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The Notion of 'Arbitral Award'

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Abstract

International conventions are often based on terms and concepts to be understood independently from domestic laws. While a uniform and coherent interpretation of international instruments signifies, in and of itself, a valuable interest, the development of autonomous concepts within the framework of an international convention may be faced with several inherent impediments. Against this backdrop, this paper examines whether the framework of international commercial arbitration supports the establishment of an autonomous concept of 'arbitral award' in the context of, in particular, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration. Relying on a comparative analysis of the notion of 'arbitral award' in core jurisdictions, this paper contextualizes the feasibility and even the desirability of an autonomous notion of 'arbitral award' in the framework of international commercial arbitration. In doing so, it draws, i.a., from a comparison of the underlying principles and objectives of the New York Convention and other treaties on the circulation of decisions and settlements in civil and commercial matters.

Keywords

Arbitral award; 1958 New York Convention; UNCITRAL Model Law on International Commercial Arbitration; 2005 HCCH Choice of Court Convention; 2019 HCCH Judgments Convention; 2019 Singapore Convention on International Mediated Settlement Agreements

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Contents

1. Introduction

International conventions are often based on terms and concepts to be understood independently from domestic laws. While a uniform and coherent interpretation of international instruments signifies, in and of itself, a valuable interest,[1] the development of autonomous concepts within the framework of an international convention may be faced with several inherent impediments. First, it may be that the international instrument itself was originally elaborated without any (or any sufficient) concept of 'autonomy'. Second, the domestic legal concepts of State parties to the convention might be very much diverse and might ultimately not permit the elaboration of an appropriate uniform concept. Third, diversity at the domestic level might impede the implementation of a uniform concept via an international instrument. Finally (and decisively), the absence of a body to provide for coherent interpretation might it make impossible to come up with a uniform interpretation. As illustrated in the following paragraphs, these impediments affect the development of an autonomous concept regarding the notion of 'arbitral award' in the framework of the New York Convention (NYC).

2. Autonomous interpretation of the NYC: reality or fiction?

The answer to whether there is a need to develop an autonomous concept of the basic notion of the New York Convention depends on the function of the international instrument itself. As the NYC has become the basic instrument of international commercial arbitration providing for a framework that permits the global enforcement of awards,[2] a uniform interpretation of the instrument would in principle be welcome in that it would contribute to the Convention's ultimate goal, ie to contribute to the effectiveness of arbitration in the settlement of private law disputes.[3]

Uniformity creates a level playing field for the implementation of arbitration clauses and the recognition of the awards. Against this background, the uniform interpretation of an international instrument requires a basic consensus on the underlying concepts and policies. It aims at preventing a recourse to the methods and concepts of domestic law when interpreting an international instrument.

However, in this respect it should be emphasized that the concept of autonomous interpretation itself is to be distinguished from the notion of uniform interpretation of an international instrument. From a European perspective, autonomous interpretation is closely related to the autonomy of European Union law, a legal concept developed by the European Court of Justice (CJEU) during the last 60 years.[4] According to this concept, the CJEU interprets EU instruments according to their objective and scheme

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[1] H Rösler, 'Autonomous Interpretation' in J Basedow, G Rühl, F Ferrari and P de Miguel Asensio (eds), *Encyclopedia of Private International Law* (EPIL, Elgar Chaltenham 2017) 1066 et seq.

[2] The text of the Convention is available at <http://www.newyorkconvention.org/new+york+convention+texts>. The Convention entered into force in June 1959 and currently counts 161 Contracting States.

[3] United Nations Conference on International Commercial Arbitration, New York, 20 May – 10 June 1958, Final Act, para 1. See also the Resolution adopted by the Conference, Id, para 16.

[4] In the context of the Brussels Convention, the ECJ stated: 'The concept in question must therefore be regarded as independent and must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.', Case C-29/76, *LTU v Eurocontrol* [1976] EU:C:1976:137, para 9, joint Cases C-9 and 10/77, *Bavaria Fluggesellschaft ao v Eurocontrol* [1977] EU:C:1977:132, para 4, stressing the 'independent concept of civil matter' and the need of a uniform application of the Convention providing for legal certainly and equal objects of the parties.

and in the light of the fundamental values of the Union, especially the principles of *effet utile* and in the light of the Charta of Fundamental Rights.[5] Any recourse to national concepts is to be avoided unless there is an express reference to national law in the instrument itself.[6]

Does international commercial arbitration provide for a similar concept? The answer to this question depends on the different conceptions of international arbitration itself. For those authors who consider international commercial arbitration a self-standing legal order, the existence of an autonomous notion is self-evident. It is the international arbitral order where they find the concepts and terms.[7] These authors refer to the progressively expanding body of published awards[8] – in which a distinctive tendency to refer to and rely on previous awards may be observed, a tendency which contributes to establishing a system of legal precedents in the framework of international commercial arbitration.[9]

For those authors who place international commercial arbitration more in the context of the domestic and international regimes (especially with regard to territoriality and notably to the place of the arbitration seat), a uniform interpretation of the international treaties (including the NYC) according to Article 31 of the 1969 Vienna Convention of the Law of Treaties might be the more appropriate approach.[10] While this perspective does not exclude a priori the development of an autonomous concept of arbitration and arbitral award, its supporters place more emphasis on the interfaces between international arbitration and State courts in the proceedings on the recognition and enforcement of foreign awards and on the 'hybrid' system of dispute resolution that is established as a consequence.[11]

An even more restricted doctrinal approach might regard the New York Convention as an instrument on mutual assistance of the Contracting States in international commercial arbitration. According to this concept, the Convention largely refers to the domestic concepts of the Contracting States: therefore, the characterization of a decision as arbitral award would primarily depend on the qualification made pursuant to the law of the Contracting State where the award was rendered.[12] In addition, the procedural law of the requested State would equally apply in order to determine whether

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[5] Case C-443/03 (Grand Chamber), *Leffler* [2005] EU:C:2005:665, paras 39 et seq.

[6] B Hess, 'Seminal judgments (les grands arrêts) in the case law of the European Court of Justice' in B Hess and K Lenaerts (eds), *The 50th Anniversary of the European Law of Civil Procedure* (forthcoming) at fn.

[7] E Gaillard, 'Aspects philosophiques de l'arbitrage international' 329 Recueil des Cours 49 (2007) paras 60 et seq.

[8] As relayed, for instance, in GB Born, *International Arbitration* (2nd edn, Wolters Kluwer 2014), vol I, para 1.06 et seq.

[9] See G Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture' (2007) 23 Arb Int'l, 357, 364 et seq.

[10] See, for instance, *Bundesgerichtshof*, Germany, 8 October 1981, VIII YB Com Arb 366 (1983) and, Supreme Court of Justice, Colombia, 26 January 1999, E-7474, both ruling that, in determining what is meant by the term 'arbitral award' under the NYC, consideration must be given to the object and purpose of the Convention.

[11] SI Strong, 'Border Skirmishes: The Intersection between Litigation and International Commercial Arbitration' (2012) Journal of Dispute Resolution, esp 2, 9 et seq, 16 (also citing GB Born, 'Keynote Address, Center for the Study of Dispute Resolution Annual Symposium 2011' available at <http://www.law.missouri.edu/csdr/symposium/2011/)>; Menon, Chief Justice, Singapore, 'Keynote Address, Standards in Need of Bearers: Encouraging Reform from Within', at Chartered Institute of Arbitrators: Singapore Centenary Conference 23–31 (Sept 3, 2015), <http:// www.ciarb.org.sg/ wp- content/ uploads/ 2015/ 09/ Keynote-Speech- Standards- in- need- of- Bearers- Encouraging- Reform- from- .pdf>, esp 23, 27 et seq; previously P Schlosser, *Recht der privaten internationalen Schiedsgerichtsbarkeit* (2nd edn 1989) paras 766-767.

[12] This was the opinion of some delegates during the elaboration of the NYC, see *Travaux préparatoires*, Recognition and Enforcement of Foreign Arbitral Awards, Report by the Secretary-General, Annex I, Comments by Governments, E/2822, at 10.

the decision at hand qualifies as an arbitral award.[13] Yet – while this double qualification mechanism would conform to the regulatory scheme put forth by the 1927 Geneva Convention, in accordance to which the recognition and enforcement of an arbitral award was dependent on the exequatur of the award in the State of origin[14] – double qualification does not seem to correspond to the structure of the NYC.[15]

Overall, the suitability of the NYC to accommodate an understanding of arbitration as a self-standing order and of arbitral award as the object of an autonomous concept is an open question. On the one hand, such suitability may appear debatable if one focuses on the assumption that the Convention tries to concentrate the control over the arbitration at the place of the seat of the arbitration, restricting to a minimum the control reserved to the place of recognition and enforcement. On the other hand, the opposite conclusion may be drawn on the grounds that the NYC limits the relevance of territoriality, in particular by not precluding that awards be valid in States where recognition and enforcement are sought, in spite of the fact that they have been set aside at the place of the seat of arbitration.[16] By detaching the validity of the award from the law of the place of arbitration, the NYC may in fact be understood as establishing an understanding of arbitration as forming an autonomous legal order.

Finally, there is a consensus that domestic courts of the Contracting States should strive for a uniform interpretation of the NYC in order to guarantee its equal and coherent application in all Contracting States.[17]

3. The lack of a uniform concept of the arbitral award in the NYC and the UNCITRAL Model Law

The NYC does not contain a definition of arbitral award.[18] However, many central provisions refer to the notion of arbitral award and contribute to shaping, to some extent, its definition for the purposes of the Convention. Article I (1) NYC limits the scope of the Convention to arbitral awards (thus implying

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[13] B Ehle, 'Article I' in R Wolff (ed), *New York Convention. Commentary* (CH Beck 2019) 31 et seq; D Otto, 'Article I' in H Kronke, P Nascimiento, D Otto and NC Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary* (Wolters Kluwer 2010) 52-53.

[14] Convention on the Execution of Foreign Arbitral Awards, done at Geneva on 26 September 1927, League of Nations, *Treaty Series*, vol 92, 301. Article 4(2) of the Geneva Convention of 1927 expressly required that the award be 'final' in the country of origin. Such pre-condition was construed by many courts as entailing that, for the purposes of enforcement, a leave for enforcement be obtained from the court in the State of origin. Since the State addressed also required a leave for enforcement, a system of 'double-exequatur' was established. During the negotiations of the NYC, this requirement was considered too demanding: consequently, the term 'final' in Geneva Convention was replaced with the 'binding' in the NYC and, according to the interpretation almost unanimously given by the courts, this has relieved parties from applying for a leave for enforcement in the country of origin.

[15] See GB Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2922: the Author argues that leaving the definition of 'arbitral award' to the law of the Contracting States would be tantamount to allowing States to 'impose discriminatory or idiosyncratic definitions' of arbitral award in the framework of the Convention and, instead, advocates that the Convention be interpreted as 'imposing *international limitations*' on such definition (emphasis added).

[16] S Kröll, 'The Concept of the Seat in the New York Convention and the Autonomy of Arbitral Award' in SL Brekoulakis JDM Lew and LA Mistelis (eds), *Evolution and Future of International Arbitration* (Wolters Kluwer 2016) 79 et seq, esp 94 et seq.

[17] *Bundesgerichtshof*, Germany, 8 October 1981, VIII YB Com Arb 366 (1983).

[18] See *Travaux préparatoires*, Recognition and Enforcement of Foreign Arbitral Awards, Report by the Secretary-General, Annex I, Comments by Governments, E/2822, at 10, where it reports that, during the negotiations of Article I, a delegate observed that whether a particular decision is to be regarded as an arbitral award lies with the law of the State in which an award is to be enforced.

the exclusion from scope of judgments). Furthermore, Article I (2) NYC clarifies that arbitral awards can be given by ad hoc and by institutional tribunals. Against this backdrop, the foundational obligation to recognize and enforce arbitral awards (Articles III and V NYC) is primarily premised on this fundamental notion.[19]

Overall, despite its fundamental importance, it is surprising to state that, in the course of more than six decades, the concept of the arbitral award has been so controversial that is was ultimately impossible to define it positively.[20] First attempts of a definition were made during the negotiations of the New York Convention: in particular, during the negotiation of Article I NYC, a delegation opined that 'it will depend on the law of the State in which an award is to be enforced whether a particular decision is to be regarded as an arbitral award'.[21] However, the final text of the NYC appears to presuppose the notion and concept of arbitral award without defining it.[22]

By the same token, the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006)[23] does not provide a definition of 'arbitral awards'. Despite some efforts – made on the basis of the important implications that the notion of award has for several provisions of the Model Law, and notably the provisions on setting aside (Article 34), form and content of the award (Article 31), correction and interpretation of the award (Article 33) and recognition and enforcement (Articles 35 and 36) – during the negotiations that led to the 1985 Model Law consensus was not reached on a commonly acceptable definition of the term.[24] While support was expressed towards a proposed notion of award as 'a final award that disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determine[s] any question of substance', concerns were raised with regard to the proposal in the part where it included in the definition decisions on 'the question of [the arbitral tribunal's] competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an awards'.[25] Since this proposal could not gather

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[19] While from the wording of the provision it may be inferred that, for the purposes of recognition and enforcement pursuant to the Convention, an award lacks finality if it 'has been set aside or suspended by the competent authority of the country in which, or under the law of which, that award was made', the Convention does not define the term 'binding'. On the debate whether the term 'binding' should be the object of an autonomous interpretation or it should be defined in accordance with the law of the country of origin of the award see B Ehle, 'Article I' in R Wolff (ed) *New York Convention. Commentary* (CH Beck 2019) 31 et seq; D Otto, 'Article I' in H Kronke, P Nascimiento, D Otto and NC Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary* (Wolters Kluwer 2010) 52-53.

[20] This difficulty is reflected also in the relatively blurred interface between arbitration and Regulation (EU) 1215/2012 of 12 December 2012. Cf the Study: 'Legal Instruments and Practice of Arbitration in the EU' The Study was prepared for the JURI Committee of the European Parliament (2014), available at <https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf>, at 193 et seq. With regard to Regulation (EC) No 44/2001, see B Hess, T Pfeiffer and P Schlosser, *The Brussels I Regulation 44/2001: Application and Enforcement in the EU* (CH Beck, 2008), para 105 et seq.

[21] *Travaux préparatoires*, Recognition and Enforcement of Foreign Arbitral Awards, Report by the Secretary-General, Annex I, Comments by Governments, E/2822, 10.

[22] Similarly, the Inter-American Convention on International Commercial Arbitration, adopted at Panama on 30 January 1975, entered into force 16 June 1976, 1438 UNTS 245, OASTS No 42, 14 ILM 336 (1975), does not provide for an express definition.

[23] The text of the Model Law is available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf>. Legislation based on the Model Law has been adopted in 80 States in a total of 111 jurisdictions.

[24] See United Nations Commission on International Trade Law, Seventeenth Session, New York, 25 June – 13 July 1984, Report of the Working Group on International Contract Practices on the Work of its Seventh Session (New York, 6-17 February 1984), UN Doc. A/CN.9/246, March 6, 1984, para 192.

[25] Id, paras 192-194. HM Holtzman and JE Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration. Legislative History and Commentary (Kluwer 2015) sub Article 2, 154.

the necessary consensus, the definition was not included. Ultimately, the Commission, while noting that a definition was desirable, reported that a more modest approach should be taken in view of the considerable difficulty of finding an acceptable definition. It was agreed to determine in the context of Article 34 and any other provision where such determination was needed which types of decisions were covered by those articles. Noting that the NYC and other laws do not define the term, the Commission left the term undefined. No changes were introduced in this respect as a result of the amendments made to the Model Law in 2006.[26]

The main reasons why the repeated attempts to define the notion of arbitral award eventually failed are twofold. However, they are not found in the concept of the 'arbitral award' itself, but in its broader context. On the one hand, there is a discussion whether procedural orders of the arbitral tribunal constitute an 'award' to be recognized and enforced.[27] This issue mainly relates to the relationship between the State courts and the arbitral tribunal. Whenever a decision of the arbitral tribunal qualifies as an 'award', the party against whom it was rendered might start review or annulment proceedings before State courts. Parallel review by State courts may impede the ongoing arbitration proceedings – from this perspective, a broad definition of 'arbitral award' might be detrimental. Consequently, a predominant opinion considers only awards on the merits as 'arbitral awards'.[28] However, the dividing lines in the domestic laws regarding this delineation are drawn differently and the debate in UNCITRAL ended up by leaving the problem out.

The second difficulty regarding the concept of arbitral award closely relates to its finality. According to some authors only final/binding awards can be recognized and enforced under the New York Convention: awards subject to review (within the arbitration process) or preliminary measures do not qualify as arbitral awards.[29] Yet, some systems are more generous in permitting the recognition of preliminary awards than others.[30] Again, the drafters of the Model Law finally refrained from a definition in order to permit a more flexible approach.

Against this backdrop, it would be incorrect to assume that an underlying concept of arbitral award is entirely missing from the NYC. There is a common understanding of the core elements of an arbitral award. *Gary Born* describes these elements as follows: (1) the award must result from an agreement

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[26] Report of the U.N. Commission on International Trade Law of the work of its eighteenth session, A/40/17, 3-21 June 1985, para 49.

[27] Especially the decision of the tribunal on its competence to decide the dispute, see Article 16 of the Model Law.

[28] While it is a common understanding that the label given to an instrument by the arbitral tribunal does not qualify as a deciding factor in determining whether such instrument is to be characterised as an arbitral award, the Chartered Institute of Arbitrators has nevertheless put forth the recommendation that 'Decisions relating to the organisation and general conduct of the arbitral proceedings which are purely procedural and/or administrative in nature should be made in the form of procedural orders or directions. Such decisions should be clearly distinguished from arbitral awards, which are intended to include a determination on the merits or affect the parties' substantive rights and which can generally be enforced under the New York Convention': Chartered Institute of Arbitrators, 'Drafting Arbitral Awards. Part I — General' (last revised: November 2016), comment sub Article 1, available at <https://www.ciarb.org/media/4206/guideline-10-drafting-arbitral-awards-part-i-general-2016.pdf>.

[29] GB Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014), 3020; P Peters and Ch Koller, 'The of Arbitral Award: An Attempt to Overcome a Babylonian Confusion' in Ch Klausegger et al (eds), *Austrian Yearbook on International Arbitration* (CH Beck, Stämpfli, Manz 2010) 162. On the debate whether the term 'binding' should be the object of an autonomous interpretation or it should be defined in accordance with the law of the country of origin of the award see B Ehle, 'Article I' in R Wolff (ed) *New York Convention. Commentary* (2019) 31 et seq; D Otto, 'Article I' in H Kronke, P Nascimiento, D Otto and NC Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary* (Wolters Kluwer 2010) 52-53.

[30] See, for instance, Section 39 of the English Arbitration Act 1996 entitled 'Power to make provisional awards', addressed more in detail in this Chapter infra, para 4.4.

to arbitrate;[31] (2) the award must have certain minimal formal characteristics;[32] and (3) the award must finally resolve a substantial issue, not a procedural matter.[33] With regard to these three elements, the first two are in principle uncontroversial.[34] However – as also outlined *supra*, in this paragraph – the third element clearly describes the controversies surrounding the international debate: Do awards on procedural issues (ie an award on the jurisdiction of the arbitral tribunal to decide the dispute at hand) fall within the scope of the NYC? What about partial awards (on the merits)[35] and procedural orders? It seems that the qualification of procedural orders, especially of awards on the jurisdiction of the arbitral tribunal for the substance of the case, are at the core of the debate. While in legal literature support is expressed in favour of characterizing awards on jurisdiction as arbitral awards on the grounds that such decision is 'final' on one aspect of the dispute,[36] the jurisprudence on this issue is not necessarily consistent. For instance, on the grounds that 'there was no determination [...] on the merits' the Supreme Court of Queensland, Australia, found enforceable under the NYC an interim award declining jurisdiction and containing a decision on costs.[37] Conversely, the Colombian Supreme Court of Justice refused enforcement of an 'Interlocutory Award on Jurisdiction' on the ground that an award affirming the jurisdiction of a tribunal does not 'substantially put an end to the arbitral proceedings and settle the dispute' and thus cannot be considered as falling under the NYC.[38]

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[31] The agreement to arbitrate refers to party autonomy being the basis of the whole arbitration process, see D Solomon, *Die Verbindlichkeit von Schiedssprüchen in der internationalen privaten Schiedsgerichtsbarkeit* (Sellier De Gruyter 2007) 310 et seq.

[32] In this regard, one might refer to Article 31 Model Law and to Article IV NYC.

[33] GB Born, *International Commercial Arbitration* (2nd edn, Wolters Kluwer 2014), vol III, para 22.02 (B)[3] 2923.

[34] It should be noted that imposed arbitration (as in sports arbitration) may not easily fall under the definition of 'arbitral award'.

[35] There is a large consensus that partial awards (on the merits) are binding and final awards in the sense of Arts I and V NYC and Article 34 of the Model Law, E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (Wolters Kluwer 1999) paras 1348 et seq. In this context, for instance, an Australian court held that, to qualify as an 'arbitral award', a decision must finally determine all or at least some of the matters submitted to the arbitral tribunal. *Resort Condominiums International Inc v Ray Bolwell and Resort Condominiums, Pty Ltd*, Supreme Court of Queensland, Australia, 29 October 1993, XX YB Com Arb 628 (1995) Similarly, a United States court held that for a decision to be regarded as an 'award', it needs to finally and definitely dispose of a separate independent claim. *Hall Steel Company v Metalloyd Ltd*., District Court, Eastern District of Michigan, Southern Division, United States of America, 7 June 2007, 492 F. Supp. 2d 715, XXXIII YB Com Arb. 978 (2008). In construing the 'finality' requirement, a Colombian court held that awards are final 'not because they put an end to the arbitration or to the tribunal's function, but because they settle in a final manner some of the disputes that have been submitted to arbitration'. *Drummond Ltd. v Instituto Nacional de Concesiones—INCO et al*, Supreme Court of Justice, Colombia, 19 December 2011 and 3 May 2012, XXXVII YB Com Arb 205 (2012) (with English translation).

[36] E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Wolters Kluwer 1999), 739, para 1357; D Di Pietro, 'What Constitutes an Arbitral Award Under the New York Convention' in E Gaillard and D Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 139, 153.

[37] *Austin John Montague v Commonwealth Development Corporation*, Supreme Court of Queensland, Australia, 27 June 2000, Appeal No 8159 of 1999, DC No 29 of 1999, XXVI YB Com Arb 744 (2001). See also Bundesgerichtshof [BGH], Germany, 18 January 2007, III ZB 35/06; Hanseatisches Oberlandesgericht [OLG] Hamburg, Germany, 14 March 2006, 6 Sch 11/05. In favour of considering awards on jurisdiction eligible for recognition and enforcement under the NYC: GB Born, *International Commercial Arbitration* (Wolters Kluwer 2014), 2935-36; E Gaillard and J Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 739, para 1357; D Di Pietro, 'What Constitutes an Arbitral Award Under the New York Convention' in E Gaillard and D Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008) 139, 153.

[38] Merck & Co Inc, Merck Frosst Canada Inc & Frosst Laboratories Inc v Tecnoquimicas SA, Supreme Court of Justice, Colombia, 1 March 1999, E-7474.

Furthermore, for the purposes of its circulation under the Convention, the award must be binding as distinguished from non-binding awards in mediation and other forms of ADR.[39] In fact, while under the NYC (unlike its predecessor, the 1927 Geneva Convention) the binding and / or final nature of the award does not appear to amount, per se, to constitutive elements of the award, they nonetheless play a distinctive role in the shaping of what constitutes a viable award under the Convention. This is confirmed by the fact recognition and enforcement may be refused if it is proven that 'the award has not yet become binding on the parties, or has been set aside or suspended' (Article V (1)(e) NYC).[40]

Yet, there are strong arguments for the restrictive approach adopted by *Gary Born* in defining the core elements of an arbitral award. Such arguments are mainly derived from the objectives of the NYC itself. This international instrument is less ambitious than parallel instruments on the recognition and enforcement of judgments. It primarily aims at ensuring that courts enforce arbitration agreements (Article II) and that foreign arbitral awards given in one Contracting State are recognized and enforced in another Contracting State (Articles III – V).

Before putting the concept of arbitral award under the NYC and the Model Law in a broader concept of parallel definitions found in other international instruments,[41] it seems appropriate to look at national laws in order to identify whether and to what extent the understanding of the notion of 'arbitral award' differs at the domestic level. While the following segment is not intended to provide a comprehensive overview of the disparities and complexities underlying the notion of 'arbitral award' in the various jurisdictions, it is nevertheless intended to distil relevant points for the purpose of discussion and reflection.

4. Different national concepts

4.1 Arbitral Awards in French Law

While, to date, it has not adopted legislation based on the UNCITRAL Model Law,[42] France was among the first Contracting States to the NYC: its ratification of the Convention dates back to 26 June 1959 and the Convention's entry into force for France is dated 24 September 1959.[43] In spite of France's prompt accession to the NYC, the Convention is scarcely applied in France on the premise that French law on the recognition and enforcement of arbitral awards is more permissive than the regime

[39] R Goode, H Kronke and E McKendrick, *Transnational Commercial Law* (2nd edn, Oxford University Press 2004) 944-945.

[40] While from the wording of the provision it may be inferred that, for the purposes of recognition and enforcement pursuant to the Convention, an award lacks finality if it 'has been set aside or suspended by the competent authority of the country in which, or under the law od wish, that award was made', the Convention does not define the term 'binding'. According to reported case law, only a decision that is binding on the parties can be regarded as an 'arbitral award' within the meaning of the Convention. For instance, the *Bundesgerichtshof* has held that an award was binding because it was not subject to appeal either before another arbitral tribunal or a national court. *Bundesgerichtshof*, Germany, 18 January 1990, III ZR 269/88. Along the same line of reasoning, the French *Cour de Cassation* refused to enforce an award on the ground that it was not binding because review of the award was pending before another arbitral tribunal. *Cour de Cassation*, *La Société Diag v The Czech Republic*, 5 March 2014, 12-29.112.

[41] See infra, paras 5.1 and 5.2.

[42] This is confirmed by the absence of France in the Model Law's status at <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

[43] *Journal Officiel*, 6 September 1959, 8729. Pursuant to Article I (3), France has declared that it applies the NYC on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State. The commercial reservation that France also made upon ratification under Article I (3) was later withdrawn, effective from November 1989: see United Nations, Treaty Series, vol 336, 426. Pursuant to Article X (1) and (2), France has also declared that the NYC extends to all the territories of the French Republic.

established under the Convention.[44] In particular, Article 1520 of the Code of Civil Procedure – which puts forth the grounds for annulment of an international commercial arbitral award – is commonly construed as setting out a more favourable regime compared to Art V NYC. In fact, Article 1520 provides that an award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy.[45]

In France the primary source of legislation on arbitration is found in Book IV of the Code of Civil Procedure. Title I regulates domestic arbitration, while Title II regulates international arbitration. In accordance with Article 1506 of the Code, numerous provisions contained in Title I apply equally to international arbitration. However, the Code's provisions on arbitration, which were codified with a legislative reform of 2011,[46] focus primarily on formal requirements and do not provide a statutory definition of arbitral award. It follows that the substantive features of arbitral awards under French law have been mainly set out by the judiciary: notably, the commonly accepted notion of arbitral award is rooted in the *Cour de cassation*'s statement in accordance to which an award is a final decision,[47] resolving in full or in part the dispute submitted to the arbitrators, concerning either the merits, the competence of the tribunal, or another preliminary objection putting the proceedings to an end.[48] At the core of this notion is the premise that an award is tantamount to an *acte juridictionnel*, through which adjudication of disputes is performed.[49] Mere procedural orders, regardless of how the arbitral tribunal labels them, do not qualify as arbitral awards.[50]

Fostering a liberal approach to international commercial arbitration, France adopts a broad understanding of 'foreign' arbitral award: this is evidenced, notably, by Article 1504 of the Code of Civil Procedure, in accordance to which an arbitration is 'foreign' when international trade interests are at stake.[51] In this respect, French law sets itself apart from the conventional and more restrictive notion

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[44] See Article VII (1) NYC, in accordance to which, 'the provisions of the present Convention shall not… 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'.

[45] While domestic and foreign arbitral awards are subject to an overall similar treatment in France, a difference arises pursuant to the more stringent requirements put forth at Article 1492 of the Code of Civil Procedure with regards to recognition and enforcement of domestic awards.

[46] Decree No 2011-48 of 13 January 2011 reforming arbitration in France (entered into force on May 1, 2011), note C Jarrosson and J Pellerin, 'Le droit français de l'arbitrage après le décret du 13 janvier 2011' Rev arb (2011) 5.

[47] Finality is an effect that stems from Article 1484(1) of the French Code of Civil Procedure. See L Cadiet, J Normand and S Amrani Mekki, *Théorie générale du procès*, (2013) 894. Cf also Paris Court of appeal, Rev arb 1999, 834, XXIVa YB Com Arb 296 (1999), finding that a reasoned decision – by which the arbitral tribunal examined in detail the arguments put forth by the parties and ultimately solved the dispute in a final manner by denying the motion for a review – amounted to an exercise of the tribunal's jurisdictional power and qualified as arbitral award.

[48] Cass civ 1e, 12 October 2011, Rev arb (2012) 86, note F-X Train. See also Paris Court of Appeal, 2 July 2013 No 12/16361, *SARL Alicantes v SAS Gerpro et al*, synopsis available in Rev arb, (2013) 817. On the finality of an award, see Cass civ 1e, 5 March 2014, No 12-29.112. See also J Héron, T Le Bars and K Salhi, *Droit judiciaire privé* (7e ed 2019), 268; E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999*)* 741.

[49] L Bernheim-Van de Casteele, *Les principes fondamentaux de l'arbitrage* (Bruylant 2012) 587.

[50] See also Paris Court of Appeal, 2 July 2013 No 12/16361, *SARL Alicantes v SAS Gerpro et al*, synopsis available in Rev arb, 2013.817. On the irrelevance of labeling see Paris, 29 November 2007 and 3 July 2008, Rev arb (2009) 741, note C Chainais.

[51] French case law and doctrine have adopted a broad approach, cf. C Kessedijan, *Droit du Commerce Internationa*l (2013), paras 19 and 20.

of foreign award, generally adopted in civil law jurisdictions, stating that a foreign award is an award made in the State where enforcement is sought pursuant to the procedural law of another State.[52]

To the further benefit of the cross-border circulation of foreign awards and in keeping with the permissive approach adopted by French law as it pertains to international commercial arbitration, French courts have also held that the NYC applies to 'a-national' awards. For instance, an award made on the basis of an arbitration agreement in which the parties self-regulated the procedure to the exclusion of any national procedural law was construed as falling in the scope of the NYC by a French court in 1984.[53] Similarly, in 1991 the *Cour de cassation* ruled that, absent the parties' choice of applicable law, the arbitral tribunal applies the rules that it deems appropriate, including rules drawn from international trade practice as established in the jurisprudence of national courts.[54] This approach was validated in the 2011 legislative reform at Article 1511(1) of the Code of Civil Procedure pursuant to which the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate.[55]

4.2 Arbitral Awards in German Law (Section 1055 ZPO)

When Germany implemented the UNCITRAL Model Law in 1998, the legislator opted for an explicit definition of domestic arbitral awards in Section 1055 ZPO. This provision reads as follows:

'Amongst the parties, the arbitration award has the effect of a final and binding judgment handed down by a court.'

This assimilation of the award with a judgment entails that the legal (binding) effects of the award (especially its res judicata) operate automatically until the award is set aside in annulment procedures (Section 1059 ZPO).[56] There is a discussion in the legal doctrine whether the parties may nevertheless dispose of the res judicata effect of the award – the predominant opinion agrees as to this possibility as the arbitration is based on party autonomy and the (scarce) resources of State courts are not affected by private dispute resolution. [57]

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[52] GB Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2958, 2959. See also AJ van den Berg, 'When Is an Arbitral Award Non-Domestic under the New York Convention?' (1985) 6 Pace L Rev, esp 43 et seq, underscoring, however, that the occurrence where parties agree to arbitrate under the rules of a state other than the one where the arbitration is conducted (in the legal sense) is a rare and 'rather hazardous undertaking': the inevitable interface between the two laws may in fact trigger conflicts, ia, in the governance of the capacity to agree to arbitrate or in the identification of the courts that have jurisdiction to render assistance to the arbitration.

[53] *Société Européenne d'Etudes et d'Entreprises (SEEE) v République Socialiste Fédérale de Yougoslavie*, Court of Appeal of Rouen, France, 13 November 1984, 982/82. See also *Société Aksa v Société Norsolor*, Court of Appeal of Paris, France, 9 December 1980, Rev arb (1981) 306. *Sed contra*: Paris Court of Appeal, Rev arb (1980) 524, considering as falling outside of the scope of the NYC an a-national award rendered in Paris, in contrast with the previous ruling of the Supreme Court of Sweden that the NYC applied to the award. Högsta domstolen, Rev arb (1980) 555, VI YB Com Arb 237, 239 et seq (1981).

[54] Cass civ 1e, 22 October 1991, Bulletin 1991 I N° 275 182.

[55] C Kessedijan, *Droit du Commerce International* (2013), para 990.

[56] V F von Schlabrendorff and A Sessler, 'Section 1055 ZPO' in K-H Böckstiegel, SM Kröll and P Nacimiento (eds), *Arbitration in Germany* (Wolters Kluwer 2007), paras 7 and 8.

[57] F Stein and M Jonas (eds), Kommentar zur Zivilprozessordnung (23rd edn 2014), Section 1055 ZPO para 6; D Solomon, *Die Verbindlichkeit von Schiedssprüchen in der internationalen privaten Schiedsgerichtsbarkeit* (Sellier De Gruyter 2007) 213 et seq.

Unlike Article 32 Model Law, German law does not provide an enumeration of different types of awards. However, the distinction between final awards, interim awards and (non) binding awards is also found in Germany, and the German case law and doctrine also permit partial awards to decide parts of the dispute which can be separated.[58] According to the case law of the Federal Civil Court, a decision of an arbitral tribunal denying its competence to decide the dispute is considered a final award and can be challenged in annulment proceedings (Sections 1059 and 1060 ZPO).[59]

However, the legal effects of foreign awards are derived from Article V NYC.[60] According to the predominant doctrinal opinion, the lex arbitri decides to which extent the award becomes res judicata. Section 1061 ZPO recognises the binding effect of the foreign award. This provision refers to Article V NYC, including the grounds of non-recognition in this provision. However, there is a consensus in the case law and the legal doctrine that the recognition of the res judicata effect of the foreign award operates automatically, without any explicit recognition procedure.[61] As a result, German courts will apply the lex arbitri (determined by the place of arbitration[62]) in order to determine whether and to what extent the foreign award becomes res judicata. However, the effects of res judicata are limited by the effects of res judicata as regulated by German law. In this regard, Section 1055 ZPO comes into play and assimilates the res judicata effect of an arbitral award to the res judicata effects of a judgment.

As a result, the legal situation in Germany appears to some extent unsettled. While Section 1055 ZPO assimilates domestic arbitral awards to domestic judgments, the prevalence of the NYC regarding foreign awards (where party autonomy prevails) is difficult to reconcile with the treatment of domestic awards. In the legal doctrine, many authors opine in a direction of assimilating domestic and foreign awards.[63] Yet, the present lawmaker does not seems to be much inclined to change the current legal situation.

4.3 Arbitral Awards in Italian Law

Arbitration is regulated in Italy in accordance with Articles 806 to 840 of the Code of Civil Procedure. These provisions are construed as regulating both domestic and international arbitration as a reflection of Article 12 of the Law reforming private international law (Law 218/1995),[64] in accordance to which a civil proceeding taking place in Italy is governed by Italian procedural law. Article 12 of Law 218/1995 is, in fact, commonly construed to apply also to arbitration on the grounds that arbitration conforms, *lato sensu,* to civil proceedings.[65] While Italy has not formally implemented the UNCITRAL

[58] Most recently BGH, 14.2.2019, SchiedsVZ 2019, 287 (addressing the application of section 301 ZPO - declaratory judgment on the ground of liability in arbitration proceedings).

[59] BGH, 6.6.2002, SchiedsVZ 2003, 39.

[60] Germany ratified the NYC on 30 June 1961. In accordance to Section 1061 ZPO, recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention.

[61] SM Kröll in K-H Böckstiegel, SM Kröll and P Nacimiento (eds), *Arbitration in Germany* (Commentary, 2nd edn, Kluwer Law International 2014), sub Section 1061 ZPO, para 6.

[62] The place of arbitration determines the applicable law to the award, SM Kröll in K-H Böckstiegel, SM Kröll and P Nacimiento (eds), *Arbitration in Germany* (Commentary, 2nd edn, Kluwer Law International 2014), sub Section 1061 ZPO, paras 10 and 11.

[63] Especially D Solomon, Die Verbindlichkeit von Schiedssprüchen in der internationalen privaten Schiedsgerichtsbarkeit (Sellier De Gruyter 2007) 208 et seq.

[64] Law of 31 May 1995, No 218 'Reform of the Italian system of private international law', OJ No 128 of 3 June 1995, ord suppl.

[65] See G Carella and A Aleandro, 'Le fonti dell'arbitrato' in MV Benedettelli, C Consolo and LG Radicati di Brozolo (eds) *Commentario breve al diritto dell'arbitrato nazionale ed internazionale* (2nd edn, Cedam 2017) 649 et seq.

Model Law, Italy's adherence to the spirit of the Model Law is signified by several provisions and, inter alia by this provision, which is understood to exemplify Italy's monistic approach to arbitration, in keeping with the Model Law.[66]

In Italy, arbitral tribunals are deemed to perform a jurisdictional function, as illustrated by Article 824-bis of the Code of Civil Procedure, in accordance to which awards have the same effects as judgments. A foreign arbitral award is eligible for recognition and enforcement in Italy pursuant to Article 839 et seq of the Code of Civil Procedure. These provisions reflect the provisions put forth at Article V NYC.[67]

Neither decisions on procedural questions nor provisional measures qualify as arbitration awards in Italy for the purposes of recognition and enforcement.[68] The former are excluded because they do not decide the issue on the merits; the latter are excluded because they lack 'finality'. On the other hand, partial awards are characterized as awards, since they decide, albeit partially, the dispute on the merits.[69]

4.3.1 The enforceability of an 'informal arbitral award' (lodo irrituale)

The question of the enforceability under the NYC of, in particular, a *lodo irrituale* (or informal arbitral award) has been the object of an extended debate.[70] Pursuant to Article 808-*ter* of the Code of Civil Procedure, an *arbitrato irrituale* (informal arbitration) is based solely on contract law and the final order ensuing therefrom has contractual force, only.[71] This kind of informal arbitration was originally designed to provide a less formal alternative to ordinary arbitration (*arbitrato rituale*). A *lodo irrituale* derogates from Article 824-*bis* of the Code of Civil Procedure, in accordance to which an ordinary award has the same effects as a judgment rendered by a court. In fact, unlike ordinary arbitration, which results in an enforceable award, an *arbitrato irrituale* generates a merely contractual

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[66] Ibid.

[67] The Convention was ratified by Italy by way of Law 19 January 1968 No 62: it entered into force for Italy on 1 May 1969, and no reservations or declarations were made. Since the ratification was made via execution order, the Convention is directly incorporated in the Italian legal system.

[68] Under Article 818 Code of Civil Procedure, arbitrators may not grant attachment or other interim measures of protection. However, foreign provisional measures issued by emergency arbitrators are construed as possibly enforceable to the extent they are considered tantamount to informal arbitral awards (see infra, in the text). G Carella and A Aleandro, 'Le fonti dell'arbitrato' in MV Benedettelli, C Consolo and LG Radicati di Brozolo (eds) *Commentario breve al diritto dell'arbitrato nazionale ed internazionale* (2nd edn, Cedam 2017) 1186 et seq.

[69] A Frignani, 'Interpretation and Application of the New York Convention in Italy' in G Bermann (ed), Recognition and Enforcement of Foreign Arbitral Awards – Interpretation and Application of the New York Convention by National Courts (Springer 2017) 564.

[70] See B Ehle, 'Article I' in R Wolff (ed) *New York Convention. Commentary* (2nd edn, CH Beck 2019) paras 37-42; G Kaufmann-Kohler and A Rigozzi, *International Arbitration – Law and Practice in Switzerland* (Oxford University Press, Corby Northants 2015) 521 et seq; M Bove, 'Il riconoscimento del lodo straniero tra Convenzione di New York e codice di procedura civile' (2006) Rivista dell'Arbitrato 25 et seq.

[71] In accordance with the amendments made to the Italian Code of Civil Procedure by Legislative decree of 2 February 2006, No 40, which codified for the first time the *arbitrato irrituale*, Article 808-*ter* of the Italian Code of Civil Procedure Code reads: 'The parties may establish in writing that the dispute be settled by the arbitrators through a contractual determination as an exception to the provision of Article 824-*bis*. Failing this, the provisions of this Title shall apply. The contractual award may be set aside by the competent court according to the provisions of Book I: 1) if the arbitration agreement is invalid or the arbitrators have decided questions exceeding its limits and the relevant objection has been raised during the arbitral proceedings; 2) if the arbitrators have not been appointed in the form and manner contemplated by the arbitration agreement; 3) if the award has been rendered by a person which could not be appointed as arbitrator according to Article 812; 4) if the arbitrators have not applied the rules prescribed by the parties as a condition for the validity of the award; 5) if the arbitral proceedings did not comply with the right to defence (*principio del contraddittorio*) […].' See A Barletta, 'Il "nuovo" arbitrato irrituale e il suo ambito di appli cazione' in *Sull'arbitrato. Studi offerti a Giovanni Verde* (2010) 47-56.

determination:[72] for the purposes of enforcing the ensuing award, a judgment needs to be obtained that validates the will of the parties underlying the award or compels payment for the monetary award issued by the arbitrators.[73]

In spite of the fact that, in accordance with Italian law, a *lodo irrituale* is not enforceable as an arbitral award, the Italian Supreme Court has repeatedly maintained that such informal award qualifies as an 'award' pursuant to the NYC.[74] The *Corte di Cassazione* recognized that, according to this line of reasoning, informal awards are treated differently under the NYC than under Italian law. Nevertheless, it observed that, in order to be enforceable under the NYC, awards must only be binding on the parties, and not necessarily judicially binding in the originating country. The Court relied on the assumption that the NYC should be read with a degree of flexibility and beyond merely national concepts.[75] The Court identified further support for its interpretation in the fact that the NYC abolished the double exequatur requirement originally mandated under the Geneva Convention of 1927 for a declaration of enforceability from the State of the seat of arbitration.[76] In fact, the NYC merely requires that the award be binding, such pre-condition being met – according to the Court – by the contractually binding nature of the *lodo irrituale*.

While this position has found some support in literature – for instance on the grounds that, in the cross-border setting, requirements should generally be construed in a less stringent manner to facilitate international trade[77] or advocating in favour of a functional interpretation of the term 'award', on the premise that denying informal awards the possibility to circulate under the NYC would entail that States with only 'non-judicial' contractual arbitration would be precluded from the possibility to benefit from the Convention[78] – a significant part of the scholarship is of the opinion that such awards should not circulate under the NYC. [79]

In support of this argument, for instance, is the fact that giving a *lodo irrituale* broader effects than those warranted under Italian law generates a conundrum that hardly conforms to the Convention's

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[72] See D Di Pietro and M Platte, *Enforcement of International Arbitration Awards* (Cameron May 2001) 139, 148-149 referring to *arbitrato irrituale* as being 'between proper arbitration and contract enhancement'.

[73] B Ehle, 'Article I' in R Wolff (ed), *New York Convention. Commentary* (CH Beck 2019) para 37.

[74] *Corte di Cassazione*, judgment of 18 September 1978 No 4167; judgment of 6 July 1982 No 4039; judgment of 15 December 1982 No 6915; judgment of 15 January 1992 No 405; judgment of 25 June 2002 No 9289. See, recently, *Corte di Cassazione* (plenary session), judgment of 7 April 2015 No 6909 ruling that, when a doubt arises as to the nature (ordinary or informal) of an arbitration as intended by the parties, the arbitration clause shall be construed as providing for an ordinary arbitration.

[75] See esp *Corte di Cassazione*, judgment of 18 September 1978 No 4167. Similarly, see *Corte di Cassazione*, judgment of 6 July 1982 No 4039 stating, again in an obiter dictum, that the NYC should be interpreted as broadly as possible, taking into account the difference in law and in mind frame in the various Contracting States. On these grounds, the Court concluded that the differences between a regular and an informal arbitration should be irrelevant for the purposes of enforcement under the NYC. In line with the statement that awards under *arbitrato irrituale* are contractually binding on the parties even if they are not automatically enforceable, the United States Court of Appeals for the Second Circuit in: *Europcar Italia, SPA v Maiellano Tours*, 156 F.3d 310, 313-314 (2d Cir 1998).

[76] *Corte di Cassazione*, judgment of 18 September 1978 No 4167; judgment of 6 July 1982 No 4039.

[77] D Di Pietro and M Platte, *Enforcement of International Arbitration Awards* (Cameron May 2001) 54.

[78] P Schlosser, *Recht der Schiedsgerichtsbarkeit* (2nd edn, Mohr Siebeck 1989) para 766.

[79] D Di Pietro, 'The Influence of the New Law on Arbitration Agreements and *Arbitrato Irrituale*' (2007) 10(1) International Arbitration Law Review 18, 22 et seq; B Ehle, 'Article I' in R Wolff (ed), *New York Convention. Commentary* (CH Beck 2019) paras 41 et seq; JF Poudret and S Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell 2007) paras 20, 21, 879; R Kreindler, J Schäfer and R Wolff, *Schiedsgerichtsbarkeit Kompendium für die Praxis* (Recht und Wirtschaft 2006) para 1130.

pursuit of harmonized solutions.[80] Furthermore, against the circulation of such awards is the argument that an *arbitrato irrituale* lacks the adjudicative features that normally allow to identify in arbitration a genuine alternative to litigation.[81] In particular, the *Bundesgerichtshof* compared a *lodo irrituale* to an interlocutory decision on the grounds that it offers the possibility of subsequently obtaining a judgment by which the informal award becomes a final judgment.[82] Similarly, another German court ruled that an informal award produces the effect of a contract – and not a judgment. As such, it cannot be enforced under the NYC.[83]

4.4 Arbitral Awards in English Law

In September 1975, the United Kingdom ratified the NYC subject to the reservation of reciprocity under Article I NYC. The Convention entered into force for the United Kingdom on 23 December 1975 and it is implemented in the UK by Sections 100-104 of the 1996 Arbitration Act (AA), which re-enact, subject to some amendments, the provisions of the 1975 Arbitration Act.[84] While the 1996 AA is not structurally based upon the UNCITRAL Model Law, it nevertheless shares its main features.

The Arbitration Act does not provide a definition of the term 'arbitral award'. However, English law is understood to endorse a broad understanding of arbitration and arbitral award. Section 39 AA, entitled 'Power to make provisional awards' is at the core of a debate on what constitutes an arbitral award under English law. The provision holds that, subject to the parties' agreement, the arbitral tribunal also has 'power to order on a provisional basis any relief which it would have power to grant in a final award'. However, while awards – including interim awards (see Sections 47 and 58 AA) – are final and binding, orders under Section 39 AA are subject to later adjustments. The wording of this provision creates a certain degree of ambiguity, in particular since the provision refers to 'provisional awards' in the heading whereas in the text it both mentions and describes, in essence, 'provisional orders'.[85]

However, this provision has been subject also to a different reading, according to which, in identifying what constitutes an arbitral award, arbitration law in England sets itself to some extent apart by not relying on the *nature of the decision* rendered by the arbitral tribunal (often equating it to that of a judgment), but rather by focussing on the *nature of the procedure* that led to the decision.[86] According to this reading, arbitral awards amount to decisions on the parties' claims based 'on the evidence and arguments presented'.

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[80] B Ehle, 'Article I' in R Wolff (ed), *New York Convention. Commentary* (CH Beck 2019) para 41.

[81] This reasoning was obviously based on the conception of arbitration being 'jurisdictional', cf D Solomon, *Die Verbindlichkeit von Schiedssprüchen in der internationalen privaten Schiedsgerichtsbarkeit* (Sellier De Gruyter 2007) 254 et seq.

[82] *Bundesgerichtshof* in BGH, NJW 1982, 1224, 1225 = IPRax 1982, 143 = VIII YB Com Arb 366, 368 (1983).

[83] *Bayerisches Oberstes Landesgericht*, NJW-RR 2003, 502, 503 = XXIX YB Com Arb 754, 757 (2004).

[84] On 24 February 2014, the United Kingdom submitted a notification to extend territorial application of the Convention to the British Virgin Islands. For the following territories, the United Kingdom has submitted notifications extending territorial application and declaring that the Convention shall apply only to the recognition and enforcement of awards made in the territory of another Contracting State: Gibraltar (24 September 1975), Isle of Man (22 February 1979), Bermuda (14 November 1979), Cayman Islands (26 November 1980), Guernsey (19 April 1985), Bailiwick of Jersey (28 May 2002).

[85] B Harris, R Planterose and J Tecks, *The Arbitration Act 1996: A Commentary* (5th edn, Wiley Blackwell 2014) 204; R Merkin and L Flannery, *Arbitration Act 1996* (5th edn, Informa 2014) 155-15.

[86] G Marchisio, *The Notion of Award in International Commercial Arbitration. A comparative analysis of French Law, English Law and the UNCITRAL Model Law* (Wolters Kluwer 2017) 19.

4.4.1 Consent awards

Pursuant to Section 51 AA, which mirrors Article 30 of the UNCITRAL Model Law 1985 (as amended in 2006),[87] in case the parties settle the dispute while the arbitral proceedings are pending, subject to the parties' consent, the arbitral tribunal 'shall terminate the substantive proceedings and, if so requested by the parties and not objected by the tribunal, shall record the settlement in the form of an agreed award'. The 'agreed award' (also known as 'consent award') will have the same status and produce the same effects as any other award on the merits (Section 51(3) AA, which is mirrored at Article 30 of the UNCITRAL Model Law1985 (as amended in 2006)).

The nature and the enforceability of these awards has been disputed. While the text of the NYC is silent on the question of its applicability to decisions that record the terms of a settlement between parties, the enforcement of consent awards under the Convention was raised during the negotiations that led to the adoption of the Convention.[88] It later found support in scholars and practitioners on the ground that such awards meet the definition of award as 'a decision putting an end to the arbitration in whole or in part and finally settling the issues that it seeks to resolve.[89] However, an opposite theory argues that consent award lack 'the adjudicative character required of an 'award'', in particular since they are not the result of adversarial proceedings and are not 'reasoned'.[90] In this regard, it has been maintained that, while consent awards should be regarded as an award insofar as the parties are concerned, recognition and enforcement of consent awards should undergo increased scrutiny when the rights of third parties are affected.[91]

4.5 Arbitral Awards in US Law

The United States ratified the NYC in September 1970 and the Convention entered into force for the US on 29 December 1970. In ratifying the Convention, the United States has adopted both the reciprocity and the commercial reservations under Article I (3) NYC: it follows that the US applies the Convention only to recognition and enforcement of awards made in the territory of another Contracting State and only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

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[87] See also the revised 2013 UNCITRAL Arbitration Rules, at Article 36(1). Cf B Ehle, 'Article I' in R Wolff (ed), *New York Convention. Commentary* (CH Beck 2019) paras 74 et seq.

[88] *Travaux préparatoires*, Recognition and Enforcement of Foreign Arbitral Awards, Report by the Secretary-General, Annex I, Comments by Governments, E/2822, 7, 10, describing as a 'regrettable omission' that the 1927 Geneva Convention did not include a provision on consent awards, and suggesting that the gap be closed; *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/L.26, where the delegate from Austria suggested that 'arbitral settlements' be included in the text of Article I NYC. See also *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Activities of Inter-Governmental and Non-Governmental Organizations in the Field of International Commercial Arbitration, Consolidated Report by the Secretary-General, E/CONF.26/4, 26, reflecting the support of the Polish Chamber of Foreign Trade to the inclusion of amicable settlements concluded in international arbitration.

[89] See also P Sanders (ed), The International Council for Commercial Arbitration, ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, (ICCA 2011) 17-18.

[90] Expressing perplexities with respect to consent awards, and arguing that such awards give the parties an instrument to opportunistically manipulate arbitration into a result: Y Kryvoi and D Davydenko, 'Consent Awards in International Arbitration: From Settlement to Enforcement' (2015) 40 Brook J Int'l L 854.

[91] GB Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014), vol III, 3025-3026.

The United States has incorporated the NYC via Chapter 2 of the Foreign Arbitration Act (FAA), whereas Chapter 1 FAA regulates domestic arbitration.[92] Chapter 1 applies to actions and proceedings brought under Chapter 2 FAA to the extent that Chapter is not in conflict with Chapter 2 FAA or the NYC as ratified by the United States.[93]

The FAA does not provide a definition of arbitral award nor does it lay down specific requirements as to the form of the arbitral award. However, according to Sec. 1-1(a) of the Restatement (Third) US Law of International Arbitration an arbitral award is a 'decision in writing by an arbitral tribunal that sets forth the final and binding determination of the merits of a claim, defense or issue regardless of whether the decision resolves the entire controversy before the tribunal. Such a decision may consist of a grant of interim relief'.[94]

In accordance with its Article I (1), the NYC is applicable to recognition and enforcement of 'foreign' and 'non-domestic' awards, respectively. The definition of 'foreign awards' under the NYC is clear-cut: the Convention identifies foreign awards as those awards that were 'made in the territory of a State other than the State where the recognition and enforcement of such awards are sought'. It follows that foreign awards in the United States are awards in which the arbitration was conducted in a seat located outside the US territory and namely in the territory of another Contracting State, as a result of the reciprocity reservation made by the US.

On the other hand, the definition of 'non-domestic' awards under the NYC appears more complex and refers to the law of the State addressed: in fact, the Convention provides that non-domestic awards as those awards that are 'not considered as domestic awards in the State where their recognition and enforcement are sought'. This provision is subject to multiple interpretations which reflect the different approaches taken to this matter: it may be construed as pointing to (1) an award made in the State where enforcement is sought in accordance with the procedural law of another State; (2) an award made in the State where enforcement is sought in accordance with the arbitration law of that State but over a dispute comprising a cross-border element; (3) an award which is not governed by the national law of a State.[95]

Overall, the flexibility introduced with Article I (1) in the part where it defines 'non-domestic awards' has likely increased the palatability of the NYC; however, it has also introduced an element of potential discrepancy in the understanding of arbitral award, and notably of non-domestic arbitral award, in accordance with the Convention.

The interpretation pursuant to which a non-domestic award is defined as an award made in the State where enforcement is sought in accordance with the procedural law of another State (supra, under

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[92] See 9 USC §§ 201-208 and 9 USC §§ 1-16, respectively. See also The American Law Institute, *Restatement (Third) of the US Law of International Commercial and Investor-State Arbitration*, § 4.9.

[93] 9 USC § 208.

[94] The American Law Institute, *Restatement (Third) US Law of International Arbitration* (Tentative draft No 2 2012).

[95] GB Born, International Commercial Arbitration (2nd ed, Kluwer Law International 2014) 2958. On awards not governed by the law of a state see, eg, *Ministry of Defense of the Islamic Republic of Iran v Gould Inc, Gould Marketing, Inc, Hoffman Export Corporation, and Gould International, Inc*, 887 F.2d 1357, 1365 (9th Cir 1989), cert. denied, at 1365, finding – with respect to the enforcement of an award issued by the Iran-United States Claims Tribunal – that the NYC does not mandate a requirement according to which awards must be based on the national arbitration law of a State in order to be enforceable under the Convention. See also *Société Européenne d'Etudes et d'Enterprises v Socialist Federal Republic of Yugoslavia,* Hoge Raad der Nederlanden, NJ 74, 361 (1974). Cp AJ van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (1981) esp 28-40.

No (1)) mirrors the situation as envisioned, in particular, by the majority of civil law countries.[96] This interpretation is understood as the 'conventional interpretation' of the provision at hand and finds support both in the drafting history and in the systematic reading of the Convention.[97] In fact, in addition to referring to arbitral awards made in another country, Article V (e) NYC refers to arbitral awards made under the law of another country, which is commonly understood as the law which governed the procedural law of the arbitration.[98]

On the other hand, the implementing legislation adopted in the United States espouses a liberal approach in accordance to which any elements that characterise as cross-border the underlying relationship between US citizens contribute to identifying an arbitral award as 'non-domestic' under the Convention. In fact, § 202 FAA implemented Article I (1) NYC by applying the Convention also to the arbitration of disputes that are entirely between citizens of the United States when their 'relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states'.[99] The formulation adopted in § 202 FAA in the part where it refers to disputes that are entirely between citizens of the United States finds its justification the drafters' need to differentiate between interstate and foreign commercial arbitration and namely to draw the line between the scope of application of Chapters 1 and 2 FAA, respectively.[100]

Finding a broad construction of the term 'non-domestic' to be overall more in line with the intended purpose of the NYC, US courts have given an interpretation of § 202 FAA that has progressively and significantly expanded the scope of 'non-domestic awards' under the FAA. For instance, upholding the lower court's decision, in 1983 the Second Circuit found an award arising from an arbitration held in New York between two foreign entities enforceable in the US in accordance with § 202 FAA and the NYC. Relying, in particular, on § 203 FAA which provides district courts with jurisdiction over actions or proceedings falling under the NYC regardless of whether the dispute involves two aliens, on § 204 FAA which supplies venue for such an action, and on § 206 FAA which states that '[a] court having jurisdiction under this chapter may direct that arbitration be held… at any place therein provided for, whether that place is within or without the United States', the Second Circuit concluded that 'It would be anomalous to hold that a district court could direct two aliens to arbitration within the United States under the statute, but that it could not enforce the resulting award under legislation which, in large part, was enacted for just that purpose'.[101]

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[96] GB Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2958, 2959. See, however, Article 1504 of the French Code of Civil Procedure, supra, at para 4.1.

[97] For the history of the provision see, in particular, U.N. Doc. E/CONF.26/L.42, Doc. E/CONF.26/SR.16 and Doc. E/CONF.26/SR.23, reprinted in 1 International Commercial Arbitration: New York Convention (1985), at III. See also AJ van den Berg, 'When Is an Arbitral Award Non-Domestic under the New York Convention?' (1985) 6 Pace L Rev, esp 43 et seq.

[98] UNCITRAL Secretariat, Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016), sub Article V (1)(e), para 23.

[99] 9 USC § 202. See also Stacy Strong, International Commercial Arbitration: A Guide for US Judges (Federal Judicial Center 2012), available at <https://www.fjc.gov/sites/default/files/2012/StrongArbit.pdf>, esp 4; L Del Duca and NA Welsh, 'Interpretation and Application of the New York Convention in the United States' in G Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards – Interpretation and Application of the New York Convention by National Court*s (2017) 1000-1001.

[100] H.R. Rep. No 91-1181, 91st Cong., 2d Sess. 2, reprinted in 1970 US Code Cong. & Ad. News 3601, 3602.

[101] See *Bergesen v Joseph Muller Corp*, 710 F. 2d 928 (2nd Cir 1983), esp 932. See also *Yusuf Ahmed Alghanim & Sons, WLL v Toys 'R' Us, Inc*, 126 F.3d 15, 18-19 (2d Cir 1997. See, further, *Ledee v Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir 1982) stating that Chapter 2 FAA mandates enforcement of a written commercial arbitral agreement when one of the parties to the agreement is

In the same vein, in 1995 the Seventh Circuit held that the NYC and § 202 FAA 'mandate that any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls within the Convention'.[102]

In 1998 the Eleventh Circuit addressed the issue whether the NYC and Chapter 2 FAA govern an arbitral award granted to a foreign corporation by an arbitral panel sitting in the United States and applying US federal or state law.[103] The Court ruled that they do, holding that arbitration agreements and awards involving a non-domestic party are 'non-domestic' regardless of whether the arbitration was conducted in the United States. In its analysis, the Court read § 202 FAA to define as 'non-domestic' for the purposes of Article I NYC all arbitral awards arising out of commercial relationships, except for those awards that 'arise out of … a [commercial] relationship which is entirely between citizens of the United States'.[104] In 2019 the US Supreme Court has denied a petition for *certiorari* to review a decision rendered in the same year by the Eleventh Circuit where the Circuit reiterated its understanding of the definition and the scope of 'non-domestic awards' pursuant to the NYC.[105]

4.5.1 The US and foreign consent awards: A consolidated and recently upheld approach

It is of note that, especially in the United States, courts appear to be inclined to enforce consent awards under the NYC, provided the parties actually commenced an arbitration and, during the pendency of the proceeding, reached a settlement agreement that was later reflected in the consent award made by the arbitrator. A recent ruling of the SDNY exemplifies this approach: in particular, on the premises that the award reflected the 'full participation by both parties in the arbitration process, which had proceeded for more than three years as of the date on which the Award was entered' and it reflected 'consent to the terms and the text of the Award, by both parties' as well as 'due care by arbitrator', the Court concluded that 'the parties' consent to the Award – their stipulation to its terms – provide[d] a sound basis for its entry' and consequently it confirmed the consent award. [106] As the Court expounded, refusing confirmation to the award 'would discourage resolution of disputes in mid-arbitration. Parties who initiate arbitration under the ICC might be less willing to settle, were the implication of a settlement that the resulting Award would lose its enforceability under the New York Convention. There is indeed limited law on this point, presumably because Awards achieved following

not a US citizen. AJ van den Berg, When Is an Arbitral Award Non-Domestic under the New York Convention?, (1985) 6 Pace L Rev, esp 26; L Del Duca and NA Welsh 'Interpretation and Application of the New York Convention in the United States' in G Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards – Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 1000-1001.

[102] *Jain v de Mere,* 51 F.3d 686, 689 (7th Cir1995).

[103] See Industrial Risk Insurers v MAN Gutehoffnungshutte GmbH, 141 F.3d 1434, 1440 (11th Cir 1998).

[104] 572 US 25, at *1441.

[105] *Inversiones y Procesadora Tropical INPROTSA, SA v Del Monte Int'l GmbH*, 921 F.3d 1291 (11th Cir 2019), cert. denied. This case was governed by the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Panama Convention); however, this did not entail any meaningful difference to the analysis at issue, since the Panama Convention mirrors (at the OAS level) the NYC. The Panama Convention was adopted on 8 May 1979; it entered into force for the US on 27 October 1990 and it is incorporated into Chapter 3 FAA (9 USC §§ 301-307).

[106] *Albtelecom SH.A* v *UNIFI Communs, Inc*, 2017 US Dist LEXIS 82154 (SDNY 30 May 2017) at *12.

the parties' consent are less likely to result in later disputes. But the limited available precedents reflect recognition and enforcement of Awards entered into based on stipulations by the parties'.[107]

Relying on the ruling of the SDNY, a District Court in Texas later confirmed a consent award where the parties had commenced and participated in an arbitration before the London Court of International Arbitration but, before an oral hearing, had consented to the entry of an arbitral award.[108] The Court held that, where '[t]he parties in this case did not dismiss the arbitration. Rather, they opted to continue the arbitration proceedings even after they came to their own agreement. While the tribunal did not make findings or reach legal conclusions, it made an award that bound the parties, within its power. No binding or persuasive statutory language or case law requires a court to hold that a tribunal must reach its own conclusions, separate from the parties' agreement, to make a valid, binding award subject to the Convention. As the *Albtelecom* court noted, this rule would dissuade parties from seeking arbitration in the first place or benefitting from the efficiencies it is meant to provide'.[109]

This approach seems to finds a further (*a contrario*) confirmation in a very recent decision of the Ninth Circuit refusing enforcement, pursuant to the NYC, to a consent award made in the Philippines.[110] In the instant case, however, the parties had already agreed to settle their dispute before commencing the arbitration proceedings: hence, as the Court observed, there was no outstanding dispute to arbitrate when they brought the matter to the arbitrator.[111] In addition, the purported arbitration had not comported with the parties' prior agreements to arbitrate, nor did it follow arbitral procedure of the forum.[112] Overall, the Court held that, despite its purported name, the consent award for which enforcement was sought lacked the essence of an arbitral award and, instead, it amounted to a mere settlement agreement intentionally disguised into an award to benefit from the NYC's favourable enforcement regime. '[T]he parties' free-floating settlement agreement and order did not transform into an arbitral award simply because the parties convened with an arbitrator':[113] accordingly, the Court reversed the lower court's decision and refused to confirm the award. Stating, in a core part of its reasoning, that an aspect of arbitration, which sets it apart from other alternative dispute resolution mechanisms, is 'each party's inability to unilaterally withdraw from proceedings', the Court maintained that '[a]ltough perhaps a modest hurdle, the modicum of formality required for a proceeding to constitute arbitration is no empty ritual'.[114] However, reinforcing the notion that 'consent awards encourage settlement by conferring substantial benefits', the Court emphasised that its refusal to confirm the award was not meant to subvert the practice of confirming consent awards.[115]

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[107] Id, at *14.

[108] *Transocean Offshore Gulf of Guinea VII Ltd v Erin Energy Corp*, Docket No H-17-2623, 2018 US Dist LEXIS 39494 (SD Tex 12 March 2018).

[109] Id, at *12.

[110] *Castro v Tri Marine Fish Co LLC*, 921 F.3d 766 (9th Cir 15 April 2019).

[111] Id, at *13.

[112] Id, at *14.

[113] Id, at *15.

[114] Id, at *18.

[115] Id, at *16.

5. Feasibility or desirability of an autonomous notion of arbitral award under the NYC

5.1 The interface of international commercial arbitration with national provisions and feasibility of an autonomous notion of arbitral award

In the framework of the nuanced and complex legal environment that surrounds the notion of 'arbitral award' in the national settings, one feature stands out as significant for the purposes of identifying whether an autonomous concept of arbitral award is sustainable under the NYC. This feature is signified, in particular, by the interplay of arbitration with national law.

In the attempt to ensure that arbitration provide a genuine alternative to litigation, States display the tendency to equate arbitral awards to judgments. In Germany the assimilation of the award with a judgment is outrightly established pursuant to Section 1055 ZPO. Similarly, in accordance with Article 824-bis of the Code of Civil Procedure arbitral tribunals are considered to perform a jurisdictional function in Italy; such function is paramount, ia, in the reasoning of those who argue that the circulation of a *lodo irrituale* under the NYC should be precluded on the grounds that the procedure that led to its adoption lacks the adjudicative features that substantiate arbitration as a genuine alternative to litigation. In the US, in a similar albeit less clear-cut fashion, the dividing line between arbitration and other alternative dispute resolution mechanisms has been identified in the binding character of the arbitral proceeding, not unlike what occurs in the framework of court adjudication.[116] Finally, in France arbitral awards are identified through the lens of an *acte juridictionnel* and in the United Kingdom the discussion surrounding, in particular, Section 39 AA and the definition of provisional awards under that provision brings to the light the distinctive feature of arbitration as a procedure which embodies a judicial enquiry and results in adversarial proceedings; in this framework, the assessment of whether consent awards should fall in the scope of the NYC is premised precisely on this feature.[117]

Against this backdrop, it is of note that the assimilation of arbitration with court adjudication is not expressly provided by the NYC. Article III NYC – which is considered to signify the pro-enforcement objective of the NYC[118] – mandates that Contracting States recognise arbitral awards as 'binding' while omitting to provide any definitions of such term[119] and while the same provision then defers enforcement to 'the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles', the interface of arbitration with the law of the Contracting States is not limited to the rules that regulate, *in concreto*, enforcement. To the contrary, in light of the Convention's express selection of the issues that it intends to directly regulate, such interface is broad: it comprises challenges against arbitration agreements, applications for enforcement of awards that are not voluntarily complied with by the award debtor, and requests to support dysfunctional or flawed

[116] *Castro v Tri Marine Fish Co LLC*, 921 F.3d 766 (9th Cir 15 April 2019), at *18.

[117] G Marchisio, *The Notion of Award in International Commercial Arbitration. A comparative analysis of French Law, English Law and the UNCITRAL Model Law*, (Wolters Kluwer 2017) 19.

[118] See, eg, *Yukos Oil Co v Dardana Ltd*, Court of Appeal, England and Wales, 18 April 2002, A3/2001/10, holding that, according to this principle, foreign arbitral awards are entitled to a 'prima facie' right to recognition and enforcement; *Gouvernement de la région de Kaliningrad (Fédération de Russie) v République de Lituanie*, Court of Appeals of Paris, France, 18 November 2010, 09/19535.

[119] On the term 'binding' see supra, para 3.

arbitral proceedings.[120] In this framework, the radius that the NYC leaves to national law is actually so broad as to leave it to States to complement and supplement essential features of arbitration under the NYC. This is illustrated, for instance, by the efforts that – by means of specific provisions or by the interpretation thereof – States have made, in different fashions and to different degrees, to assimilate arbitration (including international commercial arbitration) to judicial adjudication under their national laws.

Overall, the interface of the NYC with national procedural law is characterized by a remarkable degree of flexibility which supports the conclusion that the NYC, in and of itself, inherently suggests that it is not intended to wholly govern the framework of arbitration nor that it aims to establish or support international commercial arbitration as an autonomous system.[121] To the contrary, the NYC pursues the goal of ensuring, to the fullest and in accordance with the parties' will and underlying objectives, the effectiveness of arbitration agreements and arbitral awards. With its inherent and distinctive flexibility, the Convention leaves space for national laws to step in and further advance these goals, where necessary.

There is, of course, also a downside to the interplay of the NYC with national law. While the Model Law has certainly contributed significantly to the trend towards harmonization by fostering convergence of national laws on arbitration, the case may be that, as a result of such interplay, the NYC is subject to interpretations that either expand or contract the Convention's application. An example of this phenomenon is offered, for instance, by the expansive definition of 'foreign' or 'non-domestic' arbitral award put forth, on the one hand, at Article 1504 of the French Code of Civil Procedure, in accordance to which an arbitration is foreign when international trade interests are at stake, and, on the other hand, by the understanding of 'non-domestic' arbitral awards in accordance with US statutory law and case-law. While, with regard to the United States, such discrepancy appears to be motivated by the goal of the drafters of the FAA to mutually and clearly separate the scope of applications of Chapters 1 and 2 FAA, respectively, and it does not appear to be directly or necessarily related to the definition of 'non-domestic' arbitral awards under the NYC, the fact remains that the understanding of 'foreign' and 'non-domestic' arbitral awards is not harmonized under the Convention and that the diversity at the domestic level does, to some extent, stand in the way of the implementation not only of an 'autonomous', but also of a less ambitious 'uniform' concept via the NYC.

While a discrepancy in the understanding of the scope of the NYC is not per se desirable, a degree of flexibility in interpretation is inherent vis-à-vis any conventions, especially absent a central authority tasked with ensuring that the convention be uniformly interpreted, possibly with the further goal of establishing and ensuring the functioning of a centralized and autonomous system. Moreover – in spite of the commonly accepted interpretation of arbitral awards as resulting from an agreement to arbitrate, complying with minimal formal requirements and finally solving a substantial issue – the discrepancies arising from the interplay of the NYC with national laws support the argument that an autonomous concept of arbitral award is far from established under the NYC.[122]

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[120] LG Radicati di Brozolo, 'Arbitration, international commercial' in J Basedow, G Rühl, F Ferrari and P de Miguel Asensio (eds) *Encyclopedia of Private International Law*, (Edward Elgar 2017), 86 et seq.

[121] This conclusion is also validated by the Convention's variously modulated approach to territoriality (see supra, para 2).

[122] See, eg, LG Radicati di Brozolo, 'Arbitration, international commercial' in J Basedow, G Rühl, F Ferrari and P de Miguel Asensio (eds) *Encyclopedia of Private International Law*, (Edward Elgar 2017), 86-87.

5.2 Desirability of an autonomous notion of arbitral award under the NYC?

The adoption or implementation of an autonomous notion of arbitral award would unquestionably avoid divergent or inconsistent understandings of legal concepts and provisions and foster harmonization and predictability in the interpretation and application of the NYC. However, one may wonder whether there is a benefit in not having an autonomous notion of arbitral award and in allowing, instead, flexibility to the concept: in other words, could the idea of an autonomous concept actually frustrate the purposes of the NYC to enhance the circulation of the awards?

In this respect and regardless of the numerous similarities, a clear line appears to separate international conventions on arbitration, on the one hand, and litigation, on the other.

Both the 2005 Hague Convention on Choice of Court Agreements (Choice of Court Convention)[123] and the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention)[124] establish a regime that promotes international trade and investment through enhanced judicial co-operation in civil or commercial matters: the Choice of Court Convention pursues this objective by setting up a 'regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements', while the Judgments Convention enhances such co-operation by putting forth 'a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments'.[125] The two Hague Conventions are meant to be mutually complementary.

Unlike the NYC, both Hague Conventions include a provision on the definition of the term 'judgment' for the purposes of each Convention, respectively. Mirroring Article 4(1) of the Choice of Court Convention, Article 3(1)(b) of the Judgments Convention defines 'judgment' as 'any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention'.[126] The provision concludes by specifying that, for the purposes of the Convention, an interim measure of protection does not qualify as judgment. It follows that – pursuant to the two Hague Conventions, respectively – to be characterized as judgment a decision

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[123] The Convention of 30 June 2005 on Choice of Court Agreements entered into force on 1 October 2015. It is in force between the European Union (including Denmark), Mexico, Montenegro, and Singapore. It was also signed by the United States in 2009, Ukraine in 2016, and the People's Republic of China in 2017. More information on the Convention is available on the website of the Hague Conference at <www.hcch.net> under 'Choice of Court'.

[124] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. The Convention was signed by Ukraine and Uruguay. It is not yet in force. More information on the Convention is available on the website of the Hague Conference at <www.hcch.net> under 'Judgments'. For a synopsis of the history of the Convention and an overview of its provisions, see A Bonomi and CM Mariottini, 'A Game Changer in International Litigation? A Roadmap to the 2019 Hague Judgments Convention', XX Yearbook on Private International Law (2018/2019) 537 et seq.

[125] See the Preamble to each Convention, respectively. F Garcimartín Alférez and G Saumier, 'Judgments Convention: Draft Explanatory Report' (draft of October 2019) para 93; TC Hartley and M Dogauchi, 'Explanatory Report' in *Proceedings of the Twentieth Session*, Tome III, *Choice of Court Agreements* (Hague Conference on Private International Law 2005) 116.

[126] This definition largely corresponds to Article 2(1) of the Brussels Ibis Regulation, see B Hess, *Europäisches Zivilprozessrecht* (2nd edn forthcoming, CF Müller 2010), § 6 IV, paras 6.204 et seq.

must be: (i) on the merits; and (ii) given by a court. Furthermore, a decision on the merits qualifies as judgment regardless of how it is labeled or framed by the court of origin.[127]

Procedural rulings (other than orders determining costs or expenses) and decisions granting interim relief (provisional and protective measures) are excluded from the scope of the two Conventions.[128] The term 'interim measure of protection' is understood to encompass measures that either provide 'a preliminary means of securing assets out of which a final judgment may be satisfied', or preserve the status quo pending determination of an issue at trial.[129]

Overall, the understanding of judgment and of the limitations thereto under the two Hague Conventions are not significantly different from the ones commonly ascribed to the notion of arbitral award under the NYC. To put it concisely, both judgments and arbitral awards are characterized by their being (i) on the merits, to the exclusion of procedural rulings but to the inclusion of decisions on costs; and (ii) given by a court/tribunal. In both cases, the labeling of a decision as 'judgment' or 'arbitral award' is immaterial.

Against this backdrop, it is also of note that the NYC and the Choice of Court Convention bear strong similarities: notably, they are both premised on party autonomy and share the common goal of ensuring the effectiveness of arbitration agreements and arbitral awards (as concerns the NYC) and the effectiveness of choice of court agreements and the ensuing judgments (as concerns the Choice of Court Convention).[130]

However, in spite of the unquestionable convergences, a fundamental distinction separates the NYC from the two Hague Conventions: while the Choice of Court and the Judgments Conventions identify in the enhancement of judicial cooperation and in the circulation of judgments as expression of sovereign jurisdictional powers their main goal,[131] the NYC places its focus on ensuring that the autonomy of the parties in directing the adjudication of their dispute be effective to the fullest extent possible.[132] The goal pursued with the NYC to ensure the effectiveness of arbitral agreements and arbitral awards has a significantly lesser impact on the sovereign values and authority of States compared to that established with the two Hague Conventions: while the NYC inevitably interfaces to some degree with judicial cooperation, the outcome of the arbitration process, which the NYC aims to ensure, is not singlehandedly focused on affecting and regulating the coordination of the judicial and legal systems of the Contracting States.

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[127] F Garcimartín Alférez and G Saumier, 'Judgments Convention: Draft Explanatory Report' (draft of October 2019) para 93.

[128] F Garcimartín Alférez and G Saumier, 'Judgments Convention: Draft Explanatory Report' (draft of October 2019) para 93; TC Hartley and M Dogauchi, 'Explanatory Report' in *Proceedings of the Twentieth Session*, Tome III, *Choice of Court Agreements* (Hague Conference on Private International Law 2005) para 116. As for the Choice of Court Convention, see also the express exclusion of interim measures of protection from scope, under Article 7.

[129] F Garcimartín Alférez and G Saumier, 'Judgments Convention: Draft Explanatory Report' (draft of October 2019) paras 97-98.

[130] See, in particular, TC Hartley and M Dogauchi, 'Explanatory Report' in *Proceedings of the Twentieth Session*, Tome III, *Choice of Court Agreements* (Hague Conference on Private International Law 2005) para 1; RA Brand and PM Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press 2008), 19 et seq.

[131] See the Preamble to each Convention, respectively, F Garcimartín Alférez and G Saumier, *Judgments Convention: Draft Explanatory Report* (draft of October 2019) para 93; TC Hartley and M Dogauchi, 'Explanatory Report' in *Proceedings of the Twentieth Session*, Tome III, *Choice of Court Agreements* (Hague Conference on Private International Law 2005) 116.

[132] United Nations Conference on International Commercial Arbitration, New York, 20 May – 10 June 1958, Final Act, para 1. See also the Resolution adopted by the Conference, Id, para 16.

The different degree of sensitivity that comes with the two sets of Conventions (the NYC, on one side, and the two Hague Conventions, on the other) is also reflected in the different response that States have given to the Conventions and, notably, in the undeniable difference in the number of accessions to, in particular, the NYC and the Choice of Court Convention (161 Contracting States to the NYC as opposed to 31 Contracting Parties to the Choice of Court Convention).

Against this backdrop, it is also noteworthy that the NYC, like the 1927 Geneva Convention and the Panama Convention, does not include a provision on interpretation. This, however, is not the case with respect to the two Hague Conventions: in fact both Article 23 of the Choice of Court Convention and Article 20 of the Judgments Convention provide that 'In the interpretation of this Convention, regard shall be had to its international character and to the need to *promote uniformity in its application*' (emphasis supplied).[133]

The rationale of this provision – that is commonly construed as uncontroversial and that appears in other international conventions such as the Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods (at Article 16) and, more recently, the Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (at Article 13) – is expressed in no uncertain terms in particular in the *Nygh / Pocar Report*, according to which: 'Without such uniformity, the risk of divergent national applications will increase and the hoped for *advantages of certainty and predictability* will be lost'.[134]

While it appears from the drafting history of the NYC that a proposal was put forth to include in the text of the Convention a provision referring to the International Court of Justice any dispute arising between Contracting States concerning the application or interpretation of the Convention, such proposal was subject to strong opposition on the grounds that it would amount to a violation of the sovereign rights of States and was ultimately not included in the text.[135]

Similarly to the NYC, the 2019 UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention - SC) intends to promote mediation as an alternative and effective method of resolving trade disputes and to foster the cross-border effectiveness of settlement agreements.[136] In the same vein as the NYC (and as the 1927 Geneva Convention and the Panama

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[133] This is true also for several other conventions that regulate cross-border civil and commercial matters: see, for instance, Article 7 of the UN Convention of 11 April 1980 on Contracts for the International Sale of Goods (CISG), 1489 UNTS 3; Article 13 of the Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, available at <https://www.hcch.net/en/instruments/conventions>; Article 4 of the UNIDROIT Convention on International Factoring of 28 May 1988 (Ottawa Factoring Convention), 27 ILM 943; Article 6 of the UNIDROIT Convention of 28 May 1988 on International Financial leasing, 2312 UNTS 195, 27 ILM 931.

[134] See the 'Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by Peter Nygh and Fausto Pocar', Prel Doc No 11 of August 2000 for the attention of the Nineteenth Session of June 2001, in *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments* (Hague Conference on Private International Law 2013) 191, esp para 386.

[135] Report of the Committee on the Enforcement of International Arbitral Awards (Resolution of the Economic and Social Council establishing the Committee, Composition and Organisation of the Committee, General Considerations, Draft Convention) E/CONF.26/SR.21 (1955), at 6 (on draft Article XIII); Summary Records of the United Nations Conference on International Commercial Arbitration, New York, 20 May - 10 June 1958, 21st meeting E/2704 E/AC.42/4/Rev 1, at 16 (on draft Article XIII).

[136] United Nations Convention on International Settlement Agreements Resulting from Mediation, adopted by the General Assembly on 20 December 2018 (62nd plenary meeting) and opened for signature in Singapore on 7 August 2019. The Convention currently counts three Contracting States – Fiji, Qatar and Singapore – and it is due to enter into force on 12 September 2020. The text of the Convention is available at <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status>.

Convention), the SC does not provide a definition of 'settlement agreement' for the purpose of the Convention,[137] nor does it provide for a provision on interpretation.

Both the NYC and the SC are premised on party autonomy, the full effectiveness of which they pursue as their ultimate goal. Unlike in choice of court instruments – where party autonomy plays a role solely within the limits of the designation of a court as the one having jurisdiction to rule on certain disputes that may arise in connection with a given relationship –, under the NYC and the SC party autonomy permeates the whole procedure and, to the extent that the interface with national procedure permits it, its outcome. While it is unquestionable that a uniform and coherent interpretation is a valuable interest also with regard to the NYC and the SC, such interest is not as crucial as with conventions that regulate cross-border litigation, which identify in certainty and predictability their core value.[138]

In conclusion, the ultimate goal of the NYC (and of the SC) is the effectiveness of party autonomy. With respect to the need for uniform interpretation of its provisions, the NYC, with its underlying goals, appears to display a degree of flexibility which is instrumental to the objectives of the Convention, and which is remarkably uncommon and sets it apart from the majority of conventions that regulate cross-border dispute resolution, and notably cross-border litigation. This feature supports all the more the conclusion that an autonomous concept of arbitral award has not been established in the framework of the NYC and that, actually, such autonomous concept would hardly be construed as furthering the purposes of the Convention and the framework in which the Convention itself wants to operate.

[137] Such definition may be inferred from Article 2(3) SC where, in defining the term 'mediation', the Convention refers to a process whereby parties attempt to reach 'an amicable settlement of their dispute with the assistance of a third persons or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute'. It follows that the settlement agreement (i) must result from an agreement to mediate; (ii) it must be reached in the framework of a process aiming at the resolution of a dispute; (iii) such process must be carried out with the assistance of a third person; and (iv) the ensuing result (the settlement agreement) must lack binding authority upon the parties to the dispute. See also Article 4 of the Singapore Convention laying down formal requirements for a settlement agreement under the Convention.

[138] See 'Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by Peter Nygh and Fausto Pocar', Prel Doc No 11 of August 2000 for the attention of the Nineteenth Session of June 2001, in *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments* (Hague Conference on Private International Law 2013) 191, esp at para 386.

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