16 Review of a Foreign Arbitral Award by National Courts: A Comparative Study in Common Law and Civil Law Countries

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Abstract

The New York Convention on the recognition and enforcement of foreign arbitral awards of 1958 (hereinafter "the NYC") gives a national court the right to review the arbitral award before enforcing it in its own territory. In addition, national arbitration laws in the Contracting States grant courts the right to review the arbitral award in order to ensure that it meets the requirements for enforcement. Such judicial review differs from state to state and even from one court to another within the same state. The main grounds for the refusal of recognition and enforcement of a foreign arbitral award are exhaustively enumerated in Article V of the NYC. The additional grounds for the award's review that may arise upon the request of the opposing party are mainly derived from Articles III and VII of the NYC. Those additional grounds include discovery of evidence, estoppel and waiver, counterclaims and set-offs and a period of limitation for enforcement. This article deals with the review of a foreign arbitral award by national courts of both common law and civil law countries including additional grounds for the award's review, that is, USA and UK as common law countries; France, Germany and Greece as civil law countries.

1 Introduction

This article, focusing on the review of a foreign arbitral award in national courts of both common law and civil law countries as stated above, has two objectives. On the one hand, this article has a theoretical objective: it focuses on the theoretical matters relating to the review of a foreign arbitral award. These theoretical matters have a great impact on the efficacy of the arbitral process generally, and on recognition and enforcement particularly. On the other hand, this article

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has a practical objective: it focuses on the review of a foreign arbitral award in selected common law and civil law countries under the NYC by dealing first hand with many old and new courts' decisions regarding the refusal of recognition and enforcement of arbitral awards in those countries based on some grounds aside from the above additional grounds, that is, in a case of non-binding arbitral award, lack of authentication and lack of burden of proof. It also analyses those decisions and the judicial errors that could have been avoided if the judges paid more attention to the procedural aspects of the arbitral process and the related laws and conventions. Therefore, this article discourages the strict judicial interpretation of the NYC and inclines toward adoption of a more liberal regime in favour of recognition and enforcement of arbitration agreements and foreign arbitral awards in the Contracting States' courts.

In this article, I will deal with the recognition of a foreign arbitral award as binding, copies of agreement and award, burden of proof, discovery of evidence, estoppel or waiver, counter claims and set-offs against an award and a period of limitation for enforcement of an award. The article concludes with findings regarding the main ideas of the topic, and recommendations that draw up mechanisms for facing the new challenges of recognition and enforcement of arbitration agreements and foreign arbitral awards in the global economy; provisions that might be considered in the future in case of amendment of the NYC, *de lege ferenda* as opposed to *de lege lata*.

2 Recognition of a foreign arbitral award as binding

Each Contracting State shall recognize an arbitral award as binding[1] and enforce it in accordance with its own rules of procedure.[2] Awards are recognized and enforced in the Contracting States unless one of the grounds enumerated in Article V exists. Partial awards can also be recognized and enforced under the NYC.[3] An arbitral award is binding; this means that the award is not open for any arbitral or judicial review under the law applicable to the award, either in the country of origin or in the country of enforcement. A court may only review the award itself, not the merits, as the NYC does not have a provision allowing such review. In any case, if the award has not yet become binding, the court has a discretionary power to refuse to recognize and enforce the award at the request of the opposing party, in accordance with Article V(I)(e) of the NYC. In practice, courts of common law and

1 Albert Jan van den Berg noted that the word "shall" has been left out in the text of the Convention as published in U.N.T.S 330. According to him, this must be considered as a printing error. *See* 'Index of Court Decisions New York Convention 1958', V *Yearbook Commercial Arbitration* (1980), (hereinafter YB), p. 281.

2 NYC, Art. III. This part of Art. III of the Convention will be the basis for analysis of the additional grounds for refusing recognition and enforcement.

3 NYC, Art. V(1)(3).

civil law countries have refused in different cases to recognize and enforce the arbitral awards because they were not considered binding as defined in Article III of the NYC. For example, in *Schlumberger Technology Corporation (US)* v. *U.S.A* case,[4] the U.S. District Court for the Southern District of Texas held that an arbitral award need not be enforced until the time to appeal judicial confirmation of the award expires in the jurisdiction in which enforcement is sought. The U.S. Court of Appeals for the Fifth Circuit affirmed the district court's decision, holding "that a fixed right to receive does not exist with respect to a foreign arbitral award until the award is judicially confirmed and no longer subject to appeal in the jurisdiction in which enforcement is sought".

In Germany, the Court of Appeal for Rostock in a decision dated 28 October 1999[5] found that the claimant complied with the conditions for enforcement provided for in Section 1061(1) ZPO (Zivilprozessordnung, Civil Procedural law hereinafter "ZPO") together with the NYC.[6] However, the court refused to enforce the award because it was not considered binding on the parties in the country of origin. The court reasoned:

> "An award is no longer binding when it has been set aside by a competent court or appellate arbitral tribunal, even by a temporarily enforceable decision. This setting aside decision must be recognized without examining whether it would be recognizable according to the standards for the recognition of foreign decisions. The arbitral award in this case was set aside by the Moscow City Court and by the Moscow Court of Appeal; hence, it is no longer binding and may no longer be recognized in Germany".

In this context, it should be emphasized that the NYC requires that "each Contracting State shall recognize an arbitral award as binding" to avoid the so-called double *exequatur*.[7] In other words, the *exequatur* is required only in the country of enforcement, and not required that the award has been declared enforceable

4 *Schlumberger Technology Corporation (US)* v. *U. S.A,* 1999, 5th Cir. no. 124 F 3d, pp. 216-221, *cited in* YB (Yearbook Commercial Arbitration) 2000- II, pp. 1067-1073.

5 Parties and their nationalities are not indicated, 28 October 1999, the Court of Appeal for Rostock, YB 2000- XXV, pp. 717-720.

6 The Court of Appeal explained, "In particular, the claimant complied with the requirements of Art. IV(1)(a) of the Convention by submitting a copy of the arbitral award of the 'Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation', duly certified by a Hamburg notary public, as well as a translation and apostil. It was not necessary to prove the authenticity of the award by submitting a duly authenticated original, as a duly certified copy suffices as an alternative".

7 Elimination of the double *exequatur* is considered one of the most important achievements of the NYC in comparison to the Geneva Convention of 1927, which required only that the award had become final in the country of origin.

in the country of origin.[8] This understanding was adopted by national courts in civil law countries including France. In a decision dated 9 October 1970, *Animalfeeds International Corporation (U.S)* v. *S.A.A. Becker et Cie (France),*[9] the claimant sought enforcement of the awards rendered in Hamburg before the Court of First Instance of Strasbourg. The court granted enforcement and denied the respondent's argument that the awards had not become binding on the parties because no leave of enforcement had been issued by a German court. The court reasoned:

> "… The New York Convention does not require a double-exequatur (i.e. leave of enforcement in the country where the award is made). It suffices when it is binding (Article V Para. 1 under e). The awards in question had become binding at the moment they were deposited {with} the court in Hamburg".[10]

More recently, in *IAIGC-Inter-Arab Investment Guarantee Corporation (Kuwait)* v. *Ball- Banque Arabe et Internationale d'Inestissements SA (France)*,[11] the Court of Appeal of Paris (First Chamber) dismissed the claimant's claim that the award does not exist and is not an award within the meaning of Article 1498 of the NCCP.[12] The claimant argued that the award was rendered in Jordan, and the Jordanian Law on Arbitration requires that it should be confirmed by a Jordanian state court, which alone could terminate the arbitration before being presented for enforce-

8 In the case that the award has been declared enforceable as a court judgment in the country of origin, the controversy may arise as to whether that award can be enforced in the country of enforcement as a foreign award under the NYC, or as a foreign judgment.

9 *Animalfeeds International Corporation (U.S)* v. *S.A.A. Becker et Cie (France),* 9 October 1970, the Court of First Instance of Strasbourg, *Revue de l'Arbitrage* (1970-3), pp. 166-173, *cited in* YB 1977- II, p. 244.

10 The decision in French reads: "… Attendu que ce Tribunal Arbitral était compétent pour rendre les sentences dont l'exequatur est sollicitée ; Attendu que la convention de New York du 10 juin 1958 n'exige nullement que de telles sentences obtiennent une double exequatur, notamment dans le pays où elles ont été rendues ; qu'il suffit que ces sentences soient obligatoires. Attendu que les sentences litigieuses le sont devenues par leur dépôt au Greffe du Tribunal de Hambourg ; qu'elles lient ainsi les parties; Attendu que ces Sentences ne contiennent aucune disposition contraire à l'ordre public français".

11 *IAIGC-Inter-Arab Investment Guarantee Corporation (Kuwait)* v. *Ball-Banque Arabe et Internationale d'Inestissements SA (France),* the Court of Appeal of Paris, *Revue de l'Arbitrage* (1998-1), pp. 134-155, *cited in* YB 1998- XXIII, pp. 644-653.

12 NCCP, Art. 1498 reads: "Arbitral awards shall be recognized in France if the party relying on them establishes their existence and if this is not manifestly contrary to international public policy. Under the same conditions arbitral awards shall be declared enforceable in France".

ment in France. The Court of Appeal affirmed the lower court's decision, and granted enforcement, concluding:

> "However, the arbitration at issue was not subject to Jordanian law. As far as the procedure is concerned, neither Chap. 8 of the Guarantee Contract signed by the parties nor the UNCITRAL Rules, which it had been agreed would apply complementarily, provide for a reference to the law of the place of arbitration or require the prior confirmation of the award. On the contrary, the contractual provisions specify that 'the award shall be final and binding on the parties' and that it 'shall be enforceable immediately after it is rendered".[13]

3 Copies of agreement and award (authentication/translation)

Pursuant to Article IV(1) of the NYC, the party seeking recognition and enforcement of a foreign award shall supply the duly authenticated original award or a duly certified copy at the time of the application. That party shall also supply the original agreement referred to in Article II[14] or a duly certified copy. That is to say, in order to constitute *prima facie* evidence in the meaning of Article II(1) of the NYC, a party seeking recognition and enforcement needs to produce *prima facie* an arbitration agreement[15] to the competent court. The NYC, however, is silent as to the applicable law on the formalities of Article IV, therefore, the authentication has to be fulfilled either under the law of the country of origin, or under the law of the country of recognition and enforcement. In practice, courts in common law countries, especially U.S. courts, construe the formalities provided in Article IV of the NYC in a liberal manner in order to facilitate enforcement of a foreign arbitral

13 The decision in French language reads: "… Mais considérant que l'Arbitrage litigieux n'était pas soumis à la loi jordanienne ; qu'en ce qui concerne plus précisément la procédure, ni le chapitre 8 du contrat de garantie souscrit par les parties ni les règles CNUDCI dont il a été décide qu'elles s'appliqueraient de manière supplétive, ne comportent de renvoi à la loi du lieu de l'Arbitrage ou n'imposent l'homologation préalable de la décision, les dispositions contractuelles précisant bien au contraire que « la sentence sera définitive et obligatoire pour les parties » et qu'elle « sera exécutoire immédiatement après qu'elle a été rendue".

14 An agreement in writing.

15 A valid arbitration agreement in the meaning of Art. IV of the NYC. In *Yukos Oil Company (Russian Federation)* v. *Dardana Limited (Nationality not indicated)* case, the Court of Appeal (Civil Division) in the United Kingdom concluded that a party seeking enforcement of a Convention award need only produce, at the first stage of the enforcement proceedings, a prima facie valid arbitration agreement and award. It held that enforcement may then be refused at the second stage only if the respondent proves that there is a ground for refusing enforcement. On this decision *see*, *Oil Company (Russian Federation)* v. *Dardana Limited (Nationality not indicated)*, 18 April 2002, the Court of Appeal (Civil Division), YB 2002-XXVII, pp. 570-592.

award. That is because the United States is a very pro-arbitration country, and its courts aim at encouraging arbitration in accordance with the federal policy favouring arbitration in the United States. On that basis, the United States District Court for the Southern District of New York confirmed an arbitral award, which only was certified by the director of the New York Regional Office of the American Arbitration Institution, and not by the Panel member. It concluded:

> "A director certified the award, instead of a panel member who heard the New York arbitration. Because the director is an objective party and is responsible for all arbitrations in the New York Regional Office, a copy of the award certified by the director is sufficient for confirmation purpose".[16]

Courts in civil law countries, especially Germany, also construe Article IV of the NYC liberally in order to facilitate recognition and enforcement of arbitral awards. For example, the Munich Court of Appeal, in a decision dated 23 February 2007, decided to enforce an arbitral award based on the less strict requirement of the German law, rather than Article IV of the NYC, stating:

> "The request for enforcement is admissible … to the extent that Art. IV Convention requires further documents and a translation and sets requirements for their form, and those requirements are not contained in Sect. 1064(1) and (3) ZPO, the more-favourable-right principle applies pursuant to Art. VII(1) Convention. German law, which is more favourable to recognition, mandates, also for foreign arbitral awards, that only the original arbitral award or a certified copy thereof be submitted… the claimant has met these requirements, since it supplied a copy of the arbitral award of 26 June 2006, certified by a notary public".[17]

Similarly, in a decision made by the Hamm Court of Appeal on 27 September 2005, the court accepted a simple copy of the arbitration agreement based on the less strict requirements of the German law, and accordingly granted enforcement of the arbitral award rendered in favour of the claimant concluding, *inter alia*, that:

> "The formal conditions for a request for enforcement are met. The claimant supplied the authenticated original arbitral award of 28 May 2002 and interim arbitral award of 27 August 1999, as well as certified translations thereof. Admittedly, only a simple copy of the document containing the arbitration clause was first supplied by the defendant. However, that suffices, since the stricter requirements of Art. IV

16 *Matter of Arbitration between Continental Grain Co. and Foremost Farms Inc.,* D.C. New York, 1998 U.S. Dist. LEXIS 3509, *cited in* YB 2000-XXV, pp. 820-822.

17 *See* <www.dis-arb.de>, *cited in* YB 2008-XXXIII, pp. 521-522.

(1) New York Convention are superseded by the provisions of Sect. 1064 ZPO pursuant to Art. VII Convention".[18]

In my opinion, both courts of appeal in Germany were correct in granting enforcement of the arbitral awards. According to Section 1064 of the ZPO, a party seeking recognition and enforcement must produce only the award or a certified copy of it. Neither the duly authenticated original award nor the original arbitration agreement must be supplied for the enforcement of an arbitral award in Germany. The liberal understanding of German courts to the formalities provided in Article IV is not inconsistent with the NYC, as the Convention allows the party seeking recognition and enforcement to avail itself of the domestic law of the enforcing country based on the more favourable right provision contained in Article VII thereof.

The party applying for recognition and enforcement shall also supply a translation, if the award or agreement is not in the official language of the country in which recognition and enforcement is invoked. The translation shall be certified by an official or sworn translator, or by a diplomatic or consular agent. The translation requirement, however, is rarely used as a ground for refusing to recognize and enforce an arbitral award. That is because the grounds for refusing recognition and enforcement of an award are exhaustively enumerated in Article V of the NYC. For this reason, courts tend to deal with the translation only as a formal requirement for the efficacy of the enforcement process. An example is the decision of the Court of First Instance of Strasbourg in *Animalfeeds International Corporation (U.S.A)* v. *S.A.A. Becker et Cie (France)*[19] in which the Court of First Instance held, *inter alia*, that Animalfeeds had duly complied with the formal requirements of Article IV. It had submitted the ten awards, which were translated by a sworn translator and which were certified by the consul of France in Hamburg. Animalfeeds had also supplied the contracts which contained the arbitral clause, as well as the translation thereof.[20]

18 *Consultant v. German Company*, 27 September 2005, the Court of Appeal (Hamm), <www.dis-arb.de>, *cited in* YB 2006- XXXI, pp. 685-697.

19 *Animalfeeds* case, *supra* note 9.

20 The decision in French reads: "… Attendu que la Société Animalfeeds International Corporation produit à l'appui de ses conclusions dix sentences arbitrales rendues par le Verein du Getreidehandler der Hambourg Börse ainsi que leurs traductions faites par un expert traducteur assermenté … Attendu que ces sentences arbitrales comportent la légalisation des signatures des arbitres par le chargé d'affaires du Verein der Getreidehandler der Hamburger Börse , la légalisation de la signature de ce chargé d'affaires par la Chambre de Commerce de Hambourg, la légalisation de cette signature par le Sénat de Hambourg et enfin la légalisation de celle-ci par le Consul Général français à Hambourg … Qu'elle a produit tous les originaux et toutes les traductions

4 Burden of proof

Even though the party opposing enforcement bears the burden of proving the grounds for refusing recognition and enforcement enumerated in Article V(1) of the NYC, the party seeking recognition and enforcement has to prove the prerequisite of the existence of a valid arbitration agreement between the parties pursuant to Article II of the NYC. The Court of Appeal in Germany (Celle) reached this conclusion in a decision dated 4 September 2003 by which the court denied the enforcement of a Chinese arbitral award rendered in favour of the claimant, stating:

> "Contrary to the claimant's opinion, the defendant does not have the burden to prove that Mr. U did not have the power of attorney to conclude the arbitration agreement under Chinese law. Admittedly, according to Art. V(1) Convention, the burden to prove the existence of the grounds on which recognition and enforcement of a foreign arbitral award can be refused under that article is on the party against which enforcement is sought: here, thus, the defendant. However, a precondition for the existence of such grounds for refusal is that the parties have concluded an arbitration agreement pursuant to Art. II Convention. Only when this fundamental condition of the existence of an arbitration agreement is met can there be grounds for refusal of the recognition and enforcement of an arbitral award".[21]

The NYC shifted the burden of proof to the opposing party that must prove its request before the court in which the application for recognition and enforcement has been filed. In other words, the party against whom recognition and enforcement of an award is invoked bears the burden of proving any of the grounds for refusing recognition and enforcement. In practice, courts in both common law and civil law countries have, in most cases, dismissed the requests for the refusal of recognition and enforcement based on these grounds. In the United Kingdom, the Commercial Court of the Queen's Bench (High Court) addressed the issue of whether to enforce an arbitral award of the AAA made in New York in favour of a Belgian plaintiff, notwithstanding the absence of proof that the defendants had assets within the jurisdiction of the court. The court held that the presence of assets is not deemed to be a prerequisite to recognize and enforce an award under the NYC.[22]

exigées par les article 2 et 4 de ladite convention ; que les sentences arbitrales produites sont rendues authentique ; attendu que la demande est ainsi recevable".

21 *Buyer* v. *Seller* (nationalities are not indicated), 4 September 2003, the Court of Appeal (Celle), <www.dis-arb.de>, *cited in* YB 2005- XXX, pp. 528-535.

22 *Rossel NV (Belgium)* v. *Oriental Commercial Shipping (U.K.) Limited (U.K.) and others*, 16 November 1990, the Commercial Court of the Queen's Bench (High Court), YB 1991- XVI, pp. 615-620.

In Greece, the Court of Appeal of Patras in an old decision no. 469 of 1974[23] rejected the respondent's request to refuse the enforcement of an arbitral award made in New York in 1971 in favour of the claimant, because of a lack of proof regarding any of the grounds for the refusal of recognition and enforcement enumerated in Article V of the NYC. In reaching that conclusion, the Court of Appeal relied on Article V (1) of the NYC, reasoning:

> "Since the respondent did not furnish any proof as to the existence of one of the reasons provided for in Article V, Para. 1, (a) and (e) of the Convention, or any other evidence against its enforcement in Greece, the respondent's petition that the award should not be enforced, must be rejected".

In France, the President of the Court of First Instance of Paris reached a similar conclusion in *Compagnie de Saint Goban-Pont à Mousson* v. *The Fertilizer Corporation of India, LTD* case,[24] the court considered that it is up to the opposing party [the claimant] to prove that the award is not binding in the country where the award has been made. It further held that the claimant, who invoked the non-binding character of the award because the High Court of New Delhi had not confirmed it, had not produced sufficient evidence.[25] The Court of Appeal of Paris affirmed the decision.

Once the winning party has established the pre-condition for the existence of an arbitration agreement, the opposing party bears the burden of proving any of the grounds for refusing recognition and enforcement listed in Paragraph 2 of Article V of the NYC[26] in the case it wishes to rely on. This conclusion was confirmed by the decision of the Commercial Court of the Queen's Bench Division in

23 Parties are not indicated, 1974, the Court of Appeal of Patras, YB 1976- I, p. 187.

24 *Compagnie de Saint Goban-Pont à Mousson* v. *The Fertilizer Corporation of India, LTD*, the Court of First Instance of Paris, *Revue de l'Arbitrage* (1971- 3) pp. 108-115, *cited in* YB 1976- I, pp. 184-185.

25 The decision in French reads "… C'est à la partie qui cherche à s'opposer à l'exécution de la sentence qu'il appartient d'apporter la preuve que cette sentence n'est pas devenue obligatoire dans le pays où elle a été rendue. Attendu que si ; pour ce faire, la Compagnie de Saint -Gobain soutient que la sentence en cause serait sans valeur en Inde ; comme n'ayant pas été homologuée par le Tribunal compétent, en l'espèce la High Court de New Delhi, cette règle de droit est contestée par F. C. I. L.; que les parties produisent sur ce point des consultations et documents contradictoires ; qu'en conséquence, nous ne pouvons constater que la Compagnie de Saint Gobain apporte la preuve qui lui incombe".

26 In case of inarbitrability or when enforcement is contrary to public policy.

the United Kingdom in *Minmetals Germany GmbH (Germany)* v. *Ferco Steel Ltd. (UK)* case[27] where the Commercial Court held, inter alia, that:

> "Sect. 103(1) and (2) of the 1996 Act expressly provides that such awards must be enforced unless the party against whom enforcement is sought proves that the case falls within one of the exceptions in sub-Sect. (2). With regard to the court's power under Sect. 103(3) to decline to enforce or recognize an award on grounds of inarbitrability of the subject matter or of enforcement being contrary to public policy, whereas it is always open to the court to take an illegality point of its own violation, if a respondent to enforcement wishes to rely on matters within this subsection, the burden of making good the objection to enforcement, in my judgment, clearly rests on that party".

It must be noted that Article V(2) of the NYC allows the competent court to refuse the recognition and enforcement *ex officio*, without a request to be made by the opposing party. However, the grounds listed in the above article may not be raised by the competent court in enforcement proceedings; the opposing party then bears the burden of proving any of these grounds in the case that it wishes to rely on, as stated above.

5 Discovery of evidence

Admissible evidence in the arbitral process can be documentary, including paper documents and e-documents, or oral testimony from a witness or an expert. The arbitrators have full authority to determine the relevance of the evidence produced by the parties. Consequently, the arbitrators have discretionary power to decide, based on case-by-case analysis, on the admissibility of requests for discovery of evidence. In other words, the arbitrators can eliminate any evidence not related to the subject matter of the dispute. In this, discovery of evidence may relate to the taking of evidence by arbitrators.[28] The latest development with respect to discovery of evidence is the electronic discovery "e-discovery". E-discovery depends primarily on transformation of documents and information electronically stored (e-documents).

In enforcement proceedings, the party opposing recognition and enforcement of an arbitral award may make a request to a court having jurisdiction for discovery of evidence produced by the other party in the arbitration proceedings. Discovery of evidence is mainly exercised in courts of common law countries, es-

27 *Minmetals Germany GmbH (Germany)* v. *Ferco Steel Ltd. (UK),* 20 January 1999, the Commercial Court of the Queen's Bench Division, YB 1999-XXIVa, pp. 739-752.

28 This relationship was discussed during a conference on the taking of evidence in international arbitration jointly organized by ICC and I.S.S.A on 5 February 2010, Rome-Italy.

pecially in the United States. In general, courts have denied the requests for discovery in order not to re-examine the merits of the arbitral award in enforcement proceedings. In particular, U.S. courts have often denied the requests for discovery of evidence because of the bad faith of the opposing party. For example, in *Imperial Ethiopian Government* v. *Baruch Foster Corporation (BFC-U.S.A)* case,[29] the Federal District Court for the Northern District of Texas dealt with a request made by the defendant for discovery of evidence produced by the plaintiff because of disqualification of the president of the arbitral panel due to his connection with the plaintiff (the Ethiopian government). In opposition, the plaintiff submitted two affidavits: the first made by the president of the arbitral tribunal, and the second attested to the president's worldwide reputation and integrity. The court denied the defendant's request for discovery, and held that BFC had waived any objection to the composition of the arbitral tribunal. The United States Court of Appeals (Fifth Circuit) affirmed the district court's decision, concluding that the district's court implicit denial of discovery was proper in light of BFC's failure to come forward with any evidence showing that the claim was asserted in good faith and for any reason other than delay.

A court may or may not interpret a party's claim for discovery as a waiver of its right to arbitrate the dispute. In *Certain Underwriter at Lloyd's, et al.(BES)* v. *(1)Bristol-Myers Squibb Co. (2) Medical Engineering Corp (BMS)* case,[30] the United States District Court for the Eastern District of Texas (Beaumont Division) granted the motion, which was filed by the defendant, and remanded the case to the state court, finding that BES had failed to remove prior to trial. The District Court considered the plaintiff's claim for discovery as a waiver of its contractual right to arbitrate the dispute, noting that the plaintiff (BES) unfairly took advantage of discovery of evidence, not available in arbitration proceedings, which was related to all the issues in the case. The court reasoned:

> "There is ample evidence that BES took unfair advantage of discovery proceedings, which would not have been available to it in arbitration and, in doing so, it prejudiced Bristol-Myers. For over four years, for example, BES has enjoyed extensive discovery under Texas procedural law on all of its claims, not just misrepresentation. It has been provided with scores of documents as well as the depositions of expert witnesses on the contract issues, and not simply the misrepresentation issues. The existence of this discovery will seriously hinder Bristol-Myers in arbitration".

29 *Imperial Ethiopian Government* v. *Baruch-Foster Corporation*., 1976, 5th Cir., no. 535 F.2d, p. 334, *cited in* YB 1977- II, pp. 252-253.

30 *Certain Underwriters at Lloyd's* v. *Bristol-Myers Squibb Co*., 1999, E.D. Tex, no. 51 F.Supp.2d, pp. 756-761, *cited in* YB 2000-XXV, pp. 968-983. Nationalities of the parties are not indicated.

Subsequently, in a separate procedure, the plaintiff (BES) filed a petition in the Court of Appeals of Texas for writ of mandamus to compel arbitration.[31] The court held that the defendant (BMS) also pointed to the attempts at mediation as an example of the unfair advantage taken by BES in discovery proceedings. The court did not find that a party's attempt at settlement or mediation waived a claim of arbitration. It further noted that attempts at settlement are not inconsistent with an inclination to arbitrate and do not preclude the exercise of a right to arbitration.

6 Estoppel and waiver

The doctrine of estoppel prevents a party to arbitration from asserting or denying a ground for the refusal of recognition and enforcement that previously has been determined in the arbitral proceedings without objection. The doctrine of estoppel is derived from the permissive language of Article V of the NYC. Estoppel might be collateral[32] or equitable[33] while waiver might be derived from Article VII of the NYC. As a theoretical matter, the doctrine of estoppel may be applicable to different aspects in the arbitration including: non-compliance with the written form of the arbitration agreement, excess of authority by arbitrators, arbitrators' lack of jurisdiction and irregularities in the composition of the arbitral tribunal and the arbitral procedures.[34] Estoppel is closely related to the doctrine of waiver in international commercial arbitration. Estoppel may also relate to the *res judicata* effect of an arbitral award in enforcement proceedings.

31 An extraordinary writ or a judicial remedy in the form of order, commanding a lower court to comply with the decision of a higher court, and is issued only when all other judicial remedies fail.

32 Based on collateral estoppel (estoppel by record) contractual claims which previously determined in arbitration are not subject to counterclaims. Moreover, a non-party to arbitration (third party) may use the doctrine of collateral estoppel defensively against a party to arbitration.

33 In *International Paper Co.* v. *Schwabedissen Maschinen & Anlagen* GMBH, 2000, (C.A.4 (W.Va)), no. 206 F.3d, p. 411, the U. S Court of Appeals (Fourth Circuit) put the doctrine of equitable estoppel in a practical context stating that "equitable estoppel precludes a party from asserting rights 'he otherwise would have had against another 'when his own conduct renders assertion of those rights contrary to equity…In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him … A non-signatory is estopped from refusing to comply with an arbitration clause 'when it receives a "direct benefit" from a contract containing an arbitration clause' ". This case was cited in YB 2000-XXV, pp. 1146-1151.

34 Commentary on the New York Convention, Introductory Remarks, YB 1984- IX, p. 368.

In practice, courts in common law countries have estopped a party to an arbitration from asserting its defence in enforcement proceedings, based on non-compliance with the written form of the arbitration agreement, where it had not raised this defence in arbitration. An example is a decision of the United States Court of Appeals (the Seventh Circuit) on 27 March 2001[35] in which the court held that the plaintiff was estopped from asserting that she was not subject to the NYC as there was no written arbitration agreement. Applying the doctrine of estoppel, the court denied the plaintiff's contention and held that she was estopped from invoking lack of written arbitration agreement in enforcement proceedings. This case pertains to arbitration in sport in context of the Olympic Games. The plaintiff (the runner) was tested for prohibited substances by the United States Olympic Committee (USOC) upon a request of the International Amateur Athletic Federation (IAAF). The results of the tests proved that the runner had an elevated T/E ratio. The runner, however, denied these results and accordingly the IAAF sought arbitration based on Articles 21-23 of the IAAF Rules, which provide that all disputes between the IAAF and its members to be referred to arbitration. The IAAF arbitral tribunal ruled that the runner had committed a doping offense. Shortly thereafter, the runner brought a suit against the IAAF in the United States District Court for the Southern District of Indiana. The court dismissed the runner's claim holding that New York Convention barred re-litigation of the runner's claims against the IAAF.

Courts of civil law countries have also held that a party to arbitration might be estopped from asserting its defence in court where it had not raised that defence in arbitration. In *Czechoslovak Firm C. (Czechoslovakia)* v. *OHG Sch. & B;Sch. & H & B. personally, (F.R. Germany)* case,[36] the Hamburg Court of Appeal denied the respondent's defence that the arbitration agreement was concluded under the pressure of the dominant economic or social position of the claimant. It held that the respondent was estopped from asserting such defence in court, as he had not raised his objection before the arbitrators. In reaching that conclusion, the court relied on Article V(1)(a) of the NYC. The Supreme Court affirmed the decision.

Even though the NYC does not plainly include an estoppel provision that courts in the Contracting States can rely on when dealing with estoppel disputes, German jurisprudence continues to apply estoppels. Since the NYC does not affect national law that is more favourable to enforcement, German courts remain free to apply estoppel to the enforcement of foreign awards. For example, in *Cred-*

35 *Mary D. Slaney v. International Amateur Athletic Federation*, 27 March 2001, 7th Cir, no. 244, F. 3d, pp. 580-601, *cited in* YB 2001-XXVI, pp. 1091-1102.

36 *Czechoslovak Firm C. (Czechoslovakia)* v. *OHG Sch. & B;Sch. & H & B. personally, (F.R. Germany),* 6 March 1969 (Supreme Court), 14 October 1964, the Court of Appeal (Hamburg), YB 1977- II, pp. 235-236.

itor under the award (Taiwan) v. *Debtor under the award (Germany)* case,[37] the Court of Appeal of Karlsruhe in a decision dated 14 September 2007 granted enforcement of an arbitral award rendered in favour of the claimant, and dismissed the respondent's grounds for the refusal of enforcement. The court held that the dispute did not fall within the scope of the arbitration clause in the exclusive agent agreement concluded between the parties. The court reasoned that the respondent was stopped from relying on those grounds as it failed to rely on them in the setting-aside proceedings.

As mentioned above, a further kind of estoppel is based on the arbitrator's lack of jurisdiction. Unlike the case of non-compliance with the written form of the arbitration agreement, a party to arbitration may not be estopped from asserting the issue of lack of arbitrator's jurisdiction in enforcement proceedings. In *Svenska Petroleum Exploration AB (Sweden)* v. *(1) Government of the Republic of Lithuania (2) AB Geonafta (Lithuania)* case,[38] the Civil Division of the Court of Appeal in the United Kingdom in a decision dated 13 November 2006 disagreed with the reasoning of the high court judge that the first defendant (the Government of Republic of Lithuania) was estopped from raising the issue of arbitrators' lack of jurisdiction in enforcement proceeding, due to its participation in the arbitration without raising any objection on jurisdiction. The court held that it was open to the first defendant (respondent) to oppose enforcement on the grounds provided in the NYC, including the arbitrators' lack of jurisdiction (Article V(1)(a) of the Convention). The court reasoned:

> "In the case of a New York Convention award, Sect. 103 (2) gives the court the right not to recognize the award if the person against whom it is invoked it able to prove any of the matters set out in that subsection and if the court is satisfied that the award should not be recognized… In the present case, therefore, it was always open to the Government to challenge the recognition of the award by the English courts and therefore the fact that the award could no longer be challenged in Denmark does not lead inexorably to the conclusion that it can be relied on as giving rise to an issue estoppel".

Estoppel may also relate to the irregularities in the composition of the arbitral tribunal. In *Imperial Ethiopian Government* v. *Baruch Foster Corporation* case[39] the

37 *Creditor under the award (Taiwan)* v. *Debtor under the award (Germany,* 14 September 2007, the Court of Appeal (Karlsruhe) <www.dis-arb.de>, cited in YB 2008- XXXIII, pp. 541-548.

38 *Svenska Petroleum Exploration AB (Sweden)* v. *(1) Government of the Republic of Lithuania (2) AB Geonafta (Lithuania),* 13 November 2006, the Court of Appeal (Civil Division), <www.bailii.org/ew/cases/EWCA/Civ/2006/1529.htm1>. It was also reported in YB 2007-XXXII, pp. 629-653.

39 Imperial case, *supra* note 29.

United States Court of Appeals affirmed the district court decision (Northern District of Texas) confirming the arbitral award rendered in favour of the plaintiff. The Court of Appeals held that the defendant had waived any objection to, and was estopped from contesting, the composition of the arbitral tribunal.

It appears from the above decisions that the doctrine of estoppel was basically implemented by national courts of both common law and civil law countries in international commercial arbitration disputes, relying on the provisions of their national laws, and on the grounds provided in Article V of the NYC. Courts have exercised discretionary power regarding estoppel issues in enforcement proceedings. However, in most cases, parties were estopped from asserting any defences in enforcement proceedings, as they had not raised such defences in the arbitrations. Furthermore, the participation of a party in the arbitral proceedings without raising any objections might be considered in national courts as a waiver of its right to oppose the award in enforcement proceedings.

7 Counterclaims and set-offs against an award

A counterclaim is a claim made by the respondent which relates to the subject matter of the original claim. A set-off claim relates to equity law and is not required to be related to the subject matter of the original claim. The NYC does not manifestly refer to counterclaims or set-offs, but they might be derived from Article III of the Convention. On the one hand, an arbitral tribunal may accept a counterclaim made by the respondent only if it falls under the scope of an arbitration agreement between the parties. In enforcement proceedings, a court may grant the enforcement of a counterclaim when it finds that it is proper, equitable and is not inconsistent with the NYC. In *Jugometal* v. *Samincorp, Inc.* case,[40] the U.S. District Court for the Southern District of New York granted enforcement for the award made in favour of the plaintiff and for those counterclaims made in favour of the defendant, reasoning:

> "It would be inequitable to permit this plaintiff to recover a judgment here against the defendant on the concededly valid arbitral award in its favour, and at the same time to withhold enforcement of the three counterclaims here, requiring Samincorp to seek their enforcement separately in a foreign tribunal or wherever Jugometal can be found. The Convention does not prevent this Court from entertaining set-offs or counterclaims in a proper case where authorized by Rule 13".

However, In the United States, courts have dealt with counterclaims in enforcement proceedings differently. In *Fertilizer Corp. of India* v. *IDI Management, Inc.*

40 *Jugometal* v. *Samincorp, Inc.,1978,* D.C.N.Y, no. 78 F.R.D. pp. 504,06,07, *cited in* YB 1979- IV, pp. 334-336.

case,[41] the U.S. District Court for the Southern District of Ohio (Western Division) dismissed the defendant's counterclaim, finding that a counterclaim is inappropriate in confirmation proceedings. The court further reasoned:

> "In Chapter One of the Arbitration Act, 9 U.S.C. § 6, it is provided that a confirmation proceeding is to follow the rules for motion practice. Chapter one applies to proceedings brought under the Convention, which is codified as Chapter Two, insofar as no conflicts exist between the two. We find no conflict here. This matter is in fact before us on FCI's motion for confirmation, and a counterclaim may not be interposed in response to a motion. Furthermore, a confirmation proceeding is not an original action; it is, rather, in the nature of a post-judgement enforcement proceeding. In such a proceeding a counterclaim is clearly inappropriate".

I note that the U.S District Courts exercise a discretionary power regarding counterclaims. On the one hand, the U.S. District Courts accept the enforcement of a counterclaim based on the spirit of the NYC, which does not prohibit the courts of the Contracting States from dealing with any of the additional grounds for the award's review in enforcement proceedings, including a counterclaim. On the other hand, the U.S. District Courts refuse a counterclaim in confirmation proceedings based on the FAA, as a counterclaim might not be appropriate in enforcement proceedings. That is because of absence of clear provisions in the NYC that deal with such claims.

A court may also refuse a counterclaim based on contractual claims previously determined in the arbitral process. For example, in *Audi NSU Auto Union A.G. (F.R. Germany)* v. *Overseas Motors, Inc. (U.S.A)* case,[42] the United States District Court for the Eastern District of Michigan (Southern Division) denied the defendant's counterclaim in confirmation proceedings. It held that the principle of collateral estoppel barred these claims to the extent that they were based on an anti-trust cause of action litigated by the court, or a contractual cause of action which had been conclusively decided by the arbitral tribunal.

The importance of set-off claims has increased within the purview of economic transactions, including arbitration. In practice, a set-off may come in the arbitral process in the form of a counterclaim when the amount of a set-off claim exceeds that of the original claim.[43] A set-off claim is rarely accepted in enforcement proceedings as a ground for refusing to enforce an arbitral award under the NYC in courts of both common law and civil law countries, especially in the United States

41 *Fertilizer Corp. of India* v. *IDI Management, Inc.*,1981, D.C. Ohio, no. 517 F.Supp. p. 948, *cited in* YB 1982-VII, pp. 382-392.

42 *Audi NSU Auto Union A.G. (F.R. Germany)* v. *Overseas Motors, Inc. (U.S.A),* D. C. Michigan, no. 418 F. Supp. P. 982, *cited in* YB 1978- III, pp. 291-293.

43 The defendant may also initiate arbitration before another tribunal or alternatively, it may resort to a court of law.

and in Germany.[44] In the United States, for example, the U.S. District Court for the District of Delaware[45] granted enforcement of an arbitral award made in China in favour of the Chinese petitioner. The court denied the American respondent's set-off claim, relying on the limited nature of the enforcement proceedings, concluding that the set-off issue was not properly brought before the court.

In Germany, courts rarely accept a set-off claim in enforcement proceedings as a ground for refusing recognition and enforcement of an award. Courts, however, may accept a set-off claim when it could not have been dealt with in the arbitral proceedings. In a case decided by the Court of First Instance of Hamburg, the German respondent opposed the enforcement of an arbitral award made in favour of the Romanian claimant, based on violation of public policy, because the arbitral tribunal had not considered a set-off claim for damages. In the enforcement proceedings, the respondent filed another set-off based on commissions due to it for representation of the Romanian seller. In a decision dated 27 March 1974,[46] the court denied the respondent's contention that the award violated public policy, noting that the arbitral tribunal did not consider the set-off claim because of the lack of proof. Also, it noted that the respondent did not comply with the form requirement of a set-off as required under the Romanian Chamber of Commerce Rules, that is, not in the form of a counter-claim. Even though it deducted from the amount awarded to the claimant the sum that had been brought forward by the respondent as set-off for commission due to it for representation of the Romanian seller. The court reasoned:

> "According to Article III of the New York Convention, the enforcement takes place in accordance with the rules of procedure of the country where the award is relied upon, this procedure includes the decision concerning a set-off. Under German law, an undisputed set-off may be brought forward in an enforcement procedure, when it could not have been dealt with in the arbitral proceedings. The latter was the case with the commission on the basis of the representation made by the respondent on behalf of the Romanian Firm C".

The Court of Appeal affirmed the lower court's decision, referring to a previous decision made by the Supreme Court by which the Supreme Court held that a set-off can always be dealt with in enforcement proceedings, when arbitrators

44 A set-off claim may not be accepted in enforcement proceedings in three cases: when the court finds that the original claim is not exist, if a set off claim was raised in the arbitration proceedings without success and if the amount of a set-off claim exceeds that of the original claim.

45 *China Three Gorges Project Corporation v. Rotec Industries Inc*., 2 August 2005, D.C. Delaware, 2005 U.S. Dist. LEXIS 15692, *cited in* YB 2006- XXXI, pp. 1231-1235.

46 *Firm C (Romania) v. German (F.R) Party*, 27 March 1974, Court of First Instance of Hamburg, Recht der internationalen Wirtschaft 1975, p. 223, *cited in* YB 1977- II, pp. 240-241.

rightly or wrongly did not deal with it. The Court of Appeal, however, corrected the reasoning of the lower court's decision.

Through analysis of the aforementioned decisions, I note that a set-off claim is rarely accepted in enforcement proceedings as a ground for refusing recognition and enforcement of an arbitral award in both common law and civil law countries. That is because a set-off claim does not relate to the original claim. Moreover, such a ground is not contained in the grounds exhaustively listed in Article V of the NYC. However, some national laws in both common law and civil law countries allow a set-off defence in enforcement proceedings, after recognition of an award. For instance, Section 101(1) of the 1996 Act in the United Kingdom deals with a set-off claim in enforcement proceedings, it reads:

> "A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland".

In Greece, once the party seeking recognition and enforcement (the creditor) has obtained the exequatur, the opposing party (the debtor) may raise any ground of opposition under Article 933 of the GCCP including all substantive objections such as referring either to the non-existence of the obligation enforcement of which is being sought, or to its discharge or its enforceability.[47]

It must be noted, however, that no cases have been brought yet in courts of both the United Kingdom and Greece regarding a set-off defence in enforcement proceedings of arbitral awards.

8 Period of limitation for enforcement

A period of limitation for enforcement begins from the date of the making of an arbitral award. If the original period of limitation is interrupted, a new limitation period begins. In special circumstances, a court may extend the period of limitation for enforcement after the original period of limitation expires *ex officio*.[48] A court may interpret the period of limitation for enforcement in a liberal manner if the arbitration act in its own jurisdiction is silent on this issue. The NYC does not explicitly refer to the period of limitation for enforcement. However, Article III requires each Contracting State to enforce an arbitral award in accordance with its own rules of procedure. Therefore, the period of limitation might be derived from

47 *See*: Faltsi, Pelayia Yessiou, *Civil Procedure in Hellas* (ANT. Sakkoulas Publishers, Athens, 1995), p. 428.

48 In the case that a party against whom recognition and enforcement of an arbitral award is invoked gives a false statement about its financial circumstances or its assets.

Article III of the Convention. In common law countries, the period of limitation for enforcement of foreign awards is not the same as the period of limitation for enforcement of domestic awards. In these countries, arbitration laws or limitation acts regulate the period of limitation for enforcement. In the United States, under Section 207 of the FAA, the period of limitation for enforcement of the Convention's award is three years after the award is made, and one year for a domestic award. In *Flatow* v. *Islamic Republic of Iran,*[49] the U.S. District Court for the District of Columbia in a decision dated 10 December 1999 addressed the issue of whether to enforce an arbitral award after the expiry of a period of limitation for enforcement. The court refused to enforce the award holding that:

> "The award against FMC was issued on 12 February 1987, which was twelve years ago. Plaintiff points to no authority that suggests that the confirmation period has been extended or tolled. Thus, because the statute of limitations for confirming this award has expired, neither Iran nor anyone purporting to act on its behalf has cognizable or enforceable property rights in this award".

The period of limitation for a non-domestic award is also three years from the date the award is made. In *Bergesen* v. *Joseph Muller Corp.* case,[50] the U.S. District Court for the Southern District of New York addressed the question of whether to confirm an arbitral award made in the United States, within a period of limitation designed for a Convention award. The court confirmed the award, considering it a non-domestic award subject to the NYC. The United States Court of Appeals (Second Circuit) affirmed the district court's decision.

In the United Kingdom, the period of limitation for enforcement of an NYC award is regulated by the Limitation Act of 1980, and the Foreign Limitation Period Act of 1984.[51] On that basis, in *The Government of Kuwait* v. *Sir Frederick Snow & Partners and Others (U.K.)* case, the Court of Appeal[52] allowed an appeal against a decision of the High Court refusing to enforce an arbitral award rendered in favour of the Plaintiff. In this case, the plaintiff applied to the High Court in London on 23 March 1979, for leave to enforce the arbitral award rendered in Kuwait on 18 September 1973. The High Court judge denied applying the NYC to the award

49 *Flatow* v. *Islamic Republic of Iran*, 1999, D.C. Columbia, no. 67 F. Supp. 2d, p. 535. Also published in 1999 U.S. Dist.LEXIS 18957, *cited in* YB, Vol. XXV-2000 (United States), pp. 1102-1104.

50 Sigval *Bergesen (Norway)* v. *Joseph Muller A.G (Switz),* 1983, 2nd Cir., no. 710 F.2d, p. 928, *cited in* YB 1984- IX, pp. 487-494. *See* also T. Varady et.al, *International Commercial Arbitration, A Translational Perspective* (American Casebook Series, 1999), pp. 704-712.

51 The 1996 Act, Art. 13 (1) reads as follows "The limitation acts apply to arbitral proceedings as they apply to legal proceedings".

52 *The Government of Kuwait* v. *Sir Frederick Snow & Partners and Others (U.K.),* 17 March 1983, the Court of Appeal, YB 1984- IX, pp. 451-457.

on the grounds that the Arbitration Act of 1975 does not apply retroactively. The Court of Appeal allowed an appeal, holding that the Convention's award is subject to Section 7 of the Limitation Act of 1980, which provides that "An action to enforce an award, where the submission is not by an instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued". In reference to Article III of the NYC, the Court of Appeal concluded:

> "… It is settled law that all issues as to limitations are procedural in nature. One of the aspects of limitation, the enforcement of awards under the 1975 Act pursuant to the New York Convention is in my view precisely the same as under the Second Schedule to the 1950 Act pursuant to the Geneva Convention. Both Acts must be read in conjunction with what is now Sect. 7 of the Limitation Act, 1980, which provides that an action to enforce an award (other than under seal) … shall not be brought after the expiration of six years from the date on which the cause of action accrued".

The House of Lords affirmed the decision of the Court of Appeal.[53]

In civil law countries, arbitration laws are silent as to the period of limitation for enforcement. Consequently, the interested party can seek recognition and enforcement of an arbitral award at any time. In Germany, enforcement of a foreign arbitral award is not subject to a period of limitation. For this reason, the party seeking recognition and enforcement can bring its application before the Court of Appeal whenever it considers it to be appropriate[54]. However, the Arbitration Law provides a three-month time limit to apply for setting aside the declaration of enforceability of an arbitral award if the award has been set aside in the country of origin.[55]

In France, the NCCP does not provide any limitation period for enforcement. Accordingly, the party seeking recognition and enforcement can request enforcement any time. However, the NCCP sets a time limit to appeal the *exequatur*. Such

53 In *Sir Frederick S. Snow & Partners et al. (UK)* v. *Minister of Public Works of the Government of the State of Kuwait*, the House of Lords in a decision dated 1 March 1984 dismissed the appeal made by Sir Frederick and affirmed the decision of the Court of Appeal. The House of Lords held, inter alia, that although the award was made before Kuwait became a Contracting State to the NYC, the enforcement action could be expedited through the machinery of the NYC, because the enforcement proceedings were fixed after ratification of the Convention. This decision was published in YB 1985-X, pp. 508-513 (UK no. 18).

54 ZPO, §1062 (1) (4).

55 *Ibid*., §§ 1059 (3) and 1061 (3).

an appeal must be brought before the court of appeal within one month from the date of notification of the decision.[56]

In Greece, the Act on International Commercial Arbitration does not contain any reference to a limitation period for enforcement of an arbitral award. Thus, an application for enforcement of a foreign arbitral award may be made any time before the one-member court of first instance of the district where the debtor's domicile is located, or before the one-member court of first instance of Athens when no party is domiciled in Greece.[57] Bringing an appeal against a court decision granting the enforcement of a foreign arbitral award *"the exequatur"* is subject to a period of limitation under Article 741 of the GCCP, which provides that the general part of the GCCP is applicable insofar that is not in contradiction with the specific provisions of Articles 743-781 of the same Code. Accordingly, Article 518 of the Code that relates to bringing an appeal against courts decisions is applicable on courts decisions granting the *exequtur* since this article relates to the general part of the Code. Article 518 provides that the period of limitation is 30 days when the appellant resides in Greece, and 60 days when the appellant resides abroad. In both cases, the period of limitation begins from the day after the service (notification) of the judgment. If the judgment is not notified, the period of limitation is three years after publication of the decision.[58]

9 Conclusions

Elimination of the double *exequatur* is considered one of the most important achievements of the NYC in comparison to the Geneva Convention of 1927. In other words, the *exequatur* is required only in the country of enforcement, and it is not required that the award be declared enforceable in the country of origin in order to be considered as binding. This understanding was adopted by national courts in civil law countries including France.

Courts of both common law and civil law countries, especially in the U.S.A and in Germany, construe the formalities provided in Article IV of the NYC in a liberal manner in order to facilitate the enforcement of a foreign arbitral award.

The NYC shifted the burden of proof to the opposing party that must prove its request before the court in which the application for recognition and enforcement has been filed. The opposing party also bears the burden of proving any of the grounds for refusing recognition and enforcement listed in Paragraph 2 of Article V of the NYC in the case it wishes to rely on.

In addition to the grounds for the refusal of recognition and enforcement exhaustively listed in Article V of the NYC, there are a set of additional grounds for

56 NCCP, Art. 1503.

57 GCCP, Arts. 905 (1) and 906.

58 *See* Faltsi, *supra* note 47, p. 267.

the award's review that may be derived from the Convention. Those additional grounds were not widely accepted in enforcement proceedings in national courts of both common law and civil law countries.

Discovery of evidence is mainly exercised in courts of common law countries, especially in the United States. U.S. courts have often denied the requests for discovery of evidence because of the bad faith of the opposing parties.

Even though the NYC does not plainly include an estoppel provision that courts in the Contracting States can rely on when dealing with estoppel disputes, German jurisprudence continues to deal with estoppels. Since the NYC does not affect national law that is more favourable to enforcement, German courts remain free to apply estoppel to the enforcement of foreign awards.

The NYC does not manifestly refer to counterclaims and set-offs, but they might be derived from Article III of the Convention. In that, U.S. courts accept a counterclaim based on the spirit of the NYC, which does not prohibit the courts of the Contracting States from dealing with any of the additional grounds for the award's review in enforcement proceedings including a counter-claim. U.S. courts, however, may refuse a counter-claim in confirmation proceedings based on the FAA, as a counterclaim might not be appropriate in enforcement proceedings. A set-off claim is rarely accepted in enforcement proceedings as a ground for refusing to enforce an award in courts of both common law and civil law countries.

The NYC does not explicitly refer to a period of limitation for enforcement. However, the period of limitation might be derived from Article III of the Convention. In common law countries, the period of limitation for enforcement of foreign awards is not the same as the period of limitation for enforcement of domestic awards. In these countries, arbitration laws or limitation acts regulate the period of limitation for enforcement. In civil law countries, arbitration laws are silent as to the period of limitation for enforcement, thus, the interested party can seek recognition and enforcement of an arbitral award at any time. Though, there is a period of limitation for bringing an appeal against the exequatur.

In light of the above findings, the following recommendations should be considered for the efficacy of recognition and enforcement of arbitration agreements and arbitral awards, *de lege ferenda as opposed to de lege lata*.

In order to face the new developments of international commercial transactions, there is a need for the improvement of the international legal framework of recognition and enforcement of foreign arbitral awards including, but not limited to, the New York Convention of 1958. The NYC, as the international legal machinery governing the recognition and enforcement of arbitral awards, has consensus from the majority of the countries around the world, therefore, replacement of the NYC by a new Convention is not possible to occur. However, amendment of the NYC might be possible for the commercial relations between nations, and for international stability. A revised Convention must encompass provisions that deal with the recognition and enforcement of arbitration agreements. These provisions must deal with the writing requirement broadly considering the recent

developments of trade and technology. A part from that, a revised Convention must deal in a liberal manner with the formalities required for the recognition and enforcement of a foreign arbitral award in order to facilitate recognition and enforcement of arbitration agreements and arbitral awards. As such, a revised Convention must specify the applicable law on these formalities.

A revised Convention must refer to the taking of evidence either documentary or oral and the judicial assistance in the taking of evidence in international arbitration because of its effect on the arbitral process generally and on the recognition and enforcement particularly. It may also provide some solutions for evidence management including evidence submissions and pre-arbitration evidence collection.

A revised Convention shall expand the scope of the award's review considering the additional grounds. In practice, however, national courts should deal with those additional grounds strictly in order to encourage recognition and enforcement of foreign awards.

A revised Convention could provide parties the right to establish an appellate arbitral tribunal that can revise the legal and the procedural errors made by the first instance arbitral tribunal. Also, a revised Convention could establish an international court of commercial arbitration (an international appellate body) to which parties may submit disputes arising out of the erroneous judicial application of the NYC in national courts. Such erroneous judicial application may occur because of the lack of experience of the enforcing judges in the field of international commercial arbitration. A decision made by an International Court of Commercial Arbitration is recognized and enforced by the administrative bodies in the enforcing country without delay and without any additional judicial procedures. As such, a revised Convention must adopt specialized courts or judges that can decide the disputes relating to recognition and enforcement properly.