take account of the respective provisions of the *lex arbitri*[335] (*cf. supra* mn. 193). Thus, it would be inappropriate to preclude the respondent from raising defences for not having challenged the award in the country of origin, where failure to do so would not result in any preclusion under the law of that country.[336]

198 *(5) Good faith.* It is also accepted that the principle of good faith and the prohibition of contradictory behavior derived therefrom are inherent principles of the New York Convention and may thus defeat a ground of refusal under article V that is otherwise formally established.[337] However, a defence existing under article V may only be barred for reasons of good faith in exceptional circumstances. In particular, good faith and the

[331] Austria: *OGH*, JBl 2005, 661 (664 *et seq.*) = YCA XXX (2005), 421 (428 *et seq.*); Germany: *BGH*, SchiedsVZ 2011, 105 (106) = YCA XXXVI (2011), 273 (276).

[332] See, e.g., UK: *Minmetals Germany GmbH v. Ferco Steel Ltd*, [1999] 1 All E.R. (Comm) 315 (331).

[333] Borris/Hennecke, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mn. 67; Haas/Kahlert, in: Weigand/Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019, mn. 21.372; Scherer, *ibid.*, Art. V mn. 148; Otto/Elwan, in: Kronke *et al.* (eds), *Recognition and Enforcement of Foreign Arbitral Awards*, 2010, 406 *et seq.*; Austria: *OGH*, IPRax 2006, 496 (498 *et seq.*) = YCA XXX (2005), 421 (426); Germany: *BGHZ* 188, 1 = SchiedsVZ 2011, 105 (106) = YCA XXXVI (2011), 273 (276), overruling the prior case law before the German arbitration law reform; Hong Kong: *Paklito Investment Ltd v. Klockner East Asia Ltd*, YCA XIX (1994), 664 (672 *et seq.*); Switzerland: *BGer.*, ASA Bull. 2012, 76 = YCA XXXVI (2011), 340 (mn. 52). Also *cf.* Canada: *Smart Systems Technologies Inc. (US) v. Domotique Secant Inc. (Canada)*, 2008 QCCA 444 = YCA XXXIII (2008), 464 (mns. 19 *et seq.*): no preclusion by not raising defences against confirmation of award in country of origin.

[334] Germany: *BGH*, SchiedsVZ 2008, 196 (197 *et seq.*); *BGHZ* 188, 1 = SchiedsVZ 2011, 105 (107) = YCA XXXVI (2011), 273 (276); Hong Kong: *China Nanhai Oil Joint Service Corp. v. Gee Tai Holdings Co. Ltd*, YCA XX (1995), 671 (677). Also *cf.* van den Berg, *The New York Arbitration Convention of 1958*, 1981, 185; Borris/Hennecke, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mns 50.

[335] *Cf.*, e.g., *BGH*, SchiedsVZ 2008, 196 (198) ("defences against a foreign award which could have been raised in the country of origin by a time-limited court proceedings but have not been so raised (and thus are precluded *in the country of origin*)").

[336] As is the case with the UNCITRAL Model Law, where a party may still resist recognition and enforcement of the award on the basis of article 36 after the time limit in article 34(3) for an application for setting aside the award has passed.

[337] van den Berg, *The New York Arbitration Convention of 1958*, 1981, 185; Borris/Hennecke, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mn. 48.

prohibition of contradictory behavior have been invoked to preclude the respondent from asserting a defence where it has failed to raise that objection during the arbitral proceedings (*supra* mn. 193) or by challenging the award in the country of origin (*supra* mn. 196). As a principle inherent in the NYC, its application is autonomous and does not depend on the respective approach of the *lex arbitri* or the domestic law of the country of enforcement.

ff) Partial recognition and enforcement. In cases where the arbitral tribunal has exceeded its authority, article V(1)(c) provides that it is possible to enforce only a part of the award, to the extent that it is covered by the submission to arbitration (*infra* mn. 244). It is accepted, however, that article V(1)(c) is the expression of a general principle allowing for partial enforcement in any case where the defence to enforcement only affects part of the award and the different parts of the award can be separated.[338] **199**

gg) Relevance of decisions by the arbitral tribunal or national courts. *(1) General.* It is still a quite unsettled question to what extent a court deciding on a defence raised against the enforcement of an arbitral award under article V NYC may be bound by a decision of the arbitral tribunal or court judgments rendered in other jurisdictions.[339] **200**

(2) Decisions by the arbitral tribunal. As far as deference to decisions by the arbitral tribunal is concerned, the question arises mainly with regard to the jurisdiction of the tribunal, that is, the validity and scope of the parties' agreement to arbitrate. The prevailing view does not recognize any "*Kompetenz-Kompetenz*" of the arbitral tribunal to decide on the existence of a valid arbitration clause which would bind the enforcement court. Instead, the court is bound neither by the legal nor by the factual findings of the tribunal and makes its own review under article V[340] (as for the decision under article II, see *supra* mn. 152). This has been held to apply also to an interim award on jurisdiction.[341] – As far as the *scope* of the arbitration agreement is concerned, see *infra* mn. 242. **201**

(3) Decisions by national courts. The situation is more controversial with regard to the deference to be paid to decisions by national courts of other jurisdictions. In **202**

[338] Borris/Hennecke, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mns 81–84, 258; Quinke, *ibid.*, Art. V mn. 449 (arbitrability); Haas/Kahlert, in: Weigand/Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019, mn. 21.374; Austria: *OGH*, IPRax 2006, 496 (501) = YCA XXX (2005), 421 (423, 435) (public policy); France: *CA Paris*, Rev. arb. 1989, 280 (287) (due process); Germany: *BGH*, NJW 1986, 1436 (1438) (due process); also *cf. BGH*, SchiedsVZ 2017, 200 (202) = YCA XLIII (2018), 451 (mn. 22); Hong Kong: *J.J. Agro Industries (P) Ltd v. Texuna International Ltd*, YCA XVIII (1993), 396 (400 *et seq.*) (public policy); UK: *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp.* [2008] EWCA 1157 = [2009] 1 All E.R. (Comm) 611 (661 *et seq.*) (annulment proceedings); USA: *Laminoirs-Trefilieries-Cableries de Lens, SA v. Southwire Co.*, 484 F.Supp. 1063 (1068) (N.D.Ga. 1980) (public policy). Also see King/Meredith, (2010) 26 *Arb. Int'l* 381–390.

[339] In this respect, also see UNCITRAL Guide 2016, p. 148 *et seq.* (mns 48 *et seq.*).

[340] Haas/Kahlert, in: Weigand/Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019, mn. 21.377; van den Berg, *The New York Arbitration Convention of 1958*, 1981, 312; Nacimiento, in: Kronke *et al.* (eds), *Recognition and Enforcement of Foreign Arbitral Awards*, 2010, 222; Austria: *OGH*, SchiedsVZ 2019, 154 (159); Germany: *BGHZ* 27, 249 = NJW 1958, 1538 (1539); *OLG Celle*, SchiedsVZ 2004, 165 (168) = YCA XXX (2005), 528 (533 *et seq.*); *OLG München*, SchiedsVZ 2009, 340 (342) = YCA XXXV (2010), 383 (385); Ireland: *Kastrup Trae-Aluvinduet A/S v. Aluwood Concepts Ltd*, YCA XXXV (2010), 404 (405); Italy: *CA Trento*, YCA VIII (1983), 386 (387); UK: *Dallah Real Estate and Tourism Holding Co. v. the Ministry of Religious Affairs of the Government of Pakistan*, [2011] 1 AC 763 (771 *et seq.*). – Contra: Austria: *OGH*, SZ 2011, no. 106, 163 (175) = YCA XXXVIII (2013), 317 (mn. 47).

[341] Germany: *OLG Schleswig*, RIW 2000, 706 (708) = YCA XXXI (2006), 652 (659 *et seq.*); Kröll, in: Böckstiegel *et al.* (eds), Arbitration in Germany, 2nd ed., 2015, § 1061 mn. 60. – Contra: *OLG Hamm*, SchiedsVZ 2006, 107 (109) = ASA Bull. 2006, 153 (159 *et seq.*).

principle, the NYC is silent on that issue, except for article V(1)(e), which provides that the setting aside of the award in the country of origin is a possible ground to refuse enforcement of the award in another country. Apart from that, the deference to foreign court decisions with regard to objections against the validity or enforceability of an arbitral award is altogether a matter of national law. In that respect, however, there is considerable uncertainty whether such decisions should be given conclusive effect (*res judicata*) or merely taken into consideration as possible indications as to the merits of an objection to the enforceability of the award where that objection is governed by foreign law.

203 While there are some statements to the effect that foreign judgments on the validity of an arbitral award, particularly those rendered in the country of origin, should be given effect under the general rules regarding the recognition of foreign judgments,[342] it is helpful to distinguish between different situations: An annulment of the award rendered in the country in which or under the law of which the award was made may be given effect as a defence to the enforcement of the award under article V(1)(e) (*infra* mns 280–293). This is a strong indication that, if at all, only judgments rendered in the country of origin as defined in article V(1)(e) should be given effect. The dismissal of an application to set aside the award is not specifically provided for in article V(1)(e), as article V is only concerned with possible defences against the enforcement of the award. However, notably in Germany, the dismissal of an application for *vacatur* is recognized under the general rules on the recognition of foreign judgments.[343] Accordingly, a declaratory judgment on the validity of the arbitration agreement is capable of recognition under the general rules.[344]

204 The grant of a leave of enforcement in the country of origin (or in a third country, for that matter) is generally not considered conclusive with regard to defences raised against an application to enforce the award in another country.[345] However, there are jurisdictions in which the foreign leave of enforcement itself may be the object of enforcement (*infra* mn. 350). In a similar vein, the rejection of an application to enforce the award in a foreign country is generally held irrelevant to its enforcement in the forum.[346] This is because the rejection of an *exequatur*, in contrast to the setting aside of

[342] Australia: *Coeclerici Asia (Pte) Ltd v. Gujarat NRE Coke Ltd*, [2013] FCA 882 (mns 86 *et seq.*, 102 *et seq.*) and, on appeal, *Gujarat NRE Coke Ltd v. Coeclerici Asia (Pte) Ltd*, [2013] FCAFC 109 (mns 55 *et seq.*); Germany: *KG*, SchiedsVZ 2007, 100 (101) = YCA XXXII (2007), 347 (349); *OLG München*, SchiedsVZ 2010, 169 (171) = YCA XXXV (2010), 373; Hong Kong: *Astro Nusantara International BV v. PT Ayunda Prima Mitra*, [2012] SGHC 212; India: *International Investor KCSC v. Sanghi Polyesters Ltd*, YCA XXX (2005), 577 (586); *Lal Mahal Ltd v. Progetto Grano Spa*, YCA XXXVIII (2013), 397; USA: *Cerner Middle East Ltd v. iCapital, LLC*, 939 F.3d 1016 (1023 *et seq.*) (9th Cir. 2019). Also *cf.* Hovaguimian, *J. Int. Arb.* 34 (2017), 79–106.

[343] Germany: *OLG München*, SchiedsVZ 2010, 169 (171 *et seq.*) = YCA XXXV (2010), 371; *OLG Thüringen*, SchiedsVZ 2008, 44 (45 *et seq.*) = YCA XXXIII (2008), 534 (537 *et seq.*). Accord: Australia: *Coeclerici Asia (Pte) Ltd v. Gujarat NRE Coke Ltd*, [2013] FCA 882 (mns 86 *et seq.*, 102 *et seq.*) and, on appeal, *Gujarat NRE Coke Ltd v. Coeclerici Asia (Pte) Ltd*, [2013] FCAFC 109 (mns 55 *et seq.*). In contrast, the foreign decision rejecting an annulment was given no further consideration by *OLG Naumburg*, SchiedsVZ 2011, 228 = YCA XXXVII (2012), 226.

[344] Germany: *OLG Bremen*, BB 1999, Beilage Nr. 12, 18 (19) = YCA XXVI (2001), 326; *KG*, SchiedsVZ 2007, 100 (101). – Contra: Kröll, in: Böckstiegel *et al.* (eds), *Arbitration in Germany*, 2nd ed., 2015, § 1061 mn. 60.

[345] *Cf.* Canada: *Smart Systems Technologies Inc. (US) v. Domotique Secant Inc. (Canada)*, 2008 QCCA 444 = YCA XXXIII (2008), 464 (mns. 19 *et seq.*): no estoppel by not raising defences against confirmation of award in country of origin.

[346] See, e.g., Germany: *OLG Hamburg*, SchiedsVZ 2003, 284 (286) = YCA XXX (2005), 509 (513). – But see, for a more generous approach, UK: *Diag Human SE v. Czech Republic*, [2014] EWHC 1639 (Comm) (mns 51 *et seq.*).

the award, is considered to leave the existence of the award as a possible object of enforcement in another country unaffected.

b) Lack of a valid arbitration agreement, article V(1)(a) NYC. aa) General. **205**
Pursuant to article V(1)(a), recognition and enforcement of an award may be refused if "[t]he parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the 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". Thus, any objection against the validity of the arbitration agreement can be raised against the enforcement of the award (*cf. supra* mns 95–135): lack of form, substantive invalidity, incapacity of the parties to conclude an arbitration agreement or other defences like the lack of authority of an agent acting for one of the parties (as to the question whether lack of "objective arbitrability" may become relevant under article V(1)(a), see *infra* mn. 298). *A fortiori*, article V(1)(a) also applies where it is claimed that the parties never concluded an agreement to arbitrate, as in cases of forgery.[347] Where the respondent does not dispute the validity of the agreement but claims that the award deals with matters that are beyond its scope, the defence is governed by article V(1)(c) (*infra* mns 240 *et seq.*).

With regard to the existence of a valid agreement to arbitrate, the general rule on **206**
the burden of proof (*supra* mn. 186) requires additional consideration. As article V(1)(a) presupposes an "agreement referred to in article II" and article IV(1)(b) requires that the party seeking to enforce the award has to supply "[t]he original agreement referred to in article II or a duly certified copy thereof" (*supra* mns 169–170), the burden to establish the existence of an arbitration agreement within the meaning of article II (particularly an agreement meeting the formal requirements of article II(2)), is on the party seeking to enforce the award. Where that party submits the necessary documentation, this will normally be enough to establish whether the agreement meets the formal requirements of article II; to that extent, the burden of proof can be said to lie on the applicant. However, once the applicant has complied with the requirements of article IV, he has made out a *prima facie* case and it is up to the respondent to prove that the arbitration agreement is actually invalid under the general principle established by article V(1)(a) regarding the burden of proof.[348] – Particular considerations apply where the arbitration agreement was allegedly signed by an agent of one of the parties. Since the applicant must establish a contract signed "by the parties" or an exchange of letters or telegrams between the parties, the

[347] See, e.g., USA: *China Minmetals Materials Import and Export Co., Ltd v. Chi Mei Corp.*, 334 F.3d 274 (279 *et seq.*) (3rd Cir. 2003).

[348] Wilske/Fox, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mns 125–127; Haas/Kahlert, in: Weigand/Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019, mn. 21.377; Borris/Hennecke, *ibid.*, mns 44–45; Scherer, *ibid.*, Art. IV mns 20–21; Nacimiento, in: Kronke *et al.* (eds), *Recognition and Enforcement of Foreign Arbitral Awards*, 2010, 211; Born, *International Commercial Arbitration*, 2nd ed., 2014, Vol. III, 3402; Australia: *Transpac Capital Pte Ltd v. Buntoro* [2008] NSWSC 671 (mns 38 *et seq.*) = YCA XXXIII (2008), 349 (351 *et seq.*); Canada: *Adamas Management & Services Inc. v. Aurado Energy Inc.*, YCA XXX (2005), 479 (486); Germany: *OLG München*, SchiedsVZ 2009, 340 (341) = YCA XXXV (2010), 383 (384); *OLG München*, SchiedsVZ 2011, 337 (338); Italy: *Cass.*, YCA XXII (1997), 727 (730); Spain: *Trib. Supr.*, YCA XXXII (2007), 518 (522); *Trib. Supr.*, YCA XXXII (2007), 532 (536 *et seq.*); Switzerland: *BGer.*, ASA Bull. 2003, 364 (374) = YCA XXVIII (2003), 835 (841); *BGer.*, ASA Bull. 2000, 786 (788) = YCA XXVI (2001), 863 (865 *et seq.*); UK: *Yukos Oil Co. v. Dardana Ltd*, (2002) CLC 1120 (1125 *et seq.*) = YCA XXVII (2002), 570 (576); *Dallah Real Estate and Tourism Holding Coo. v. Ministry of Religious Affairs, Government of Pakistan*, [2010] 3 WLR 1472 (1478 *et seq.*, 1487); USA: *China Minmetals Materials Import and Export Co., Ltd v. Chi Mei Corp.*, 334 F.3d 274 (277) (3rd Cir. 2003). *Czarina, LLC v. W.F. Poe Synd.*, 358 F3 d 1286 (1292) (11th Cir. 2004).

applicant also bears the burden of proving that the person signing the arbitration agreement had the authority to act for the other party.[349]

207 For the possibility of a waiver or preclusion with regard to the validity of the arbitration agreement see *supra* mns 187–198; for the possible deference to decisions of the arbitral tribunal or national courts regarding the existence of a valid arbitration agreement see *supra* mns 200–204.

208 **bb) Form.** The reference in article V(1)(a) to an "agreement referred to in article II" is generally interpreted to mean that, also in the context of enforcement of a foreign award, the formal validity of the arbitration agreement must be determined under the autonomous requirements of article II NYC.[350] As for the possibility to apply less strict requirements of national law regarding the form of the arbitration agreement, see *infra* mns 219–221.

209 **cc) Substantive validity.** Regarding the substantive validity of the arbitration agreement, article V(1)(a) does not lay down any autonomous requirements, but only provides the respective choice-of-law rule by referring these questions to "the law to which the parties have subjected it or, failing any indication thereon, […] the law of the country where the award was made". Where the law referred to by article V(1)(a) provides for the validity of the arbitration agreement, enforcement of the award cannot be refused on that issue. Where it leads to the invalidity of the agreement, it may possibly still be upheld on the basis of a law determined by the autonomous choice-of-law rules of the enforcing state (*cf. infra* mn. 220).

210 In the first place, article V(1)(a) NYC refers to the law to which the parties have subjected the arbitration agreement. The NYC does not impose any geographical limitations to the law chosen by the parties; they are allowed to choose any law, even if it has no objective connection to the parties or the dispute.[351] Limits are only imposed, as always, by the public policy of the enforcing state (article V(2)(b); *infra* mns 307 *et seq.*).

211 In practice, parties rarely make a specific choice of law with regard to the arbitration agreement. However, it is generally accepted that such a choice may also be made implicitly.[352] In that respect, the question frequently arises whether a choice-of-law clause contained in the main contract may be extended to also apply to the arbitration clause. If such interpretation is rejected, the consequence is that under article V(1)(a), lacking a choice of law by the parties, the place of arbitration will determine the law applicable to the validity of the arbitration agreement. This is indeed the position taken by some courts and commentators.[353] However, where the parties have agreed on the

[349] Germany: *OLG Celle*, SchiedsVZ 2004, 165 (167) = YCA XXX (2005), 528 (532 *et seq.*). – Contra: Austria: *OGH*, SZ 64, no. 61, 323 (324 *et seq.*) = YCA XXI (1996), 521 (522 *et seq.*); *OGH*, IPRax 2006, 268 (269 *et seq.*) = YCA XXXII (2007), 254 (257 *et seq.*).

[350] Haas/Kahlert, in: Weigand/Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019, mn. 21.377; Otto, in: Kronke *et al.* (eds), *Recognition and Enforcement of Foreign Arbitral Awards*, 2010, 159; Germany: *OLG Hamm*, RIW 1995, 681 = YCA XXII (1997), 707 (708); *OLG Köln*, IPRax 1993, 399 (400) = YCA XXI (1996), 535 (536 *et seq.*). This approach has now also been accepted by Italian courts: *Cass.*, RDIPP 1986, 707 (708) = YCA XII (1987), 497 (498).

[351] Wilske/Fox, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mn. 114; Haas/Kahlert, in: Weigand/Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019, mn. 21.382; Nacimiento, in: Kronke *et al.* (eds), *Recognition and Enforcement of Foreign Arbitral Awards*, 2010, 224 *et seq.*

[352] See, e.g., Wilske/Fox, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mn. 114; Haas/Kahlert, in: Weigand/Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019, mn. 21.383.

[353] van den Berg, *The New York Arbitration Convention of 1958*, 1981, 293; UK: *Deutsche Schachtbau- und Tiefbohrgesellschaft m.b.H. v. R'as al-Khaimah National Oil Co.*, [1987] 3 WLR 1023 (1029 *et seq.*); for the US case law, see next fn.

law applicable to their agreement as such, it can be assumed (save contrary indications) that they intend this choice to cover the entire agreement and consequently also the arbitration clause contained therein. The prevailing position therefore rightly extends a general choice-of-law clause to the arbitration agreement, unless a contrary intent of the parties can be determined.[354]

It is much more doubtful whether a choice of the law governing the arbitration procedure may be found to constitute an implicit choice regarding the arbitration agreement.[355] Such a conclusion should only be drawn in exceptional circumstances. Where the parties have also chosen the law governing the main contract, this choice should prevail over a choice of procedural law. Where the parties have merely determined the place of arbitration, it is immaterial whether this can be interpreted as an implicit choice regarding the arbitration agreement, as that law would apply anyhow on the basis of the subsidiary reference to the place of arbitration contained in article V(1)(a). In other cases, a specific choice of rules governing the arbitration procedure will often reflect particular procedural concerns that do not necessarily involve the validity of the agreement to arbitrate as such. **212**

Where the parties have not chosen the law governing the arbitration agreement, article V(1)(a) refers to the law of the country where the award was made. The criteria for determining that country are the same as for article I(1) s. 1.[356] The award is therefore "made" at the place (or "seat") of the arbitration (*cf. supra* mns 26–28). **213**

dd) Capacity to conclude an arbitration agreement. The arbitration agreement may also fail because one of the parties lacked the capacity to conclude a valid arbitration agreement. Although article V(1)(a) speaks of the "parties", it is clear that also the incapacity of just one party will constitute a defence to the validity of the arbitration agreement and thus to the enforcement of the award. **214**

The parties' capacity to conclude an arbitration agreement is referred to "the law applicable to them". However, article V(1)(a) NYC is silent on how this law should be determined. The choice of law is therefore left to the respective rules of the enforcement state.[357] Some jurisdictions apply the law of the nationality of the respective party,[358] **215**

[354] Wilske/Fox, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. II mns 232–233, Art. V mn. 115; Lew/Mistelis/Kröll, *Comparative International Commercial Arbitration*, 2003, mns 6–24, 6–59; Austria *OGH*, SchiedsVZ 2019, 154 (159); Canada: *Achilles (USA) v. Plastics Dura Plastics (1977) Itée Ltd*, 2006 QCCA 1523; Germany: *BGH*, NJW-RR 2011, 1350 (1353); *OLG Dresden*, IPRax 2010, 241 (242) = YCA XXXIII (2008), 549 (551); *OLG Thüringen*, IPRspr 2011, no. 293, 781 = YCA XXXVII (2012), 220 (222). Also *cf.* UK: *Sulamérica Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.*, [2012] EWCA Civ 638 (mns 36 *et seq.*); Singapore: *BCY v. BCZ*, [2016] SGHC 249 (mns 38 *et seq.*), rejecting the rule followed in *FirstLink Investments Corp. Ltd v. GT Payment Pte Ltd*, [2014] SGHCR 12. – The case law in the USA is split; in favour of extending a general choice-of-law clause to the arbitral clause: *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (50 *et seq.*) (2nd Cir. 2004); *Telenor Mobile Communications AS v. Storm LLC*, 584 F.3d 396 (411 fn. 11) (2nd Cir. 2009); *International Chartering Services, Inc. v. Eagle Bulk Shipping Inc.*, 138 F.Supp. 3d 629 (638) (S.D.N.Y. 2015); contra: *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277 (289) (3rd Cir. 2010); *Alfa Laval U.S. Treasury Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 857 F.Supp. 2d 404 (417) (S.D.N.Y. 2012).

[355] In that sense, e.g. Germany: *BGH*, NJW 1998, 2452 = YCA XXIV (1999), 928 (930).

[356] *Cf.* van den Berg, *The New York Arbitration Convention of 1958*, 1981, 295; Wilske/Fox, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mn. 116; Nacimiento, in: Kronke *et al.* (eds), *Recognition and Enforcement of Foreign Arbitral Awards*, 2010, 225.

[357] Wilske/Fox, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mn. 106; Haas/Kahlert, in: Weigand/Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019, mn. 21.386; van den Berg, *The New York Arbitration Convention of 1958*, 1981, 276 *et seq.*; Germany: *BGH*, SchiedsVZ 2011, 46 (48) = YCA XXXVII (2012), 216 (219).

[358] Germany: Article 7(1) EGBGB; *cf. BGH*, SchiedsVZ 2011, 46 (48) = YCA XXXVII (2012), 216 (219); Italy: Frignani, *EurLF* 2013, I-65 (69).

others the law of that party's habitual residence or domicile.[359] A divergence of approaches also exists with regard to the capacity of companies: here the applicable law is either that of the company's seat (center of administration) or the place of incorporation.[360]

216 In principle, the incapacity defence also applies to States or State-controlled entities.[361] However, the above choice-of-law principles will invariably lead to the respective State's own law. Where that law restricts the capacity of public entities to enter into arbitration agreements,[362] this would allow a State to invoke its own law in order to contest the validity of an arbitration agreement it has concluded. Such a defence is normally not accepted: This result can be derived from the general principle of good faith and the prohibition of contradictory behavior (*cf. supra* mns 147, 198), precluding a State or State-controlled entity that has, like a private actor in international trade, entered an arbitration agreement to claim that it lacks the respective capacity under its own law[363] (also *cf. supra* mn. 53).

217 **ee) Objective arbitrability.** The arbitration agreement may also be invalid because it refers to a subject matter that is not capable of settlement by arbitration. The lack of "objective arbitrability" constitutes a specific defence under article V(2)(a), which, in that respect, refers to the law of the enforcement forum. As for the question whether objective inarbitrability may also be considered as a defence to the arbitration agreement under article V(1)(a) (and its choice-of-law rules), see *infra* mn. 298.

218 **ff) Other defects of the arbitration agreement.** Other aspects that may affect the validity of the arbitration agreement are governed by the law determined by the conflicts rule of the enforcement state, e.g. issues of agency[364] (also see *supra* mn. 131).

219 **gg) More favourable law, article VII(1) NYC.** Particular problems regarding the operation of the more-favourable law principle established by article VII(1) (*supra* mns 13–17) arise in relation to the validity of the arbitration agreement, where this validity must be assessed in the context of a decision on the enforcement of an award on the basis of article V NYC. Here, the question is whether domestic law may substitute the provisions of the Convention if this would result more favourable to the validity of the arbitration agreement. Although the problem may arise with regard to any ground of invalidity, it is most prominently discussed for the purpose of overcoming the strict

---

[359] *Cf. ICCA's Guide to the Interpretation of the 1958 New York Convention*, 2011, 85.

[360] *Cf.* Wilske/Fox, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mn. 107; Haas/Kahlert, in: Weigand/Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019, mn. 21.386; Nacimiento, in: Kronke *et al.* (eds), *Recognition and Enforcement of Foreign Arbitral Awards*, 2010, 219 *et seq.*; Born, *International Commercial Arbitration*, 2nd ed., 2014, Vol. III, 3489 *et seq.*

[361] Wilske/Fox, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mn. 102; Haas/Kahlert, in: Weigand/Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019, mn. 21.387.

[362] See, e.g., Lew/Mistelis/Kröll, *Comparative International Commercial Arbitration*, 2003, mn. 27–5; Foustoucos, (1988) 5 *J. Int'l Arb.* 113 (125 *et seq.*).

[363] Wilske/Fox, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mns 102–104; Haas/Kahlert, in: Weigand/Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration*, 3rd ed., 2019, mn. 21.387; Nacimiento, in: Kronke *et al.* (eds), *Recognition and Enforcement of Foreign Arbitral Awards*, 2010, 219; France: *CA Paris*, Rev. arb. 1993, 281 (285); Spain: article 2(2) Arbitration Act 2003; Switzerland: article 177(2) IPRG.

[364] Wilske/Fox, in: Wolff (ed.), *New York Convention*, 2nd ed., 2019, Art. V mns 123–124; Austria: *OGH*, YCA XXXIII (2008), 354 (357 *et seq.*); Germany: *OLG Celle*, SchiedsVZ 2004, 165 (167) = YCA XXX (2005), 528 (531 *et seq.*). – Contra: Italy: *Cass.*, YCA XXIV (1999), 709 (710 *et seq.*) (authority of agent characterized as a question of capacity and thus subject to the personal law of the party, article V(1)(a)).